

KOSOVO/A CIVIL SOCIETY PROJECT

**KOSOVO/A STANDING TECHNICAL
WORKING GROUP**

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**THIRD MEETING:
ADMINISTRATION OF THE JUDICIARY
UN GOVERNMENT BUILDING, PRISTINA
30 JUNE 2001**

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I. INTRODUCTION

The third consecutive meeting of the Standing Technical Working Group was held on 30 June 2001, in the KTC room, Government Building, Pristina. The meeting reviewed issues of judicial organisation and the administration of justice. Just under thirty participants attended the meeting, representing the main political parties, all minority communities and specialist NGOs. The meeting also drew the attention and active involvement of a broad collection of local and international experts and representatives from the administrative structures. Unlike previous meetings, the agenda of the third meeting was deliberately curtailed allow for members of the Group who are restricted by transport and security arrangements to play a full and active role in the final session of the proceedings.

The meeting was divided into three main issue areas, each constituting one plenary session. These issue areas had been identified by the Steering Committee for the Judiciary in a series of preparatory discussions prior to the meeting. The deliberations of the Steering Committee had been assisted by the provision of a background paper specially compiled by Mr Blerim Reka of the Euro-Atlantic society and Kosovo Law Centre (appended below). These issues were:

- The unity, professionalisation and independence of the judiciary
- Cooperation with the executive
- Human rights in the judiciary

Mr Hysni Bajrami, who had also presided over the preparatory discussions of the Steering Committee, chaired the session. The meeting commenced with a presentation of the main issues followed by a brief review of UNMIK's evolving policy response to the establishment of a judicial system in Kosovo/a. This review was provided by Mr Maurice de Thevenard, Senior Legal Officer, UNMIK, who remained to observe the ensuing discussions. Mr Robert Muharemmi, UNMIK Department of Public Services, also attended all sessions.

II. SUMMARY OF THE DEBATE

In a series of three consecutive plenary sessions and a concluding working session, the Group considered each issue in detail, and put forward a number of wide-ranging arguments and positions. In all sessions, the multi-faceted and complex nature of the issue under discussion was apparent. In the account that follows, some attempt has therefore been made to categorize and summarize the main findings of the proceedings. This account has not been reviewed by any of the participants and does not claim to reproduce the views of each member of the Group.

a. Unity, Professionalisation and Independence of the Judiciary

Unity of the judiciary

1. The meeting noted the necessity of establishing a unified judicial system in the territory of Kosovo/a. It was felt that a unified judicial system was of particular importance in establishing a fully functional legal system based on the rule of law, and for the provision of equal justice for all sectors of Kosovo/a society.
2. The meeting draw attention to the existence of parallel structures in the provision of legal services to majority and minority communities. It was noted that this served to reinforce existing divisions. It was also felt that the overall aim of establishing systems equally accessible and fair to all would help heal the wounds of the recent past.
3. In this context, the meeting drew attention to the framework of UN Resolution 1244 and welcomed the commitment of the SRSG Mr Hans Haekkerrup to the unity of Kosovo/a in all areas of administration – a view he had expressed in Brussels previous to the meeting.

Professionalisation of the judiciary

4. The meeting noted the essential importance for high quality training for the development of a professional and independent judiciary. In particular, it was proposed that training should be coordinated across all relevant organisations and implemented according to a perceptible time plan. This would include training for judges who had already qualified and also those who are about to qualify.

5. The importance of continued education and on-the-job training was emphasised. It was proposed that this training should be delivered with appropriate involvement of the Kosovo/a Association of judges and high quality NGO providers of training.

6. It was proposed that training should be focused on those who in turn can deliver training to others, and should be available in all languages that are widely used in Kosovo/a.

7. It was further noted that training in the applicable law of Kosovo/a should also be mandatory for international judges and judicial officials entering service in Kosovo/a.

8. It was further proposed that the meeting invite the international agencies to present a programme in consultation with Kosovo/a professional bodies for the establishment of forensic and other court services.

9. The selection of judges and admission of lawyers to the Bar should be performed exclusively according to criteria of competence. The process of qualification should be designed with the appropriate involvement of professional and university bodies in Kosovo/a.

10. The meeting highlighted the need to raise the status and profile of judges. It was noted that adequate salaries for all members of the judicial services, and especially judges, was an important measure for strengthening the judicial system. It was proposed that this be reflected in the Consolidated Budget of Kosovo/a.

Independence of the judiciary

11. It was emphasised that a well-paid judiciary is a precondition for an independent and professional judicial service that is impervious to corruption. The issue of security of judges and judicial officials was also raised in this context.

12. The meeting noted the essential importance of the independence of the judicial process for fair trial and human rights standards. Executive intervention in this process was deemed inconsistent with this principle. The meeting deemed it incumbent on the executive to clarify the criteria for intervention. Where such intervention must take place for an interim period it should only be conducted according to restrictive criteria and only in accordance with international standards. These decisions should be transparent and the reasons for the decisions must be stated.

13. In the establishment of a judicial administration, the meeting however recognised the relevance of the overall framework of Resolution 1244 in this context.

b. Cooperation with the Executive

Transparency and availability of information

14. The meeting emphasised the need for an overall electronic network detailing all applicable law, court decisions and orders and international standards and judgements relevant to the application of human rights.

15. The international implementation agencies were invited to launch a public information campaign outlining the structure and function of the judicial system and adding to its accessibility. The use of citizens' advice services through NGOs and establishment of helplines was emphasised in assisting in the provisioning of equal and easy access to the judicial system.

16. It was emphasised that there should be a full written record in court including witness statements. The translation facilities for these services need urgent

improvement. It was suggested that they be delivered by independent agencies on the basis of competitive tender and quality of services. To add to transparency it was proposed that courts should appoint an official a spokesperson who should operate subject to data protection standards and the requirements of security and privacy.

Improving cooperation and the provision of services

17. The meeting expressed surprise at the absence of effective cooperation between courts and the enforcement agencies. It was noted that improvement in the services of summons, protection of witnesses and the execution of court orders was urgently required.

c. Human Rights in the Judiciary

International human rights standards

18. The meeting emphasised the need to ensure that human rights as enshrined in the European Convention on Human Rights and other such instruments pervade all aspects of the administration of justice – this includes specialised human rights training not only for judges and prosecutors but also for defence counsel through the Office of the Ombudsman, NGOs and other channels. Information and awareness in relation to human rights issues should be increased.

19. It was noted in particular that, through training, the courts at all levels should be enabled to arrive at decisions that are consistent and fully in compliance with human rights principles.

Equal access to the judiciary

20. The development of a broad human rights culture was also deemed to be essential for the purpose of raising confidence in the judicial system on the part of all communities in Kosovo/a.

Pre-trial, fair trial and post-trial human rights guarantees

21. The meeting noted that human rights provisions apply not only in the trial phase but also in the pre-trial investigative phase where criminal procedures are concerned. This includes the provision of effective defence counsel, trial conduct and the translation of all relevant documents and proceedings into a language the defendant can understand. This also includes the expedition of communication of grounds for arrest, and where relevant, the possibility of judicial review of a decision to detain within a short period of time.

23. The meeting also noted the need to ensure that the execution of sentences be conducted fully in compliance with human rights standards, including especially for the treatment of prisoners.

24. Alternative modes of sentencing were considered in relation to less serious offences (e.g. community services) also with a view to easing the reintegration of offenders into society. The need to provide for a reliable and objective parole procedures was noted in this context.

d. Dialogue with UNMIK, JIAS and OSCE

For the final session, the Group engaged with eight senior representatives of the international implementation agencies and administrative structures (Appendix 2). The Chair provided a brief overview of the issues that the Group had tackled during the meeting and invited the spokespersons for the two working groups to put forward the individual positions and suggestions they had considered.

Working Group 1: The Administration of the Judiciary

Professionalising the Judiciary through Training

The first speaker noted that in order to realise an efficient and independent judicial system in Kosovo/a, there was a clear and apparent need for an adequate and comprehensive programme of ongoing training. It was suggested that this be

implemented across all levels of the judicial system, consistent with the need to enhance the skills of judges, prosecutors and other court officials, both old and new. It was further proposed that to meet the need for training, greater involvement be made of local NGOs, and that training be treated as a normal part of the work of judges.

The OSCE and UNMIK representatives agreed that training programmes were extremely important and that there was a need for a streamlined and widespread programme of judicial training. The OSCE representative pointed out that the Kosovo Judicial Institute had been specifically created to fulfil this task. In achieving this, the KJI was supported by local NGOs and cooperated with organisations such as ABA/Ceeli. Such partnerships would ensure that funding was available to continue training. It was, however, important to maintain realistic expectations. Much progress had been made so far but there were plans to increase this commitment further at all levels. In this regard, the OSCE representative pointed to new training programmes that were anticipated, especially with regard to the training of defence counsel. He further pointed to the formulation of the new criminal code as an attempt to address these questions.

Status, Pay and Security of Judicial Personnel

The meeting felt that Kosovar judges were not accorded the same standing as international magistrates. Without a level of dignity and authority, Kosovar judges would be unable to win the respect they needed to carry out their duties effectively.

