



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

**Independence of the Judiciary in Kosovo:  
Institutional and Functional Dimensions**

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

CoE	Council of Europe
DoJ	UNMIK Department of Justice
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
HRAP	Human Rights Advisory Panel
ICO	International Civilian Office
ICR	International Civilian Representative
ICCPR	International Covenant on Civil and Political Rights
IJPC	Independent Judicial and Prosecutorial Commission
KFOR	NATO-led Kosovo Force
KJC	Kosovo Judicial Council
KJI	Kosovo Judicial Institute
LSMS	Legal Systems Monitoring Section
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Co-operation in Europe Mission in Kosovo
SRSG	UN Special Representative of the Secretary-General
UDHR	Universal Declaration of Human Rights
UNMIK	United Nations Interim Administration Mission in Kosovo
USAID	United States Agency for International Development

## **EXECUTIVE SUMMARY**

Despite improvements following the initiation of substantial judicial reform in Kosovo, problems regarding judicial independence continue to impact negatively upon the rule of law and access to justice in Kosovo. Substantial developments in recent years have included the reconfiguration of the United Nations Mission in Kosovo (UNMIK) in 2008 and subsequent deployment of the European Union Rule of Law Mission in Kosovo (EULEX) as the primary international actor in the justice sector and the promulgation by the Assembly of Kosovo of a host of legislation directly affecting judicial functions. In addition, the entire judiciary has been re-appointed after a thorough, internationally-led vetting process. While these reforms are unquestionably moving the judiciary in the right direction, judicial independence remains challenged on multiple fronts.

Positive developments have included significant steps toward securing the material well-being of judicial professionals as well as increasing the security of their tenure under the new Law on the Courts. In terms of the judicial (re)appointment procedure, the 2010 institution-wide vetting process can also be viewed positively overall, although the rejection of some vetted candidates by the Kosovo Judicial Council (KJC) and the Office of the President of Kosovo for unknown reasons had deleterious effects on the process, in particular the public perception thereof. Public perceptions of independence of the judiciary have also suffered partly as a result of cultural factors, including too-easy access by the public to judicial actors, and partly as a result of lax security and a lack of rigour in adhering to ethical precepts.

Another concern is that the overall composition of the KJC falls short of international standards even after recent reforms, particularly because judges themselves elect an insufficient percentage of its membership. A constitutionally-mandated three-year probationary period for new judges places them on unequal footing with previously-appointed colleagues and raises questions as to the standards and criteria upon which their contracts will be renewed.

The judiciary continues to struggle with high-profile cases, particularly those involving organized crime, war-crimes and/or persons of influence. Although EULEX is assisting in this regard, their mandate is finite. The local judiciary will need to adopt the resolve to assert their independence and properly adjudicate such cases, as well as to earn the respect that is due to the institution in the face of improper influence. Likewise, the KJC should vociferously respond to attacks against individuals and the institution, and seek similar reactions from the legislature and the executive.

Despite these challenges, the outlook for judicial independence is positive. Structural reforms together with the vetting process have provided the judiciary with an opportunity to re-assert its independence both at the individual and institutional level.

## I. INTRODUCTION

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Article 10, Universal Declaration of Human Rights (UDHR)

This report addresses the topic of judicial independence in Kosovo, an issue which continues to impact upon the rule of law, access to justice and the equitable enjoyment of human rights. The report sets out to assess the current situation of the Kosovo judicial system in the light of significant developments which have taken place in recent years, as well as to identify outstanding problems which remain to be addressed, and make recommendations to that end.

Article Ten of the UDHR<sup>1</sup> sets forth a well-known human rights principle, one so pervasive that not only the UDHR, but every regional human rights instrument and most constitutions around the world have codified it.<sup>2</sup> The right to a fair trial by an independent and impartial tribunal is a cornerstone to governance systems based upon the rule of law.<sup>3</sup> The basis of judicial independence is straightforward; it requires that the courts decide matters impartially, without restrictions, improper influence, inducements, pressures, threats or interference. Independence of the judiciary is an especially important human rights principle where individuals are pitted against the state and its authority. Where it is in place, the public generally has confidence in the ability of the justice system to perform an arbiter’s role in that society’s conflicts. The positive effects of an independent judiciary are numerous. For example it bolsters security both in business and personal relationships by providing parties in conflict with predictable and fair outcomes. It therefore fosters, *inter alia*, stability, peaceful resolution of conflicts, and economic development.