The meeting agreed with UNMIK and the Co-Head of JIAS that a higher status needs to be attributed to judges and judicial officers in Kosovo/a. In this regard the importance of awarding judges a salary commensurate to their standing was noted. The meeting welcomed the increase of salaries for prosecutorial personnel that was announced at the meeting. It was further proposed that adequate provision be made in the Kosovo/a Consolidated Budget for funding the judicial system. The need to address this matter as an essential tool in fighting corruption was also recognized. The Co-Head of JIAS appealed to the participants to work with the executive in finding the material provisions for this in the budget.

UNMIK and the Co-Head of JIAS also agreed with the call for greater guarantees of safety provisions as a means of supporting the effectiveness of judges and judicial personnel. UNMIK indicated that this would prove more important in future. Provision was now being made to ensure that all courthouses would be guarded by a minimum number of officers from the law enforcement agencies. Further security arrangements would, however, take away from the court budget. Training had also been undertaken to raise security in courthouses but more needed to be done. UNMIK was currently distributing regulations to all judicial institutions.

Cooperation with the Executive

The meeting noted the lack of consultation between UNMIK and local legal experts in drafting laws that would be applicable in Kosovo/a. UNMIK acknowledged that local experts had not been sufficiently involved in this process so far. This situation had arisen under the pressure of time. There had been an urgent need to establish a fully functional judicial system in Kosovo/a with sufficient legal safeguards. This had led to inevitable deficiencies and compromises. The UNMIK representative assured the meeting that the international agencies had not established laws for the benefit of the internationals and had every intention of involving Kosovars in future. The Co-Head of JIAS emphasised this point and proposed that the SRSG needed to employ a local advisor to this end.

It was further noted that there was no mechanism for monitoring the implementation agencies. In this regard, it was proposed that the media be given a more prominent role in monitoring the activities of the courts and that the courts themselves appoint a spokesperson. The OSCE representative responded that there was in fact a monitoring mechanism already in place and that this function was fulfilled by the OSCE legal system monitoring section. The Co-Head of JIAS, however, doubted whether such mechanisms would prove sufficient checks against the possibility of misinformation.

Enhancing conduct of court proceedings:

The meeting drew attention to the lack of cooperation between the courts and the law enforcement agencies. It was recognised that this was in part due to the low rates of pay. However, while this could be remedied with an injection of funds, serious

structural problems existed that hampered the proper functioning of the judiciary, e.g. the serving of court summons. It was proposed that the courts be invested with more powers vis-à-vis CIVPOL and that CIVPOL be better briefed on local circumstances.

UNMIK acknowledged that cooperation between the courts and the law enforcement agencies had been deficient. Cooperation was inherently difficult to accomplish when the personnel of these bodies are drawn from over fifty countries. Most were unfamiliar with Kosovo/a but a training programme in local affairs was provided by experienced Kosovar judges. Nevertheless, meetings had been especially organised in an attempt to stimulate cooperation between all the judges, police and others involved in the criminal legal system.

Adequate Provision of Information and Services

The speaker also raised the issue of adequate translation facilities and the scarcity of ancillary interpretation services. It was noted that the implementation agencies had an affirmative obligation to ensure the accessibility of applicable laws in Kosovo/a. The meeting recognised that so far this had not been the case, and that laws were promulgated before being translated into languages widely used in Kosovo/a.

UNMIK acknowledged that laws were not promulgated in the other official languages of Kosovo/a at the same time as English. This was regretted. The implementation agencies had, however, been driven by the need to act rapidly and prioritise scarce resources. There is a dearth of skilled legal translators in Kosovo/a and UNMIK had to make the best use of the resources it had at its disposal.

It was further noted that public access to applicable laws and UN Regulations concerning Kosovo/a were limited by the lack of adequate documentation centres. This added to the general feeling of opacity in areas of governance. The speaker called attention to the incomplete stock of reference works on current law in the faculty library of Pristina University and bemoaned the lack of an Official Gazette to ensure the effective dissemination of UN Regulations. It was proposed that a comprehensive electronic database be established which would provide access to all judicial announcements and regulations as they occur.

UNMIK and the Co-Head of JIAS welcomed greater transparency in the judiciary. UNMIK noted that an Official Gazette was already in circulation and indicated that the existing volumes would shortly be updated. There was also a policy for ensuring that regulations of special importance to the work of the courts were delivered directly. The Co-Head of JIAS welcomed the proposal of an electronic database and agreed that the law library was incomplete. Given that existing funds were allocated to priority areas such as ongoing training, it was however presently impossible to secure funds for documentation.

Working Group 2: Human Rights in the Judiciary

The second working group had considered aspects of human rights in the administration of the judiciary. Two speakers were nominated by the second working group and addressed the following areas.

Ensuring compatibility with international human rights standards.

The implementation agencies and the meeting pronounced themselves in favour of setting the highest standard for human rights provisions in the applicable law of Kosovo/a. Both groups agreed on the necessity of raising awareness amongst judicial personnel in human rights covenants and standards, and reiterated support for further training in this area. On the question of involving NGOs in monitoring judicial proceedings, UNMIK was hesitant whether this would not infringe on the impartiality of the judiciary.

One speaker questioned whether human rights standards had not been violated by the UNMIK itself, particularly in regard to executive interventions into the independence of judiciary. The speaker requested clarification of the circumstances under which the executive could intervene and, questioned whether allegations of CIVPOL's disrespect of the acquittal of some detainees were true.

UNMIK responded that some intervention was inevitable and necessary where there were gaps and weaknesses in the present system, and where the likelihood that the trial was being driven by partiality was evident. It was emphasised that this was undertaken only when absolutely necessary and that the provision of directive 2000/64, which regulated executive intervention, was subject to strict guidelines. The

representative of UNMIK acknowledged that he was aware of such criticisms but was unaware of UNMIK representatives ever disregarding a decision for acquittal. He questioned the veracity of the information. In regard to the Camp Bondsteel prisoners, the Co-Head of JIAS questioned the standards and authority under which the enforcement agencies had been operating. She drew attention to the usual custodial time limit of 72 hours.

The issue of war crimes was also raised in this context and it was felt that sufficient attention had not been paid to this issue. It was proposed that greater attention be paid to this through the generation of wider public debate. The Co-Head of JIAS agreed that more needed to be done to address some issues and flaws that had arisen during the emergency period.

Equal access to judicial services and human rights safeguards

The speaker then raised the question of minority access to judicial services. Despite the commitment of the implementation agencies to unity of all administrative services, it was noted the provision of judicial services was still marked by separate service provision for different ethnic groups.

The Co-Head of JIAS responded that the judicial service in Kosovo/a was in danger of establishing two norms, which could effectively yield two different decisions and undermine the validity of the courts. The need to provide opportunities for minority groups was highlighted. It was proposed that Kosovar Albanian judges go to visit Serb enclaves to have meetings with their Kosovar Serbian counterparts, this was of particular importance with regard to clarifying disputes such as those of inheritance. The Co-Head of JIAS noted that progress had been made in the previous two years, especially in regard to the application of human rights foreseen in Resolution 1999/24, but acknowledged that more needed to be done. This was particularly the case with ensuring effective defence counsel through all stages of the criminal proceedings. In this regard, the Co-Head of JIAS drew attention to the provisions foreseen in the Constitutional Framework and the safeguards for the protection of minority groups.

The meeting concluded with an expression of thanks to the representatives of the implementation agencies. It was indicated that the Steering Committee would reconvene the next day to draw conclusions from the meeting, and that these issues would be examined in more detail at a training event scheduled to take place in Flensburg two weeks later. Finally, it was noted that the end of the meeting did not constitute the end of the debate and that these issues would be revisited in cooperation with the implementation agencies in December.

III. RECOMMENDATIONS

These recommendations have evolved through a process of discussion and consultation with the members the Steering Committee on the Judiciary. They have developed in response to concerns articulated during these discussions and those expressed during the STWG meeting on the administration of the judiciary. Further recommendations and suggestions were generated during a follow-on training workshop on the judiciary and human rights in Flensburg, which took place two weeks after the meeting (see ECMI Report # 16).

RECOMMENDATIONS

On the Unity of the Judiciary

- The common goal must be to build a society in Kosovo/a that is based on the uniform acceptance of democratic standards and the rule of law.
- To ensure the stability of the legal system, the promotion of the rule of law and the realization of equal justice for all, the establishment of a unified system is crucial.

On Professionalising the Judiciary

- In order to sustain the conditions required to engender a professional and independent judiciary, a comprehensive and coordinated strategy of high-

quality training for all levels of judicial personnel needs to be implemented.

This should include:

- The provision of continuous, on-the-job training in an appropriate language for established judicial personnel as well as those just starting out;
 - The creation of a structured framework of education, with the involvement of professional bodies and NGOs, and with integrated mechanisms for the transfer of knowledge;
 - The extension of compulsory and comprehensive training in the applicable law of Kosovo/a to international judges and judicial personnel;
 - The adoption and implementation of a discernible time plan to achieve this strategy.
- To support the judicial system and the just application of law, the international agencies should also collaborate with the professional bodies of Kosovo/a and present a programme for the establishment of forensic and other court services. Efforts by judges to organise themselves into a lobby group should be supported and commended.
 - The selection of judges and admission of lawyers to the Bar should be performed exclusively according to criteria of competence and meritocracy. The process of qualification should be designed with the appropriate involvement of professional and university bodies in Kosovo/a.
 - International efforts should focus on increasing the status and salary of all members of the judicial services, and especially judges, as an anti-corruption measure. Provision for this and for maintaining an adequate level of judicial services should be foreseen in the Consolidated Budget for Kosovo/a.
 - More vigorous steps should also be taken to guarantee the safety of judges and judicial officials.