### A) Context

As in most societies in transition and those grappling with the after-effects of conflict, the judiciary in Kosovo has been under tremendous pressure. It faces a host of complex and serious challenges including enormous backlogs, entrenched organized crime, complex property disputes, a legacy of strong executive influence, inter-ethnic crimes, allegations of corruption, a divisive war crimes caseload, and poor infrastructure, to name only the most prominent.<sup>4</sup> Efforts to address these challenges by various actors, both domestic and

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<sup>1</sup> See Article 10, Universal Declaration of Human Rights (UDHR), UN General Assembly Resolution 217A (III), 10 December 1948.

<sup>2</sup> See Article 6, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS 5, opened for signature 4 November 1950, entered into force 3 September 1953; See also Articles 8–10, American Convention on Human Rights (1969), and Article 7, African Charter on Human and Peoples’ Rights (1981). For constitutions see Gerhard Robbers, *Encyclopaedia of World Constitutions* (New York, Facts on File Publishers, InfoBase Publishing, 2007).

<sup>3</sup> Independence is fundamental both to rule of law and the right to a fair trial because it fills a gap between a number of judiciary-related human rights principles and their implementation. See Preamble, Basic Principles on the Independence of the Judiciary (Basic Principles), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Later adopted by the United Nations General Assembly, UNGA Resolutions 40/32 and 40/146 (1985). Available online at: <http://www2.ohchr.org/english/law/indjudiciary.htm> (accessed 22 August 2011).

<sup>4</sup> The OSCE has issued several reports on these and other problems faced by the Kosovo judiciary. See <http://www.osce.org/kosovo/documents> for a collection of such reports (accessed 22 August 2011). The European Commission has also noted a number of these challenges, for example recently observing, “[a]long

international, have put the judiciary in an almost constant state of reform. While few observers would disagree that these measures are moving the justice system in a positive direction, the process of transitioning for over a decade still has not garnered the confidence of the public.<sup>5</sup> With respect to the independence necessary to meet European and other international human rights standards, outstanding issues remain.

Nonetheless, apart from the northern municipalities<sup>6</sup>, the Kosovo judiciary today is generally functional and operates within an acceptable institutional framework. It has received a range of assistance from the EU, in particular judges and prosecutors who are situated to take on the most sensitive and divisive cases. However, despite having at its disposal most of the tools that accompany modern European judiciaries, it has struggled to fill many key judicial positions, and still lacks a witness protection and support regime. The judiciary is currently consolidating the reforms brought about by new legislation and dealing with the after-effects of the vetting process. Two of the most recently-anticipated laws from a judicial independence perspective were the Law on Courts<sup>7</sup> and the Law on the Kosovo Judicial Council<sup>8</sup>, adopted in 2010, both of which figure prominently in the analysis carried out in this report. In respect of these issues, outstanding aspects also remain to be addressed as the reform process continues.

In February 2002, the OSCE published its first *Review of the Criminal Justice System*, a report delving into three broad themes of which one was independence of the judiciary.<sup>9</sup> The report examined concerns with the appointment process of judges and prosecutors, the case allocation system, the disciplinary process, immunity issues with UNMIK and KFOR, and various types of executive or legislative interference in the judiciary.

Since the publication of that report, four substantial events have occurred that prompted the OSCE to revisit the topic of judicial independence:

1. The handover of executive functions to local institutions;
2. The transfer of responsibilities in the justice arena from UNMIK to EULEX;<sup>10</sup>
3. The processes that lead to (re)appointment of all judges and prosecutors;
4. The initiation of a large number of legislative and judicial reforms.<sup>11</sup>

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challenges such as corruption and nepotism, the continued political interference at different levels and in different forms in a number of cases, including in the work of the Kosovo Judicial Council, is of serious concern.” The European Commission Progress Report on Kosovo, SEC(2010)1329, 9 November 2010, p. 11.

<sup>5</sup> See United Nations Development Programme (UNDP), *Early Warning Report, Kosovo*, for 2007, 2008 and 2009. However, the 2010 Report notes that while the judiciary remains the institution that people in Kosovo are “least satisfied” with, the polling figures indicate an increase in satisfaction over previous years. See UNDP 2010 *Early Warning Report, Kosovo*, for 2010 #28, p. 12, [http://www.ks.undp.org/repository/docs/EWR\\_eng\\_web-opt.pdf](http://www.ks.undp.org/repository/docs/EWR_eng_web-opt.pdf) (accessed 22 August 2011). See also a report by Freedom House on the category of Judicial Framework and Independence. Kosovo’s judiciary receives a 5.75 rating on a 1–7 scale (7 being the lowest) <http://www.freedomhouse.eu/images/Reports/NIT-2010-Kosovo-final-final.pdf> (accessed 22 August 2011).