On Ensuring Independence of the Judiciary

- To safeguard the independence of the judicial process, and particularly in regard to fair trial and human rights standards, executive interventions ought to be avoided.
- Where such interventions take place, they should be executed according to international standards and only for an interim period; the reasons for doing so must be principled, consistent and transparent.
- The international agencies must live up to their own obligations and ensure as a priority an adequate mechanism of appeal for challenging executive decisions.

On Increasing Transparency and the Adequate Provision of Information

- To ensure the proper implementation, and increase popular understanding and acquiescence to laws, more effective steps should be taken to improve the transparency and availability of legal information.
- A public information campaign should be launched on television, radio, through the production of free leaflets as well as through local newspapers to keep the general public informed about the structure and function of the judicial system.
- There needs to be a clearer and more realistic acknowledgement of the inadequacies of existing translation facilities and the keeping of court records, including witness statements. Adequate resources and funding should be allocated to improving these services, possibly through the use of competitive tendering.
- The appointment of an official courts spokesperson should be investigated, providing he operate subject to recognised standards of privacy and security.
- The establishment of citizens' advice bureaux and helplines, in collaboration with NGOs, should be explored as a means of furnishing easy and equitable access to legal advice and services.
- There is also a clear need to set up a widely accessible electronic database of legal information holding information on applicable law, court decisions and

orders as well as international standards and judgements relevant to the application of human rights.

- Urgent steps should be taken to establish such an electronic data processing system to forestall a backlog of cases.

On Improving Cooperation and the Provision of Services

- The international implementation agencies should make more intense efforts to strengthen cooperation between the courts and the enforcement agencies.
- Areas of particular concern are the inadequate provisions for serving of summons, protection of witnesses and the execution of court orders.

On Compliance with International Human Rights Standards

- Moves to bring all aspects of the administration of judicial services in line with universal human rights standards should be a central goal of policy-makers.
- Specialised training programmes in human rights should be made available for all judicial personnel, either through the Office of the Ombudsperson, NGOs or other channels.
- Fostering a culture of human rights through public awareness campaigns and through ensuring the compliance of court decisions with human rights principles would raise public confidence and establish trust in the legal system across communal divides – an essential element for ensuring equal access to justice.

On Guaranteeing Pre-trial, Fair Trial and Post-trial Human Rights

- Without the comprehensive application of human rights provisions in all phases of criminal procedure – trial, pre-trial and post-trial – the establishment of a human rights culture in Kosovo/a would be illusory.
- Particular attention needs to be paid to the provision of adequate defence counsel, trial conduct and the provision of safe premises for endangered minorities

- Attention also needs to be focused on ensuring the provision of judicial review of decisions to detain within a discernible period of time.
- There is also a clear need for the translation of all documents and proceedings into a language the defendant can understand, this includes expediting the communication of grounds for arrest.
- Attention to the treatment of prisoners should be heightened in the public conscience. Public participation and NGOs should be supported monitoring the state of the prisons, through the establishment of an official visitors programme.
- Greater consideration should be paid to exploring alternative modes of sentencing for minor offences, and procedures for parole should be improved to make them more reliable and objective.

APPENDIX

1. Programme of the Third Meeting

Saturday, 30 June 2001

TIME	ACTIVITY
9.00-9.45	Introductory Remarks <ul style="list-style-type: none">○ Presentation of background paper○ Brief presentation UNMIK: general overview of implementation agency policies – successes, failings and constraints.○ Preliminary remarks on unity of the judiciary in Kosovo/a
	Coffee Break
10.00-11.00	First Plenary Session: <ul style="list-style-type: none">○ Professionalisation and independence of the judiciary○ Training and provision of facilities○ International monitoring and relations with international judicial structure
	Coffee Break
11.15-12.45	Second Plenary Session: <ul style="list-style-type: none">○ Cooperation with the Executive○ Provision of practical facilities○ Enhancing conduct of court proceedings: communication of summons, witness protection and execution of court orders○ Role of the courts in improving overall security in Kosovo/a
12.45-14.00	Lunch
14.00-15.00	Third Plenary Session: Human Rights in the Judiciary <ul style="list-style-type: none">○ Ensuring compatibility with and awareness of international human rights standards○ Equal access to judicial services○ Guaranteeing fair trial, pre-trial and post-trial human rights
	Coffee Break
15.00-16.00	Working Groups 1 and 2: <ul style="list-style-type: none">○ Working Group 1: First plenary topics○ Working Group 2: Second plenary topics
16.00-18.00	Dialogue with UNMIK, JIAS and OSCE
19.30-20.30	Closing Dinner

2. Implementation Agency Representatives

Name	Agency	Status
Alexander Borg Olivier	Director of the Office of the Legal Adviser, UNMIK	Attended
Maurice de Thevenard	Senior Legal Officer, UNMIK	Attended
John Cubbon	Officer in Charge, Prosecution Services and Court Administration, UNMIK	Attended
Nekibe Kelmendi	National Co-Head of the Department of Judicial Affairs	Attended
Françoise Simard	Head of the Legal Office, Penal Management Section, Department of Judicial Affairs	Attended
Zait Xhemajli	Judge at the Supreme Court of Kosovo/a	Attended
Carsten Weber	Chief of Rule of Law Liaison, OSCE	Attended
Naser Peci	Legal office, Penal Management Section, Department of Judicial Affairs	Attended

Other implementation agency officials were invited to the session but owing to previous commitments were unable to attend. These were:

- Gary Matthews (Deputy to the SRSG and Head of Pillar I – Judiciary and the Police);
- Fernando Castanon (Co-Head of Judicial Affairs);
- Colonel van den Elsen (KFOR Legal Office);
- Colette Rausch and David Marshal (OSCE Rule of Law Department).

Two further internationals attended the session as observers: Benjamin Allen (Senior Rule of Law Advisor, USAID) and Lothar Rieth (Office of the Ombudsperson).

3. Background Paper

**ECMI Background Paper:
Administration of the Judiciary in Kosovo/a**

BLERIM REKA

Pristina, June 2001

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- II. Administration of the Judiciary in Kosovo/a after 10 June 1999 – the UNMIK framework**
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The training, selection, status and payment of judges
 - i. Inadequate financial incentives and turnover of judicial personnel
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How to help judicial personnel to be effective in their role

- iii. Safety
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International monitoring and relations with the international layers of justice

- v. Inspection and monitoring of the Judiciary
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2. Cooperation with the Executive

- vii. Finance, budget, premises and practical facilities
- viii. Lack of working premises and technical supplies
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- x. Witness protection programmes
- xi. Assuring the execution of judicial decisions by the Executive: the (non) coordination of the Judiciary with the police and KFOR

3. Human Rights in the Judiciary

- xii. How to integrate the European Convention for Human Rights (ECHR) into the legal system of Kosovo/a and the implementation of the Convention in the judicial practice of Kosovo/a.
- xiii. Guarantees for compliance with the ECHR, during arrest, and in the investigative procedure – securing access to defence lawyer and non-use of torture
- xiv. Compliance with the ECHR post-trial, during imprisonment and the conduct of the prisoner

V. Recommendations for a better Administration of the Judiciary in Kosovo/a

VI. Sources and References

Executive Summary

Since the end of the war in Kosovo/a and the establishment of the International Interim Administration Mission in Kosovo/a (UNMIK) one of the key priorities of UNMIK has been to create a professional, effective and independent judiciary. After the war, establishing the judiciary as an instrument of a war against crime in a post-conflict and a conflict-traumatized society was one of the main objectives of the international community. This was defined not only by Resolution 1244 of the UN Security Council but also by the first report of the UN Secretary-General Kofi Annan.¹ Today, with almost two years gone since the establishment of the international interim administration in Kosovo/a, it can be said that UNMIK has achieved a certain level of stabilization in the administration of the judiciary compared to the confusion that characterized the first period of the so-called Emergency Judicial System. At the same time, it was the first time in the history of international peacekeeping and within the system of the UN administration that the UN, together with local partners, had created and administered a judicial system.

It is thought that Kosovars requested the transfer of competences from UNMIK to themselves in all fields, including that of the judiciary, prior to their requests being presented before the Joint Council for Legislative Matters. And that they had been especially insistent in the drafting of the Constitutional Framework within the Joint Working Group (JWG). However, this Kosovo/ar request was not complied with to the extent Kosovars had desired. Immediately after KFOR's entry into Kosovo/a, various legislative and judicial systems were adopted according to which KFOR contingents were stationed in which particular zone. On 28 June 1999, UNMIK began to realize the so-called Emergency Judicial System by reactivating district courts and respective prosecutions in Pristina, Prizren, Mitrovica, and Peja and appointing 55 Kosovo/ar judges and prosecutors. Until the establishment of the Joint Interim Administrative Structure (JIAS), which included the Department of Justice, the judiciary of post-war Kosovo/a was not administered in a coordinated and unified

¹ See UNSCR 1244/99; Report of the SG of UN for UNMIK, July 1999.

manner from the central level but instead by means of a chain UNMIK regulations combined with an ad-hoc approach to building up the judiciary.