<sup>6</sup> See OSCE Report *The Mitrovicë/Mitrovica Justice System: Status Update and Continuing Human Rights Concerns* (January 2011) LSMS Monthly Report, Issue 1. <http://www.osce.org/kosovo/75526> (accessed 22 August 2011).

<sup>7</sup> Law No. 03/L-199 on Courts, 22 July 2010.

<sup>8</sup> Law No. 03/L-223 on the Kosovo Judicial Council, 30 September 2010.

<sup>9</sup> OSCE Report *Review of the Criminal Justice System: September 2001-February 2002* (February 2002). <http://www.osce.org/kosovo/13043> (accessed 22 August 2011).

<sup>10</sup> See United Nations Secretary General (UNSG) report S/2008/354, paragraphs 14–16, and EC Joint Action 2008/124/CFSP..

In specific ways that will be discussed below, the impact of these events on the judiciary in Kosovo, and on the judiciary's independence in particular, has been strongly felt. This follow-up report assesses that impact through an examination of circumstances, including specific cases, that have taken place in Kosovo in the two years preceding the report's publication.

## **B) Scope of the Report**

Following a brief overview of the international standards and legal framework pertaining to the Kosovo judicial system, the report focuses on the current situation confronting the justice system and judiciary.

This report addresses the question of judicial independence on two primary fronts, institutional and functional. Institutional aspects of independence include appointment and removal from office, disciplinary accountability, the legislative framework governing matters of independence, and rules of case assignment. Functional independence refers to the individual judicial actors (judges, including lay-judges, prosecutors and related legal professionals) and whether there is sufficient respect for the principle of separation of powers to insulate actors from improper interference in decision-making. This is a particularly important point in Kosovo as its judiciary bears the legacy of the former-Yugoslav judicial system, particularly in never having developed a tradition of judicial independence vis-à-vis the executive branch. Functional independence also takes into account the social context in which judges operate. Justice in Kosovo is also influenced by a culture of close-knit and inter-related families.

Equally important to these two components are factors that are internal to the judicial actor in question – his or her personal integrity. This report addresses the issue of independence as it applies to individual legal actors in Kosovo. The question arises whether the individual judge or prosecutor believes in their own independence, and, if so, whether they are willing to assert that independence in the face of external influence.<sup>12</sup> A respected jurist recently commented that “[e]ven an ideal legal framework cannot guarantee independent decisions, if judges themselves are not fully willing to render their judgments on the basis of the law only, but tend to act in ‘anticipatory obedience’ to external influences.”<sup>13</sup> In a similar vein, judicial actors must possess a level of intellectual independence. This is independence born of the

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<sup>11</sup> Among the most relevant: Law on Courts, note 7, *supra* (also affecting salaries); Law No. 03/L-225 on the State Prosecutor, 30 September 2010; Law No. 03/L-224 on the State Prosecutorial Council, 30 September 2010; Law on the Kosovo Judicial Council, note 8, *supra*; Law No. 03/L-202 on Administrative Conflicts, 16 September 2010; Law No.03/L-191 on Execution of Penal Sanctions, 22 July 2010; Code No. 03/L-193 on Juvenile Justice, 8 July 2010; Law No. 03/L-117 on the Bar, 12 February 2009; Law No. 03/L-121 on the constitutional court, 16 December 2008; Law No. 03/L-123 on the Temporary Composition of the Kosovo Judicial Council, 16 December 2008 (to aid with the re-appointment/vetting process); Law No. 03/ L-007 on Non-Contentious Procedures, 20 November 2008; Law No. 03/L-002 Supplementing and Amending the Criminal Code of Kosovo, 6 November 2008; Law No. 03/L-003 Supplementing and Amending the Criminal Procedure Code of Kosovo, 6 November 2008; Law No. 03/L-10 on Notaries, 17 October 2008; Law No. 03/L-006 on Contested Procedures (Civil Procedure Code), 30 June 2008; Law No. 03/L-008 on Executive Procedure, 2 June 2008; Law No. 03/L-052 on the Special Prosecution Office, 13 March 2008; and the Law on Jurisdiction cited above.

<sup>12</sup> For one example of the recognition of this aspect of independence see Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa 2004), commentary to Principles 2, p. 8.