Today, the judiciary, the courts, the prosecutions and correction institutions (prisons) are all administered in a unique manner through the Administrative Department of Justice. This department operates within the structures of JIAS, although UNMIK has still proved unable to eliminate the parallel structures that obtain in Serbian enclaves. This particularly is the case with three municipalities in the north of Mitrovica. Here the judicial structure remains based on Serbian law and the administration of the judiciary is duplicated between one administered by UNMIK and another administered by Belgrade. However, it remains true that UNMIK has objected to this practice. By way of distancing itself from the proposal of the deputy president of the Serbian government Mr Qoviç for the separation of Kosovo/a² UNMIK emphasized that “it will not allow parallel governance or parallel institutions in Kosovo/a”. The fact remains, however, that parallel institutions do continue to exist in the Kosovar judiciary.³

The Administrative Department of Justice, which is co-chaired and co-directed by two Co-Heads, one Kosovar and one international, has made efforts to eliminate such parallelism in the Kosovar judiciary. This Department has all the elements of a Justice Ministry of a sovereign state, although it is not yet a ministry with complete inherent powers of governance. This is especially the case with regard to the Kosovar Co-Head, to whom the authority to take decisions is often limited. As such, the Department, as its title betrays, is limited to mainly administrative powers. Nevertheless, the establishment of the Department at the beginning of 2000 marked the foundation of post-war law and order in the Kosovo/a’s judiciary.

After the approval of the Constitutional Framework for Provisional Self-Government in Kosovo/a,⁴ the whole period that had until then been administered by the Kosovar judiciary was now replaced by a constitutional administration. Furthermore,

2 According to the Kosovo/a daily periodical, 18th –22nd of May 2001.

3 Ibid.

4 UNMIK Regulation 2001/9, 16th of May 2001.

immediately after the approval of the Constitutional Framework, UNMIK established “The First Pillar”, or as it was further named, “Police and Justice”.⁵

Even though it was not a part of the judiciary, at the end of 2000 the institution of the Ombudsman⁶ was also newly established with the aim of securing legal mechanisms to protect human rights and freedoms as well as to prevent abuses by the bodies and institutions of the international civil interim administration.⁷ Initially, an international ombudsperson had been appointed and the office administered with the help of a local assistant.⁸ In the end, the institution of the Ombudsman was formalized by the Constitutional Framework for Kosovo/a as an independent institution and highly important in the field of protection of human rights and rule of law.⁹

I. Administration of the Judiciary in Kosovo/a prior to 10 June 1999

Here only a general historical introduction is provided of the administration of the judiciary in Kosovo/a before 10 June 1999. Without further elaboration on this period, it can be said that during the 54 years since the Second World War and under Yugoslav jurisdiction, the administration of the judicial system in Kosovo/a, depending on various constitutional phases, functioned on varying levels: the federal, the republic and the provincial level.¹⁰

Viewed from the perspective of international principles and standards, the judicial system of Kosovo/a as the part of the single-party Yugoslav judicial system was a that of a judicial system based more on ideological norms than on the rule of law. Within

⁵ 21 May 2001.

⁶ UNMIK Regulation 2000/38.

⁷ Until January 2001, the office of the Ombudsman in Kosovo/a had received 120 citizens’ demands from Kosovo/a. However, one of the problems of exercising his competencies was the limitations of his powers with regard to citizens’ requests relating to property disputes over real estate in relation to KFOR; see also: Antoni Mareck Novicki: “European Convention for Human Rights in Poland: Ten years after”; Nikë Lumezi: “Institution of the Ombudsman of Kosovo/a”, *Kosova Law Review*, Vol. VI, no.1, spring 2001, pp. 13-17; 43-49.

⁸ Antoni Mareck Novicki from Poland was appointed International Ombudsman in Kosovo/a.

⁹ See article 10.1 and 10.2 of the Constitutional Framework for Provisional Self Government in Kosovo, UNMIK Regulation no. 2001/9.

¹⁰ See also Esat Stavileci- Blerim Reka- Arsim Bajrami: “Kosova: Political, International Law and Constitutional Arguments”, *Kosova Law Review- Special Edition*, 1996.

this judicial system, it was understood that there could be no serious thought of any independence of the judiciary. Furthermore, as it will be seen, at the end of this period – 1989-1999 after Kosovo/a's occupation – Serbia introduced a special system with discriminatory laws and with a Draconian judiciary. This Serbian judicial system, which was executed in Kosovo/a, was in violation of all international conventions on human rights and orders, including the European Convention for Human Rights.¹¹ With elements of national apartheid, this system of Serbian 'justice' in Kosovo/a discriminated against the Albanian community and was administered entirely through the authorities in Belgrade.

Initially, in conformity with the first Yugoslav Constitution of 1946, the administration of the judiciary was centralized, not only in Kosovo/a but also at the federal level. The subsequent Constitution of 1963 also gave Kosovo/a no administrative independence in the judiciary. Moreover, it discriminated against Kosovo/a – when compared to Vojvodina – by not allowing Pristina to have the highest judicial instance, instead reducing it to a branch of the Supreme Court of Serbia. After the constitutional reform of the 1970s and especially after the approval of the Yugoslav Constitution of 1974, Kosovo/a was able to self-administer its courts, prosecutions and prisons for 15 continuous years. This was done through the Secretariat of Judicature in an autonomous manner all the way up to the level of the Supreme Court of Kosovo/a. Throughout this period, Kosovo/a also had its own Constitutional Court. After the unconstitutional de-federalization of Kosovo/a on 23 March 1989, Kosovo/a, while losing other attributes of power, was also suspended from having judicial power and hence from the functioning of the judicial system as a whole. The judicial system in the ten years that followed was directly administered by Belgrade, transforming the judiciary of Kosovo/a into a arm of the judicial system of Serbia.

¹¹ More in: *Kosov/a Law Review*, Vol. VI, no. 1, Spring 2001

II. Administration of the Judiciary in Kosovo/a after 10 June 1999 – the UNMIK framework

After the end of the Kosovo/a conflict and KFOR's entry into Kosovo/a, the Kosovar judiciary underwent a series of dynamic phases in its development:

PHASE ONE:

The first could be called the phase of judicial 'confusion'; that is to say, the phase corresponding to the various judicial systems that were adopted according to the laws of the member countries of KFOR¹² whose sector they were responsible for.

PHASE TWO:

The second phase is also known as the 'emergency' phase established by the UNMIK decision of 28 June 1999 (and which was active until 10 September 1999). Here the Special Representative of the Secretary General of UN for Kosovo/a appointed 55 judges and public prosecutors.¹³ Initially, the first district courts and respective offices of prosecution were established in four municipal centres: Pristina, Prizren, Mitrovica and Peja. Finally, a court of appeal was also established¹⁴.

PHASE THREE:

Between this first emergency period of the Kosovo/ar judiciary – immediately after the end of the war and the fall of the judiciary under the Department of Justice – there was a seven-to-eight month period of efforts by UNMIK to administer the judiciary “outside the emergency fever” – but nevertheless under “the fever” of the applicable law. In fact, one of the most problematic issues was exactly the issue as to which law should be applied in post-war Kosovo/a. The first Regulation of UNMIK,¹⁵ with the determination that “laws which were valid

12 Hence, immediately after KFOR's entrance in Kosovo/a, from 12th-28th of June, 1999, in the German zone of responsibility it was judged based on German law, in the British zone based on British law, whereas in the American zone it was based on American law; see the daily: Fakti, Koha Ditore, June 1999, and the reports on the arrests and the first “trials” by KFOR.

13 Among them: 42 Albanians, 7 Serbs, 4 Bosnians, 1 Turk and 1 Roma; see: OSCE Report: The system of Kosovo/ar Judiciary, 1st of February-31st of July 2000, p. 11

14 Ibid.

15 UNMIK Regulation 1999/1, 25th of July 1999.

until 24 March 1999 will continue to be applied” led to a fierce reaction from the legal community of Kosovo/a. There were many resignations from Albanian judges who had been appointed immediately after the war within the system of the Emergency Judicial System.

Therefore, in order to deal with this substantial problem, which was not only legal but also political, and which at worst could serve to block the entire work of UNMIK, the UN SRSG for Kosovo/a established the Joint Advisory Council for Legislative Matters (JACL) on 15 August 1999. The JACL had the duty to advise the SRSG on the reform of Kosovar legislation.¹⁶ The first working meeting of this Council was held on 18 August of the same year, whereas working groups were elected according to their specialist fields. The work was mainly oriented towards the field of criminal legislation, and more specifically towards developing the New Criminal Law and the New Law of Criminal Procedure of Kosovo/a. This process was coordinated with the Council of Europe, on which occasion the first delegation of Kosovo/ar legal experts visited the headquarters of the Council of Europe in Strasbourg at the end of October 1999 and again at the end of November 2000. In addition, experts from the Council of Europe were present in Kosovo/a four times in missions of professional expertise for these two criminal laws during the year 2000/2001. After this process of consultations between Kosovo/ars and internationals, the SRSG approved UNMIK Regulation 1999/24 on 15 December 1999 and by doing so changed the first resolution of UNMIK Regulation 1999/1. Instead of the contested determination of the time for “the execution of laws in power until 24th of March 1999”, he ruled that applicable laws in Kosovo/a would be the regulations of UNMIK and the laws enforced in Kosovo/a until 23 March 1989, but that these would remain at all times in compliance with relevant legal international conventions and instruments.¹⁷ Meanwhile, within this period of legal uncertainty, UNMIK in September of the same year, with Regulations 1999/6 and 1999/7, had begun the approval of the first regulations regulating the issue of the judiciary of post-war Kosovo/a. These

16 See: “New Inclusive Legislative Approach”, UNMIK News, 16th of August 1999, p. 1

17 See Blerim Reka: “New Legislation in Post War Kosova: The Sui Generis Model of National and International Co-Participation on the Exercise of Sovereignty”, *Kosova Law Review*, Vol. IV, no.4, Winter 1999, pp. 9-12; See also: Blerim Reka: “The European Convention for Human Rights: How to Apply it in Kosova?”, *Kosova Law Review*, Vol. VI, no.1, Spring 2001, pp. 9-12.

established two *ad hoc* judicial commissions, one for appointing the functionaries of the judiciary and the other for its structure.¹⁸ Since the establishment of the international interim administration in Kosovo/a all the way up to the approval of the Constitutional Framework for Provisional Self-Government in Kosovo/a – and thus in a nearly two-year period 1999-2001 – UNMIK has issued 17 regulations aiming to administer the judiciary which have been regulating this field¹⁹ either directly or indirectly.