<sup>13</sup> Agim Miftari, Former Supreme Court Judge in Skopje. Cited in “Foreword”, OSCE Report *Legal Analysis: Independence of the Judiciary* (December 2009), Spillover Monitor Mission to Skopje.

confidence in one's own knowledge – of the substantive and procedural law, and also of the applicable ethical and moral strictures. To be independent, judicial actors must have, quite apart from and in addition to structural and legal frameworks, a combination of personal integrity, intellect, and a perception of themselves as independent and impartial.

The report concludes by presenting main findings, and concrete and specific recommendations for consideration.

### **C) Methodology**

As part of its ongoing monitoring activities, the OSCE examines a range of circumstances that impact upon the judiciary. The information forming the basis of this report was gathered primarily by the OSCE's legal system monitors, observing cases and the Kosovo judicial system from within courtrooms across Kosovo. The OSCE's field-based monitors provide it with a unique perspective on justice matters. Legal system monitors attend hearings and meet legal actors; they assess the justice system in operation, in real time, and on an individual case-by-case basis; and they report extensively about both the positive and negative phenomena they observe.

In its assessment of the developments in and the independence of Kosovo's judiciary, this report relied upon the observations of the OSCE's legal system monitors, collected during their regular activities throughout 2010. In addition, in November and December 2010 over 30 targeted interviews were conducted with a broad cross-section of judicial actors. Among the interviewees were both national and international judges and prosecutors, as well as representatives from various institutions including the Kosovo Chamber of Advocates, the Ombudsperson Institution in Kosovo, the Kosovo Anti-Corruption Agency, the Independent Judicial and Prosecutorial Commission, the Kosovo Judicial Council and the Ministry of Justice, amongst others. Interviewees were questioned regarding their perspectives on the various themes analysed in the report.

The legal analysis delivered below was conducted using a human rights-based approach, assessing court practice in terms of its compliance with international human rights standards, followed by – where relevant – an assessment of the domestic legal framework intended to give effect to those standards. The report assesses the extent to which the law and the practice meet or exceed those standards, employing examples from cases monitored by the OSCE.

## **II. GOVERNING PRINCIPLES AND LEGAL FRAMEWORK**

### **A) International Sources**

“In the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>14</sup>

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<sup>14</sup> See Article 14(1), International Covenant on Civil and Political Rights (ICCPR), emphasis added; Article 14(1), UN General Assembly Resolution 2200A (XXI), 16 December 1966.



To assist the implementation of the principle of an independent judiciary, international human rights bodies offer guidance. For example, the United Nations Basic Principles on the Independence of the Judiciary<sup>15</sup> (Basic Principles) is a collection of 20 succinct precepts designed to guide the efforts of those seeking to secure and promote judicial independence in domestic systems. The document contains standards relating to the relationship of the judiciary to other authorities; the selection, appointment and training of judicial officials; the conditions of their service and tenure; their immunity; and their suspension and removal from office. The Basic Principles speak to numerous areas relevant to the judiciary in Kosovo and will be examined in more detail in the discussion that follows. As important in the arena of international standards are the Bangalore Principles of Judicial Conduct (Bangalore Principles).<sup>16</sup> While primarily concerned with ethical matters, the Bangalore Principles are divided into six overarching concepts, the very first of which is independence.

Regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) contain provisions nearly identical to that of the International Convention on Civil and Political Rights (ICCPR).<sup>17</sup> In examining the judicial independence principle, Article 6(1) of the ECHR and the European Court of Human Rights (ECtHR) in its judgments stress that an independent court requires that each judge must be free from outside instructions.<sup>18</sup> Importantly, whether such external influences “appear to have taken place” is as important as whether they have taken place in fact.<sup>19</sup> The European Commission of Human Rights (Commission)<sup>20</sup> also identified the “appearance of independence” among the key aspects of an independent judiciary, together with the selection process, the term of office, and institutional guarantees against outside pressures.<sup>21</sup>

The Council of Europe (CoE) has also been active in this sphere, adopting three seminal texts which apply directly to judicial independence in Europe. The *European Charter on the Statute of Judges (European Charter)* sets out guidelines in crafting statutes governing the judiciary and in particular safeguarding its independence. For example, the Charter declares in its first provision,

“The statute for judges [must] aim at ensuring the competence,

<sup>15</sup> Basic Principles, note 3, *supra*.

<sup>16</sup> The Bangalore Principles of Judicial Conduct (Bangalore Principles), adopted by the UN Economic and Social Council (ECOSOC) as an annex to UN Resolution 2006/23 on Strengthening Basic Principles of Judicial Conduct. According to the Resolution, the Bangalore Principles “represent a further development and are complementary to the Basic Principles on the Independence of the Judiciary.” Ibid, para. 2.

<sup>17</sup> See Article 6(1), ECHR. See Also CoE Recommendation No. R. (94) 12 of the Committee of Ministers to member states on the independence, efficiency and the role of judges, adopted 13 October 1994. It observes that rule of law in democratic States hinges upon the independence, efficiency and role of judges and that there is a desire “to promote the independence of judges” in order to accomplish this aim. <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534553&SecMode=1&DocId=514386&Usage=2> (accessed 22 August 2011).

<sup>18</sup> *Campbell and Fell v. the United Kingdom*, ECtHR judgment, No. 7819/77; 7878/77, 28 June 1984, para. 77 - 82; and, *Sovtransavto Holding v. Ukraine*, ECtHR judgment, No. 48553/99, 25 July 2002, para. 80.

<sup>19</sup> *Findlay v. United Kingdom*, ECtHR judgment of 25 February 1997, para. 73. “[J]udges must not only meet objective criteria of impartiality but must also be seen to be impartial.”

<sup>20</sup> The Commission was operational until 1 November 1998, when Protocol No. 11 to the ECHR entered into force. Protocol 11 abolished the Commission, gave individuals direct access to the ECtHR, established the mandatory jurisdiction of the Court, and abolished the judicial functions of the Committee of Ministers.

<sup>21</sup> See Application No. 19589/92, *B Company v. the Netherlands*, para. 60. Report of the European Commission of Human Rights, 19 May 1994. “[I]t is irrelevant whether influence from outside sources or any actual bias has occurred; what is relevant in examining the independence and impartiality of a tribunal is that appearances must be taken into account.”

independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality.” [Emphasis added.]<sup>22</sup>

Since 2008, the Office for Democratic Institutions and Human Rights of the OSCE, together with the Max Planck Institute for Comparative Public Law and International Law, led a research project on judicial independence that resulted in the *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*.<sup>23</sup> The document was adopted by a group of experts in July 2010.

More recently, the European Commission for Democracy through Law (Venice Commission) published a substantial text summarizing European Standards on independence of the judiciary in effect at the time (Venice Commission Report).<sup>24</sup> The report was commissioned in part to advise the CoE’s Committee of Ministers to update what is probably the most authoritative text on judicial independence in Europe: Recommendation (94)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities and Explanatory Memorandum of the European Charter.<sup>25</sup> The update was published only in November 2010 and has significantly updated the CoE’s judicial independence standards.<sup>26</sup> While reinforcing the independence prerogative, the new text makes a distinction between “external”<sup>27</sup> and “internal”<sup>28</sup> independence. Their recent promulgation combined with their specific application in Europe makes these standards uniquely apropos to any study of the Kosovo judiciary.

## **B) Domestic Sources**

The key legal documents in Kosovo secure the independence of the judiciary in its own right – in multiple places. Relevant legal provisions mirror the above-cited UDHR and ICCPR provisions on judicial independence.<sup>29</sup> In Article 102(2) of the constitution, the language is unequivocal: “The judicial power is unique, independent, fair, apolitical and impartial [...]”

<sup>22</sup> European Charter on the Statute of Judges (European Charter), Council of Europe, 1998. <http://www.judicialcouncil.gov.az/Law/echarte.pdf> (accessed 19 August 2011).

<sup>23</sup> OSCE / ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*. <http://www.osce.org/odihr/73487> (accessed 19 August 2011).

<sup>24</sup> Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, 16 March 2010. [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)004-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.pdf) (accessed 19 August 2011).

<sup>25</sup> Explanatory Memorandum of the European Charter of the Statute of Judges, Strasbourg 8 – 10 July 1998.

<sup>26</sup> See CoE Recommendation (2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities, adopted 17 November 2010. [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383) (accessed 19 August 2011). For the previous version see CoE Recommendation No. R. (94) 12.

<sup>27</sup> CoE Recommendation (2010)12, para. 11 reads “The external independence of judges is not a prerogative or privilege granted in judges’ own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice.”

<sup>28</sup> CoE Recommendation (2010)12, *ibid*, para. 22. “In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence.”

<sup>29</sup> See Article 31(2) of the constitution and corresponding chapter 9, section 4, Articles 9.4.3 and 9.4.6 of the Constitutional Framework for Provisional Self-Government in Kosovo.