How difficult was it for a Kosovar lawyer to find himself between such pluralities of applicable laws in Kosovo/a? A revealing answer to this question was provided by the international Co-Head of the Department of Justice, Silvie Puntz: “if you want to be a good judge in Kosovo, you have to go through not only one but who knows through how many laws and books”.²⁰ However, even in this sub-phase of the administration of the Kosovar judiciary, and thus even under very inappropriate conditions for the division of justice, results were becoming evident. For example out of 44,361 cases accepted for review in the municipal courts of Kosovo/a in 2000, there was a total of 38,440 or 86.7% of cases solved; out of 4,650 of cases accepted in district courts, 3,791 of them were solved.²¹

PHASE FOUR:

This period of administration of the Kosovar judiciary lasted until the establishment of the Department of Justice within the Joint Interim Administrative Structures (JIAS). In conformity with UNMIK Regulation 2000/15 on the establishment of the Administrative Department of Justice, the judiciary of Kosovo/a is administered by an administrative body for the whole territory of Kosovo/a, even though, as stated above, in Serbian enclaves in the north of Mitrovica, the municipal courts continued to judge according to Serbian law. The Department of Justice hence administers the judiciary of post-war Kosovo/a and thus “is responsible for the general management of issues dealing with the judicial system and with the correction service”.²² Sub-competences of the Department of

18 Regulations of UNMIK: 1999/6 and 1999/7.

19 See Regulations of UNMIK: 1/1999; 5/1999; 6/1999; 7/1999; 18/1999; 26/1999; 5/2000; 14/2000; 15/2000; 17/2000; 30/2000; 34/2000; 64/2000; 1/2001 and 2/2001.

20 Interview to *Zëri*, 17th of February 2001, p. 7.

21 See Department of Justice: “Report on the work of municipal courts, district courts and courts of offence for the year 2000”, March 2001, pp. 2-5).

22 Article 1, par. 2 of Regulation of UNMIK 2000/15.

Justice are as follows: the execution of the general strategy and politics, work, organizing and functioning of the judicial system and the correction service financed by the Consolidated Budget of Kosovo/a; proposal of regulations for this field; coordination of issues with administrative departments; providing information and statistics on the judicial and correction system; assisting the training of judges, prosecutors, lawyers, as well as their recruitment and training; internal inspection and revision of prisons, etc.²³ At the beginning of 2001, UNMIK also began to issue the Regulation for the establishment of the Judicial Council,²⁴ which was nevertheless received with much criticism from local experts in the JACL²⁵ as well as from international experts of the Council of Europe.²⁶ The Council of Europe's criticism stemmed from the violation of the European Charter on the status of Judges, since local judges were prevented from taking decisions on appointing their colleagues. This function was held exclusively by the SRSG, owing to the composition of this council being disproportionately distributed between the relation of locals to internationals. In addition, it considered judges and prosecutors as equals, which is not in compliance with European practice.

PHASE FIVE:

Even though this sub-phase of the administration of the Kosovar judiciary was entirely new and inaugurated only a few days after the approval of the Constitutional Framework for Provisional Self Government in Kosovo/a, we present it here because of the institutional and functional link with the previous sub-phases. It is linked with the establishment of the new pillar of UNMIK – 'Police and Justice', established by the SRSG and Gary Matthews on 21 May 2001. The aim of establishing this new pillar was to put Kosovo/a's Police Service, the Kosovo/ar Judiciary and UNMIK's Police under a single umbrella and thus to ensure their close coordination in the war against crime. In fact we had supported this coordination between these three branches of the anti-crime mechanism. Since the conclusion of this material is linked with the inauguration day of this pillar, it

²³ See points: a-m, of article 2, Regulation of UNMIK, 2000/15.

²⁴ Project Regulation of UNMIK, 2001/xx, February 2001.

²⁵ See remarks presented in the JACL meeting, on 16th of March 2001.

²⁶ See Maria Theresa Romer: "Comments on the project regulation no. 2001/xx on the establishment of the judicial council of Kosovo/a", Council of Europe, Strasbourg 12th of March 2001, PCRED?DG?EXP (2001)4.

was announced that besides the police segment, the judiciary should be transferred to this pillar as well. According to press releases, the “number of Kosovo/ar policemen should be increased to 1500, in order for the total to reach 6000 persons”, as well as increasing the number of judges and prosecutors.²⁷ Besides such a dense program of measures and activities of this pillar considering the judiciary, there were two very important programs announced: one for witness protection and the other for the protection of judges and prosecutors. Meanwhile, there were also proposals for increasing the capacity of Kosovo/a’s prisons.²⁸

III. The Judiciary in Kosovo/a according to the Constitutional Framework for Kosovo/a (Regulation 2001/9)

According to the Constitutional Framework for Provisional Self-Government in Kosovo/a, which is based on the principal of division of powers into legislative, executive and judiciary, the Judiciary of Kosovo/a is distinctive as a special branch exercising the authority of democratic self-government.²⁹ Initially, according to the first draft for self-governance offered by UNMIK,³⁰ the whole judiciary was to remain in the exclusive competence of the SRSG. However, after the almost two-month process of negotiation within the Joint Working Group of local and international experts, the Judiciary was to be divided so that it would be mainly in the hands of the self-governing institutions of Kosovo/a, with some inherent powers left to the SRSG. Hence, the international administrator for Kosovo/a is left with two competences dealing with the judiciary: “the exercise of the final power related to the appointment, dismissal from the duty and the discipline of the judges and prosecutors; and the decision on appointing international judges and prosecutors and the change of their working place”.³¹ Otherwise, the administration of the Judiciary in Kosovo/a, according to the Constitutional Framework, is a competence of the self-governing Kosovar institutions. The Constitutional Framework also defines the principle of the independence of courts and the independence of the Kosovar administration of the

²⁷ See daily reports from the press conference for the inauguration of this pillar; see also the interview of the officer of this pillar Gary Mathew for *Zëri*, 22nd of May 2001, p. 2.

²⁸ *Ibid.*

²⁹ Article, par.4 of the Constitutional Framework for Kosovo/a.

³⁰ UNMIK: “Principles on the interim self governance in Kosovo/a”, 6 March 2001.

³¹ Article 8, points g-h.

Judiciary – “Judges are independent and unbiased. They shall not hold any other official functions”.³² Furthermore, “Courts are responsible for the administration of justice in Kosovo/a in conformity with the law”.³³ The structure of the Judiciary remains the same as predicted by previous regulations of UNMIK i.e. the Supreme Court of Kosovo/a, as the highest instance of the Kosovar judiciary; the District Courts and the Municipal Courts.³⁴ The appointment of judicial functionaries based on this Constitutional Framework is a three level process: The Judiciary Council proposes the list of candidates, which shall be approved by the Parliament of Kosovo/a, but which shall be appointed by the SRSG.³⁵ The innovative aspect arising from the Constitutional Framework compared to other UNMIK regulations in this area, is the establishment of a special College within the Supreme Court of Kosovo/a on Constitutional matters. This was brought about as a response to the request of Kosovar legal experts for the establishment of a Constitutional Court for Kosovo/a.³⁶ This Constitutional Court decides on requests by the President of Kosovo/a, or by the Leadership of the Parliament, of at least five deputies of the Parliament and of the Government if any approved law by the Parliament of Kosovo/a is not compliant with the Constitutional Framework or international legal instruments.³⁷

³² Ibid, article 9.4.6.

³³ Part IV, Article 9, par.4, point 1 of the Constitutional Framework of Kosovo/a.

³⁴ Ibid, Article 9.4.4.

³⁵ Ibid, Article 9.4.8.

³⁶ Ibid, Article 9.4.11.

³⁷ Ibid, points a-d.

IV. Problems of the Judiciary in Kosovo/a

The Supreme Court of Kosovo/a functioned until the end of 2000 with 31 regular courts, 13 prosecutions and 25 offence courts with 391 court functionaries as well as with the prosecution service as an independent institution.³⁸ According to the last situation report of court institutions of Kosovo/a, there are currently 405 judges and prosecutors working with 682 assistants, whereas it is expected that this number will reach 1679 working in 69 institutions of the Kosovar Judiciary.³⁹ However, today, as a consequence of their denial to serve or their dismissal, only 374 judges are working.