With respect to the source of judicial decision making, Article 102(3) requires that courts “adjudicate based [solely] on the Constitution and the law.” Finally, lest doubt remain as to whether judicial actors can entertain outside influence, Article 102(4) states clearly that “[j]udges shall be independent and impartial in exercising their functions.” To accept the role of judge under the governing legal framework in Kosovo is thus to deny the influence of anything but the law, and law-based argumentation, in rendering decisions.

The constitution contains clear recognition of judicial independence in Kosovo’s legal system. Domestic law, however, contains provisions which reaffirm this principle in a more detailed manner. The Law on Courts affirms, in two separate provisions, judicial independence. Article 3 governs the independence and impartiality of the courts by requiring that, “during the exercising of their function and taking decisions [judges] shall be independent, impartial, uninfluenced in any way by natural or legal person, including public bodies.” Article 34 sets out the duties of judges and is even more straightforward: “Judges shall act objectively, impartially and independently.”<sup>30</sup>

The Kosovo Judicial Council, as the governing body of the judiciary, has a legal mandate to “ensure the independence and impartiality of the judicial system.”<sup>31</sup> It exercises this role, *inter alia*, by conducting the selection/appointment process, developing and overseeing the annual court budget, and carrying out the inspection, sanction and disciplinary measures. Disciplinary sanction centers on violations of the Code of Ethics and Professional Standards.<sup>32</sup> That text is equally categorical in its requirement of independence in judicial functions:

A judge has in particular the following responsibilities:

“a) to act impartially and independently in all cases and free from any outside influence, and perform judicial duties based on the facts and the law applicable in each case, without any restriction, improper influence, inducements, pressures, threats of interferences, direct or indirect, from any quarter.”<sup>33</sup>

The Code of Criminal Procedure<sup>34</sup> also contains a reference to judicial independence.<sup>35</sup> From a legal perspective, there can be little doubt that both the domestic and international regulatory frameworks applicable to the judiciary in Kosovo demand independence from the judicial actors. With these principles firmly settled in the law, the report examines

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<sup>30</sup> See Article 34(1), Law on Courts, note 7, *supra*. Note that, with the exception of Articles 29, 35, 36, 38, and 40, this law does not come into effect until 1 January 2013.

<sup>31</sup> See Article 108 of the constitution.

<sup>32</sup> Code of Ethics and Professional Conduct for Judges, adopted 31 July 2001.

<sup>33</sup> See Article 3(a), Code of Ethics. Note that, although the EULEX judges are not bound by this text, they have a professional regulatory framework to which they must abide. That text has not been made publicly available. However, in an interview with a EULEX judge in January 2011 in Prishtinë/Priština, this author was told that a disciplinary mechanism is in place whereby judge’s misdeeds are adjudicated in front of a three-judge panel of other EULEX judges, elected by their peers.

<sup>34</sup> Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments. On 22 December 2008, Kosovo Assembly adopted Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, which left the code substantially the same as the 2003 law, though a section on guilty plea agreements was added, an article on the length of police-ordered detention was amended, and the name of the code was changed to Kosovo Code of Criminal Procedure.

<sup>35</sup> See Articles 2 and 8 of the Criminal Procedure Code of Kosovo refer to, “a competent, independent and impartial court”.

implementation of the standards of independence of the judiciary.<sup>36</sup>

### III. INSTITUTIONAL/ORGANIZATIONAL INDEPENDENCE

#### A) Appointment and Selection of Judicial Actors

No uniform mechanism is in place among Europe's judiciaries when it comes to selection of judicial actors. The manner of appointment varies across jurisdictions and states. While the Basic Principles provide only that the method of judicial selection "shall safeguard against judicial appointments for improper motives,"<sup>37</sup> the Venice Commission Report is rather direct:

"The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable."<sup>38</sup>

Relevant to appointment of judicial actors, the European Charter on the Statute of Judges "envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers [...]"<sup>39</sup>

Whereas local judges and prosecutors in Kosovo previously were appointed by UNMIK's executive institutions under fixed-term renewable contracts – a situation that led to significant criticism in 2001 and 2002<sup>40</sup> – the current system is a step in the right direction. Judges are now recruited and proposed by the KJC, with final appointment by Kosovo's President.

The appointment mechanism employed for international judicial actors has also improved with the arrival of EULEX.<sup>41</sup> At the outset, EULEX judges are not recruited, selected, disciplined, removed, or in any other way involved with or contractually bound to the

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<sup>36</sup> Some themes in the discussion that follow have more specific, applicable laws or guidelines. These are mentioned in the introduction to the theme.

<sup>37</sup> Principle 10, Basic Principles, note 3, *supra*.