After having outlined the legal basis of the activity in the Department of Justice, of its competences and judicial institutional structure, a number of questions remain unanswered: to what extent and by what means were the normative aims defined in the Kosovar judiciary realized? How is this field of social importance presently administered and what are the principles and problems involved? Below we present only a few of the main problems facing the Judiciary in Kosovo/a. By their nature, they can be categorized as follows: principle and financial problems; problems of personnel and provision of premises; and technical problems.

- **Preliminaries: the unity of the Judiciary and Court structure - to what extent is the principle of unity of judicial power respected: judicial parallelism?**

Based on Resolution 1244 of the UN Security Council and UNMIK Regulations 1999/1 and 1999/24, the whole power, hence also that of the Judiciary in Kosovo/a, is exercised in a unified manner over its whole territory. From the perspective of abiding by the principle of the unity of judicial power, it can be argued that over the two-year period of administration of the judiciary in Kosovo/a this principle has been violated on a number of occasions. Whereas the Judiciary was mainly administered in a unified manner by UNMIK, and so for the whole territory of Kosovo/a, this competence was later transferred to the Department of Justice in Serbian enclaves in

³⁸ The Department of Administration of Justice: "The situation in the Kosovar judicature bodies", in Pristina, 5th of September 2000, p. 1.

³⁹ The Department of Administration of Justice: "Strategic Plan of Kosovar Justice: 2000-2001, Pristina, October 2000, p. 2.

municipalities with a majority population of Serbs – like the north of Mitrovica, where the administration of the Judiciary continued to be based on Serbian law. Moreover, there were also attempts to transfer the District Court of Mitrovica from its location in the northern part of the city to the southern part, but this was banned by UNMIK. Besides the problem of unique non-administration of judiciary in this part of the territory of Kosovo/a, with such acts of creating parallel judicial systems in the north of Mitrovica, Resolution 1244/99 of the UN Security Council is violated also by UNMIK Regulation 24/1999, and lastly, the Constitutional Framework itself (2001/9). Therefore, in the future, UNMIK must aim to unify the administration of the Judiciary in the whole territory of Kosovo/a, in order to eliminate such Serbian judicial parallelism in these enclaves, and for the Kosovar judiciary to function in a unified manner in the whole territory of Kosovo/a.

- **Practical Problems facing the Judiciary in Kosovo/a**

- 1. Professionalism and Independence Of Courts**

Within this, we should give adequate attention to the following:

The training, selection, status and payment of judges.

- A. Inadequate financial incentives and turnover of judicial personnel**

After the war, international donors have provided assistance to the Kosovar judiciary. However, the human factor i.e. the court personnel have received little or no support. The exception here is the case last year, where the initial 55 judges of the emergency period were assisted (immediately after the war with explicit assistance), through the OSCE, by the USA. However, no additional aid from international donors has been directed to the personnel of the courts of Kosovo/a. The average monthly income for the professional personnel of the court, judges and prosecutors is DM 636 while the income of the administrative assistants lies between DM 150-390 per month.⁴⁰

⁴⁰ See: DAD: “The strategic plan of the Kosovar justice: 2000-2001, in Pristina, October 2000, p. 4.

Therefore, during the months of April/May 2001, judicial employees discontent with these low wage levels went on strike – this strike continues to this day in many ways, for example through daily stoppages of 1-2 hours. The Department of Justice, concerned about the strike and appreciative of the dissatisfaction of the employees, requested additional financial interventions from the SRSG and AQF, but met with no success. This discouragement and demotivation resulted from carrying out work in a profession that carries great responsibility yet is not remunerated accordingly. The Kosovar judiciary has also faced a high turnover of professional personnel in the last months. Thus until now, six judges have resigned from the Municipal Court of Pristina; four from the District Court in Pristina, and another three have already announced their resignations.⁴¹ Court functionaries also prefer the profession of a lawyer, as it is more profitable. As a consequence, none of the courts or prosecutions in Kosovo/a is currently complete in the sense of having sufficiently trained personnel i.e. of judges and prosecutors, even though the increase in the number of cases imposes a corresponding increase in the number of court functionaries.

B. Inadequate treatment of court functionaries and the need for continuous training, especially training on international documents for human rights

One of the problems burdening the more effective administration of the Judiciary in Kosovo/a is also the inadequate treatment of court functionaries. Judges and prosecutors are not ordinary employees selected by open competition but appointed public functionaries. As such, they cannot be degraded to the level of an ordinary administrator, being functionaries of a higher level, placed only below functionaries who are politically elected. It may be that one of the reasons that appointed Kosovar judges and prosecutors are discontent is the treatment and the lowly status of a judicial functionary, who elsewhere secures special value and respect.

An important element for the good administration of a judiciary is without doubt the continuous professional education and training of court personnel. Up to the first half of 2001, training was mainly performed by the OSCE, through the Kosovo Judicial

⁴¹ See: *Zëri Javor*, 18.05.2001, page 35.

Institute or through local legal NGOs, such as KIEAI or KLC. The Department of Justice⁴² has established a commission for holding the judiciary exam for the first time in ten years in Kosovo/a. In cooperation with the KIEAI and with the support of KFOS and COLPI, it is expected that before the end of this summer or at the beginning of autumn, the first manual in Albanian will be prepared to facilitate the passing of this exam⁴³ - also so that the examination of the first candidates can be held in November or, at the latest, in December of this year.

How to help judicial personnel to be effective in their role

C. Safety

Besides demotivation through lack of material incentives and the conflicts incurred with the high level of responsibility accorded to their duties. One other reason for the high turnover of judicial personnel even after their appointment is also their fear for their own personal safety. This is also proves a burden to Albanian judges as well as those of minorities. Besides the above-mentioned reasons for refusing judicial functions, Serbian judges are also burdened by directives from Belgrade to boycott these functions along with the whole judicial system created in post-war Kosovo/a.⁴⁴ However, even with such insecurity amongst judicial functionaries, “local personnel has never accepted measures of security”.⁴⁵

D. Forensic services and ongoing training

An interesting and complementary activity for the judiciary is naturally that of judicial professional expertise. After the conflict, there were efforts to restore the institutes and respective centers that had dealt with these kinds of judicial expertise. Work was particularly initiated to restore the Institute of Forensic Medicine, but without their centres of expertise for ballistics and falsification of evidence, etc. In the year 2000, the possibility of realizing the project of the forensic institute was considered, with

⁴² Nr. 1/2001, of 1st of March 2001.

⁴³ The first establishing meeting of the editing staff of this manual was held on 22nd of May 2001.

⁴⁴ See DAD: “The strategic plan of Kosovar justice: 2000-2001, Pristina, October 2000, page 4.

⁴⁵ Silvie Pantz, co-chair of the department of justice, in the interview given to “Zëri”, 17th of February 2001, page 7.

Swiss support.⁴⁶ On the other hand, the reason for the lack of this judicial expertise could be the inadequate incentive of professionals to specialize in these areas. For example, the payment of DM 3 per hour in certain areas of expertise of investigative procedure is more than an insult.⁴⁷

International monitoring and relations with the international layers of justice

E. Inspection and monitoring of the Judiciary

A very important dimension of the administration of the Judiciary is also the inspection of progress in this sector. In the Judiciary of Kosovo/a, international inspectors of UNMIK carry out periodical inspection, mainly inspecting the work of courts and prosecutions, and rarely the work of prisons. Exceptionally, inspectors of the administration also inspect court cases. In the meantime, as mentioned above, the Department of Justice, in line with UNMIK Regulation 2000/15, has competences only to inspect the prisons of Kosovo/a. A distinct kind of ‘inspection’ is probably the investigation of the administration of the Judiciary, which is periodically conducted by the OSCE, as the UNMIK pillar responsible for establishing democratic institutions, including legal institutions. This is entirely handled by the Section on Monitoring the Legal System of the OSCE (SMLS), which publishes periodical reports.⁴⁸ The last reports of the OSCE on the Judiciary of Kosovo/a,⁴⁹ were highly critical in their evaluation of the present situation. The most senior directors of the Department of Justice have reacted negatively to this, referring to the conclusions of these reports as ‘unsustainable’, ‘biased’, ‘hypothetical’ and ‘based on suppositions and prejudgments.’⁵⁰

⁴⁶ The sum of this donation reaches 680.000 DM and it is expected this project will be finalized soon.

⁴⁷ See: The Department of Justice: “Report on the work of municipal courts, district courts and courts for offences for the year 2000”, Pristina, March 2001, page 9.

⁴⁸ Until now, ten similar reports have been drafted.

⁴⁹ of October 2000 and April 2001.

⁵⁰ These evaluations were given in two official letters of the Kosovo/ar Co-Head of the Department of Justice, Nekibe Kelmendi towards the “Report of OSCE: 18th of August-27th of March 2000” and towards the “Report of Anne Lepage”, of 25th of October 2000; See official letters of the co-chair Nekibe Kelmendi, June 2000, pages: 1-5 and 12th of October 2000, page: 2-5.