<sup>38</sup> Venice Commission Report, para. 27. See also the Consultative Council of European Judges (CCJE) in its Opinion N°1 (2001) para. 37. "Every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria." See also CoE Recommendation (2010)12, para. 44, "Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

<sup>39</sup> Article 1.3 of the European Charter. This principle is echoed in the CoE Recommendation (2010)12, at para. 27.

<sup>40</sup> OSCE report *Review of the Criminal Justice System 1999-2005, Reforms and Residual Concerns*, (March 2006), p. 31. For several reports on this topic, see also the website of the Kosovo Ombudsperson Institution: [www.ombudspersonkosovo.org](http://www.ombudspersonkosovo.org) (accessed 23 August 2011).

<sup>41</sup> The OSCE expressed concerns that the status of judges and prosecutors as civil employees within UNMIK affected the independent nature of their functions. As described in a 2002 OSCE Report, "[...]the European Court has held that a nomination for judicial office solely by a government entity does not itself affect the independence of the courts; what is decisive is the absence of any control or supervision by the executive authority after the nomination. In this respect, the very short contractual period for international judges and prosecutors, and the fact that each extension of these contracts is solely dependent on UNMIK, creates an appearance of executive control over these officials." OSCE Report of 2002, p. 27 (emphasis added).

executive.<sup>42</sup> EULEX justice personnel are hired either by secondment or via contract. The former method means staff are recruited and paid by the government of their home countries, but EULEX ultimately selects them.<sup>43</sup> For contracted staff, EULEX accepts applications from interested candidates directly, and after selection, EULEX itself pays the incumbent's salary. Under either method, judges have one-year renewable contracts with the process of renewal initiated by the judge, and assuming the approval of the Assembly of EULEX Judges, the Head of the EULEX Mission renews the contract. Another important improvement over the UNMIK system is that, as with local judges and prosecutors, EULEX judges can now be dismissed or sanctioned for professional misconduct, such that underperforming or unethical judges can be removed. Importantly, the panel ruling on such cases will be comprised of judges elected by their EULEX peers.<sup>44</sup> In light of the political imperatives that the EULEX Mission is intended to satisfy by injecting external judges and prosecutors into a domestic system, such a selection mechanism can hardly be faulted.

## **B) Judicial Tenure**

The Basic Principles are clear with respect to term of office for judges, “judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office.”<sup>45</sup> European standards add other conditions wherein judges can only be removed “through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a [disciplinary] procedure...”<sup>46</sup>

For local judges and prosecutors, the Law on Courts provides the job security foreseen by international standards. For all judges and prosecutors who successfully completed the re-appointment process, (described below) contracts of employment are permanent until retirement,<sup>47</sup> a measure that should serve to bolster their position with respect to attempts at improper influence. For new judges, the situation is not quite as secure in that, although they will have successfully passed a rigorous entry exam and program of initial legal training at the Kosovo Judicial Institute (KJI), their appointment begins with a three-year probationary period.<sup>48</sup>

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<sup>42</sup> The ICO did appoint one judge, and one non-judge to serve as a member of the KJC according to the transitional provisions of the constitution, article 151(2). However, the KJC is not involved with selection of international judges. The Assembly of Judges, discussed further below, is an internal EULEX mechanism comprised solely of judges. That body appoints a panel that conducts interviews from candidates proposed by seconding countries after a “Call for Contributions.”

<sup>43</sup> EULEX issues a “Call for Contributions” to participating states, who then put forward candidates for judicial posts. The Call generally states the minimum experience and competency requirements for the post, and adds that the chosen candidate “will be part of the Assembly of EU judges, being fully independent in the exercise of judicial functions.” Job descriptions are posted on the EULEX webpage and are periodically available at: <http://www.eulex-kosovo.eu/en/jobs/international.php> (accessed 19 August 2011).

<sup>44</sup> Interview with EULEX judge, Prishtinë/Priština, January 2011. See also note 34, *supra*.

<sup>45</sup> Principle 12, Basic Principles, note 3, *supra*. European standards are equally clear, “judges should have guaranteed tenure until a mandatory retirement age, where such exists”, CoE Recommendation, (2010)12 para. 49.

<sup>46</sup> See Article 7.1, European Charter. The disciplinary procedure must involve a tribunal or authority composed of at least one half elected judges and must have a procedural framework that involves the full hearing of the parties, in which the judge proceeded against is entitled to representation.

<sup>47</sup> Article 27 (5), Law on Courts, note 7, *supra*. Of course subject to other bases for removal, such as disciplinary measures or incapacitating illness.