F. Relations between local and international judges

General international principles valid for the field of the Judiciary, as those of the UN on the independence of the Judiciary,⁵¹ should be valid for Kosovo/a, also as a guide for the administration of the Kosovar judiciary. In other words, the basic principles – independence of courts and the freedom of expression and unity; qualification, selection and exercise of the judiciary profession; conditions of service and exercising the duty; the discipline, suspension and dismissal from work and judicial function – seen as a whole, were incorporated mainly from UNMIK Regulations regulating the Judiciary. However, as will be seen, some basic international principles on the independence of the Judiciary were somehow intruded upon through the interference of the ‘executive branch’, more precisely, by the envoys of the SG. The practice of prolonging detentions by administrative orders from the SRSG began with the case of Afrim Zeqiri, who has now been held in detention for almost a year. The case of Merdar, is another example of the interference of the Executive in the Judiciary, but it is at the same time a violation of the European Convention on Human Rights. (Although the court, in the process of investigation and in the absence of facts officially released the accused for the case of the explosion in Merdar on 16 February 2001, the SRSG Mr Hans Haekkerup often prolonged the detention of the accused for a further 30 days – most recently on 25 May 2001; Celë Gashi, Jusuf Veliu, Avdi Behluli and Florim Ejupi are held in the American military prison in Bondsteel, although Florim Ejupi, in mid-May escaped). Such was also the case with keeping Afrim Zeqiri in detention for almost one year, based on an administrative order of the former SRSG. Besides violating UN regulations on the independence of courts through Executive interference into the Judiciary (Art. 6), the ECHR has also been violated, which based on UNMIK Regulation 24/1999 is also an applicable law in Kosovo/a. Such interference of the Executive in the independence of the Judiciary was defined in some Regulations of UNMIK.⁵² The legal community of Kosovo/a considered that UNMIK Regulations 2000/64 and 2001/1 intruded on the

⁵¹ Approved in the seventh Congress of the UN on the prevention of crime, Milan, 26.08-06.09.1985 and defined by Resolution of the General Assembly of UN, nr. 40/32, 29.11.1985 and nr. 40/146, 13.12.1985.

⁵² Especially in Regulation 2000/64; 2001/1.

independence of Kosovar courts twice: first, with the interference of the Executive, (in the case of Kosovo/a of the SRSG, as the bearer of the function of the legislative and executive power) in the work of the courts; and second, with the distrust and *a priori* suspicion of the international experts towards the local bearers of judicial functions, especially with the possibility of appointing international judges instead of local ones; taking over the cases from local judges in any procedural phase, etc.

As a consequence, the Supreme Court of Kosovo/a, in its ‘Principle Statement’ of 1 February 2001,⁵³ emphasized that “Regulations 2000/64 and 2001/2 issued by the UN SRSG, are not in conformity with international norms on the independence of the judiciary and the internal organization of courts and prosecutions, because they fragmentize the judicial procedure by placing judicial subjects in equal positions, by creating different levels of authorizations in the exercise of the function between international and local judges and prosecutors, that they are legally unclear and that they present a difficulty in the unique and consequent execution of the applicable law in Kosovo/a”.⁵⁴ In the response of the international Co-Head of the Department of Justice,⁵⁵ it was said that “these two regulations,⁵⁵ are not in objection with international norms, but are in conformity with created precedents by the decisions of the European Court for Human Rights, based on the provision of Article 6 of the European Convention on Human Rights” and that “this was done as a response toward some cases, which were created when local judges and prosecutors refused to continue the investigations independently from the existence of strong facts against the accused, or they had raised unsustainable accusations, which were not in conformity with the facts”.⁵⁶

Not only the Supreme Court of Kosovo/a but also the Joint Advisory Council of Legislative Matters (JACL) also reacted towards this snub in the drafting process of the Regulation. Moreover, the Council was not informed nor consulted for its approval and requested an official explanation from the Legal Office of the SRSG –

⁵³ Supreme Court of Kosovo/a, Agj. Nr. 13/2001, 1 February 2001.

⁵⁴ Ibid, page 2.

⁵⁵ Official letter of Miss Silvie Puntz, 15 February 2001 addressed to the president of the Supreme Court of Kosovo/a. Mr. Rexhep Haxhimusa; Similarly also in the: “Report of OSCE: 1 September-28 February 2001”, 25.04.2001, p. 16.

⁵⁶ Ibid, p. 2.

no official response was forthcoming.⁵⁷ However, there were also similar cases expressing similar sentiments from the local and international judges and even inconsideration towards decisions of UNMIK own international judges. Thus, the international judge, Marti Harsia himself, in the case of Merdar decided to release the arrested persons, but such a decision was later ‘annulled’ by the “administrative order of the SRSG”, by which their detention was prolonged.

2. Cooperation with the Executive

Here the problems fall into the following categories:

G. Finance, budget, premises and practical facilities

A very important segment of the administration of the Judiciary, in general and in particular for Kosovo/a, is the issue of financing, and more specifically, the budget. Taking into account that the Judiciary also falls under budgeted activities, the primary financial source for the Judiciary in Kosovo/a is the Consolidated Budget of Kosovo/a. In the consolidated budget for 2000, the Judiciary was financed by a total of DM 31, 051,939. With the consolidated budget of Kosovo/a for the year 2001, the Department of Justice was financed from a total of DM 47,104,130 or roughly about one tenth of the total Consolidated Budget of Kosovo/a.⁵⁸ However, it should be noted that the major part of the budget for the Department of Justice, or more than two-thirds of it, is devoted to the police (DM 27,893,384) and only DM 19,210,750 for financing the services of the prisons (DM 6,151,648); Courts, (DM 12,954,391) and for the Joint Advisory Council for Legislation (DM 104,711).⁵⁹ Because of the new Kosovar nominations for the Judiciary and the increasing number of judicial officials, the Consolidated Budget of Kosovo/a also provided an additional sum of DM 3,1 million.⁶⁰ The Judiciary of Kosovo/a was also assisted and continues to be assisted by a series of international donations; most of which were used for the reconstruction of

⁵⁷ See the minutes from the meetings of this Council, January 2001.

⁵⁸ UNMIK, CFA, "The Consolidated Budget of Kosovo: Spending according to the functional classification", 2001, page 1.

⁵⁹ Ibid.

⁶⁰ UNMIK, CFA, "Memorandum for explanation of regulation 2000/xx; The Presentation of the Consolidated Budget of Kosovo for the year 2001", page 6.

the judicial buildings, the prosecution offices, the prisons and for equipment and inventory.⁶¹ The US Government gave equipment to the Judiciary of Kosovo/a amounting to US\$2.5 million.⁶² Since Kosovo/a lags behind advanced judicial systems in comparison to western judicial administrations, and with the purpose of creating a more streamlined administration, Kosovar judges, attorneys and lawyers shall be provided with the possibility to have the legislation and judicial practice concentrated in one location. In order to achieve this, we must start with a program of 'electronic administration' of the Judiciary', as soon as possible. Kosovo/a's Institute for Euro-Atlantic Integrations (KIEAI) has recently completed such a project and will soon initiate its implementation. The essence of the program is that all the judicial functionaries should at all times have access to any approved law and judicial decision of every court in Kosovo/a, as well as access to the comparative legislations of different countries along with the jurisprudence of the International courts – such as the Hague, the EU, the European Council and the Hague Tribunal.

H. Lack of working premises and technical supplies

The problem of finding sufficient working space for courts and Kosovar prosecution offices was prevalent during 2000 and at the beginning of 2001. Most drastically, this problem was expressed in Deqan, Drenas, (former Glllogoc), and also in Pristina.⁶³ The problem of the lack of premises also came across in the implementation segment of criminal punishment. The Dubrava prison, until very recently has been the main correction-punishment institution in Kosovo/a, had a project to house 1,500 prisoners. Thanks to the British government, the prison was expanded to house 520 additional prisoners.⁶⁴ On the other hand, the international donors have contributed to the Kosovar judiciary with the provision of technical supplies. This problem nevertheless still remains acute and detracts from the effective administration and work of the

⁶¹ See "Report on the finalized projects in the regions, projects that are expected to be finished and financed projects for judiciary of Kosovo", Pristina 19.04-23.04.2001.

⁶² Department of Justice, "The strategic plan of Kosovar Justice: 2000-2001", Pristina, October, 2000, page 2.

⁶³ For example in Deqan, where the municipal court practiced its work in private homes, just as the premise problem was acute for courts of offence in Drenas and in Pristina, for example when two lawyers work in one office; See Department of Justice, "Report of jobs in municipal court and district courts, for the year 2000", Pristina, March, 2001, p. 9.

⁶⁴ See: Department of Justice, "The Strategic Justice Plan: 2000-2001", October 2000, p. 3

Kosovar judiciary. The Americans have assisted with the provision of much needed information technology, Kosovar courts were supplied with 226 computers, but there are still courts in which five lawyers must share only one computer. By comparison, in the Municipal court in Pristina 26 lawyers have only 5 computers available, but in the Supreme Court of Kosovo/a, 33 employees have access to only 4 computers.⁶⁵

Maybe the best solution would be to build one Palace of Justice in Pristina, where all the institutions of the Kosovo/ar central judiciary could be concentrated in one place, along with the municipal and district court of Pristina. The idea of building the Palace of Justice in Pristina has been in discussion for a long time, but so far there has been no concrete decision as to when this project will be carried out. If this were to be accomplished, this would provide a solution as to the problem of premises, but it would also lead to judicial concentration.

I. Cooperation with the serving of court summons, communication, speeding up the court summons and the protection of witnesses

Initially, one of the practical problems of the Kosovar judiciary is that of the difficulties of sending official letters and court summons to witnesses and defendants. This was somehow understood in the first months after the war, when the postal service did not function, but also relying on addresses proved difficult because houses had been ruined and many people had moved from the villages to the cities, especially to Pristina. Later, general circumstances like the resumption of PTT services in Kosovo/a stabilized the situation. With the reconstruction of the administrative infrastructure of the Judiciary, judicial correspondence has once again started to function in Kosovo/a. However, there is still widespread discontent with the pace of this service.

J. Witness protection programmes

⁶⁵ Ibid; See also: "Department of Justice, " The strategic plan of Kosovo/ar judiciary: 2000-2001, Pristina, October 2000, p. 2.

The need to provide protection for witnesses has been discussed extensively throughout the two years subsequent to the conflict. Moreover, a special programme for the protection of witnesses, especially in trials dealing with organized crime and those for serious crimes has also been discussed. It is still unknown if anything has been done in this direction. However, the need for this kind of programme for defending witnesses still remains prevalent.

K. Assuring the execution of judicial decisions by the Executive: the (non) coordination of the judiciary with the police and KFOR

In the initial phase of the administration of the judicial system by UNMIK, one of the most disturbing problems in terms of principles was the lack of respect for the judicial decisions of the courts displayed by KFOR and UNMIK Police. In other words, KFOR and UNMIK Police were imposed as an executive body above that which issues judicial decisions. Furthermore, in certain cases they even undertook certain criminal procedure actions on their own, as for example, investigations. In time, such cases have been reduced in number, but still have not been eliminated.

This relation between the Judiciary and the police was improper and led developments in the wrong direction: the criminal charges of the police were incomplete, did not contain the required documentation in addition to the criminal charges, the plan of the crime scene was omitted as well as any minutes on the crime scene, ballistic expertise, forensic expertise, etc.⁶⁶ Since the establishment of UNMIK, there have been 21 cases of prisoners escaping, accusations of war crimes, an escape of a minor accused of murder and two others accused of serious criminal offences, all from the prison in Mitrovica; a prisoner who escaped from the prison of Peja and one from the prison of Pristina. These cases, at their best, highlight the problem of the lack of coordination between the judiciary and the police. The escapes happened while the prisons, also the prison in Mitrovica, were being administered by UNMIK Police and not by the Department of Justice. The fact that the persons accountable for this Department did

⁶⁶ See: "The Department of Justice: "Report on the work of the municipal courts, district courts and the courts of offence for the year of 2000, Pristina, March 2001, page 9.

not take over responsibility, but instead directed it to UNMIK Police is revealing of the degree of non-coordination that exists between them.⁶⁷ In sum, for the future there should be greater coordination and mutual respect between the judicial branch and the executive branch. In the meantime, while the present paper was being drafted, the new pillar of ‘security’ was created within the UNMIK structure, consisting of: the justice branch, the branch of UNMIK’s Police and the KPS, under the direction of the deputy of the SRSG.⁶⁸

3. Human Rights in the Judiciary

Here, the following issues merit consideration:

- L. How to integrate the European Convention for Human Rights (ECHR) into the legal system of Kosovo/a and the implementation of the Convention in the judicial practice of Kosovo/a.

This problem has already been raised at the Conference organized by Kosovo/a’s Institute for Euro Atlantic Integrations on the occasion of the 50th anniversary of the European Convention on Human Rights.⁶⁹ As already mentioned, not only the European Convention on Human Rights (ECHR) but also a series of international conventions in the field of human rights became the applicable law of post-war Kosovo/a with UNMIK Regulation 1999/24.⁷⁰

In fact, although Kosovo/a was not a member of the European Council and therefore was not a signatory to this contract, in its territory, this convention and other international documents dealing with human rights and freedoms were already being implemented, also by Kosovar judicial bodies. Furthermore, each time local applicable law challenged the provisions of these international conventions the latter

⁶⁷ See the interview of the international co-chair of the Department of Justice, Silvie Pantz, in *Zëri*, 17.02. 2001, page 7.

⁶⁸ See: *Zëri*, 22nd of May 2001, pages: 1-2.

⁶⁹ The Training Workshop for judges and prosecutors, held in Pristina, since 19-20th of January 2001.

⁷⁰ See: article 1.3; Thus, the international judge Beatrice de Sharette also qualified this convention as an applicable law in Kosovo/a, *Koha Ditore*, 04.06.2001, pages: 1-3.

took precedence.⁷¹ The readiness of Kosovar judges and prosecutors to accept these conventions and other relevant documents in the field of human rights and freedoms as applicable law⁷² can be deduced from the following statistics: 54 % of judges considered this convention as an internal applicable law, in conformity with UNMIK Regulation 1999/24; 30 % treated it as an ‘international law’, whereas only 6 % were undecided.⁷³

M. Guarantees for compliance with the ECHR, during arrest, and in the investigative procedure – securing access to defence lawyer and non-use of torture.

Since the Kosovar judiciary over the two years since the establishment of UNMIK has moved towards international standards and conformity with the principles of international law, it can be said that this process of the transformation – from an ideological into an independent judiciary – a key place has been reserved for the provisions of human rights and freedoms. As mentioned above, international conventions protecting human rights and freedoms have become the applicable law of post-war Kosovo/a. Because the former criminal legislation applied in Kosovo/a – whether it be material-criminal or procedural-criminal – contains to a certain extent the provisions that were in violation of the ECHR, the former SRSG, Bernard Kouchner, established the Joint Advisory Council for Legislation (JACL) on 15 August 1999. One of its priorities was the drafting of the new criminal law and criminal procedure in Kosovo/a.⁷⁴ The new criminal legislation of Kosovo/a, which is expected to be approved soon, contains all the ECHR provisions dealing with the rights and treatment of the arrested persons, including the investigative procedure, provision of a defence lawyer from the moment of arrest and the non-use of torture

⁷¹ See also: Blerim Reka: “Half a century of the ECHR: How to apply it in Kosova”, op. cit.

⁷² Judges, prosecutors and lawyers of Kosovo/a from all municipalities of Kosovo/a, participants of this conference of the institute of KIEAI, also took part in the research of this institute related to what the European Convention on Human Rights represents for Kosovo/a.

⁷³ See more related to the ECHR report and Kosovo/ar judiciary in *Kosova Law Review*, Vol.VI.No.1, Spring 2001.

⁷⁴ Since this process of drafting new criminal legislation of Kosovo/a was coordinated with the Council of Europe, two new drafts contained all requirements of ECHR dealing with the conduct of the judiciary in judicial procedures.

against the defendant.⁷⁵ Therefore, we consider that in the field of legislation, there certainly are guarantees that human rights and freedoms in judicial procedures in Kosovo/a will be obeyed. It remains to be seen to what extent the Kosovo/ar judges will abide by these legal guarantees.

N. Compliance with the ECHR post-trial, during imprisonment and the conduct of the prisoner

Since the drafting of the new law for executing criminal sanctions in Kosovo/a has not yet been finished, this field is currently still being regulated on the basis of applicable laws. However, as for the respect for human rights and freedoms after the conclusion of the criminal procedure, and respectively during the sentence, here also provisions of the ECHR should take precedence over applicable laws, respectively to abrogate provisions of old applicable laws if they contain articles in conflict with this convention and other international standards of the protection of human rights. Particularly, we have to take into consideration the compliance of accepted international standards of humane behaviour by wardens and other prison officers towards the prisoners, so as to end abuse, and the exercise of torture on prisoners, etc.⁷⁶

⁷⁵ Articles: 3, 5 and 7 of ECHR and its Protocol nr.4; see also: Prof. Dr. Ismet Salihu: "Compatibility and Incompatibility of the draft of the Criminal Law of Kosova in relation to the European Convention for Human Rights", *Kosova Law Review*, Vol. VI, nr. 1, Spring 2001, pages: 19-24 and 25-34.

⁷⁶ See Article 3 of the European Convention of Human Rights: judicial cases: "Denmark, France, Norway, Sweden and Benelux countries against Greece, (1969); Ireland against Great Britain, (1978); Tomass against France (1992); Aksoy against Turkey, (1996); Ribitch against Austria, (1995), etc.

V. Recommendations for a better Administration of the Judiciary in Kosovo/a

After analyzing the situation in Kosovo/a of the administration of the Judiciary, the following recommendations for a plan of action would be:

1. Completion of the constitutional and legal infrastructure.
2. Execution of a unified judicial system for the whole territory of Kosovo/a and eliminating judicial parallelism.
3. Independence of the judiciary and non-interference of the Executive in the Judiciary.
4. Incentives and adequate treatment of judicial functionaries.
5. Continuous training of judges in conformity with international documents for human rights.
6. Coordination of the Judiciary with UNMIK Police, KPS and KFOR.
7. A division, not only a level division, of the judicial system vertically but perhaps even on the basis of fields: criminal, civil, administrative, and economic.
8. A greater autonomy in the internal administration of Kosovar courts and prosecutions.
9. Provision of adequate working premises, technical and electronic facilities for the work of the Judiciary and complementing this with professional judicial expertise.
10. A more efficient administration of and a greater security in prisons.
11. A special programme for of the electronic administration of the Judiciary in Kosovo/a.
12. A closer cooperation of the Judiciary and the ombudsman.
13. A special programme for the protection of witnesses.

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