<sup>48</sup> Article 105, Kosovo Constitution. Interestingly, the new law on the Courts makes no such mention. Yet the three-year probation remains intact in light of Article 105.

Although the Basic Principles are silent as to probationary periods, these are not favoured in CoE standards, particularly those of the Venice Commission. “[T]he Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence.”<sup>49</sup> The difficulty with such probationary periods is that they presumably apply a lower threshold for dismissal than those facing permanent judges; otherwise, there would be little need for the probationary period. And refusing to renew a judge’s contract for reasons other than those set out in the law and the ethics code risks injecting a level of arbitrariness into the process which infringes judicial independence.<sup>50</sup>

### C) Re-appointment Process

Beginning in April 2009, each of the nearly 450 then-sitting judges and prosecutors had to re-apply for their jobs. The vetting process was open to all persons, not only sitting judges and prosecutors, who fulfilled the qualifications for office. Some 898 people overall entered the process. Those that did were subject to a battery of tests, some of which were of an eliminatory nature.<sup>51</sup> A substantial number – in fact, more than 50 percent of sitting judges and prosecutors – did not make it through.<sup>52</sup>

According to its foundational law, the Independent Judicial and Prosecutorial Commission (IJPC)<sup>53</sup> was established for “the purpose of conducting a one-time, comprehensive, Kosovo-wide review of the suitability of all applicants for permanent appointments [...] as judges and prosecutors in Kosovo.”<sup>54</sup> As a measure to bolster objectivity in the exercise, the law foresees that the IJPC be led by internationals. Indeed, it consisted only of international members during the critical initial phases,<sup>55</sup> and, as the exercise progressed, international members retained a voting majority even as local legal professionals (having been vetted) joined the body. In the course of its operations the IJPC recommended to the KJC the re-appointment of over 400 persons as judges and prosecutors. Ultimately 343 persons were appointed.<sup>56</sup> Overall, the process warrants a positive assessment, but it was not perfect, and its imperfections relate to judicial independence.

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<sup>49</sup> See Venice Commission, *Report on the Independence of the Judicial System*, note 24, *supra*, para. 38; CoE Recommendation (2010)12 also does not favour probationary periods, noting that “judges should have guaranteed tenure until a mandatory retirement age, where such exists”, para. 49.

<sup>50</sup> See Venice Commission, *Report on the Independence of the Judicial System*, note 24, *supra*, para. 33–38.

<sup>51</sup> UNMIK Administrative Direction 2008/2, Sec.2, para.11. Section 2.13 of Administrative Direction 2008/2 specifies that all candidates without exception were required to pass an examination on the relevant Codes of Ethics. See also *Report on the Work of the Independent Judicial and Prosecutorial Commission* (hereinafter, IJPC Report), 29 October 2010, p.3.

<sup>52</sup> There were 461 advertised positions when the process began, 340 of which were filled during the process. EC Progress Report 2010, p. 10: “The vetting process of judges and prosecutors has been successfully completed. In all three phases including the Supreme Court, District Courts, Municipal Courts, associated Prosecutors Offices, Commercial Courts and Special Chamber, the President has appointed over 340 candidates.” According to the Report on the work of the IJPC, “Sixty percent of the positions were filled by new occupants. This represents a major transformation of the judicial system in Kosovo. IJPC Report, p. 1.

<sup>53</sup> The temporary body set up by the SRSG as part of the KJC to conduct the exercise.

<sup>54</sup> IJPC Report, note 53, *supra*, p. 2. This language exists also in the constitution at art. 150 (1). “The comprehensive, Kosovo-wide review of the suitability of all applicants for permanent appointments, until the retirement age determined by law, as judges and public prosecutors in Kosovo shall continue [...]”

<sup>55</sup> For example, during the first phase, Supreme Court judges were vetted and recommended only by international members.

<sup>56</sup> Of the posts remaining vacant, it is important to note that 30–45 posts are being held open for non-Albanian candidates. IJPC Report, note 53, *supra*, p. 18–19.



### 1. The re-organization/repeat of the ethics exam

UNMIK's Administrative Directive 2008/2 on the organization of the re-appointment process specifies that "all candidates without exception shall be required to pass an examination on the relevant Codes of Ethics."<sup>57</sup> The IJPC administered the ethics exam to all applicants at the outset of the process.<sup>58</sup> Conducting the exam early on allowed the IJPC to move forward to the more onerous parts (background checks and interviews) with a smaller pool of candidates. The exam took place in the spring of 2009 with 860 persons sitting. With 671 candidates successful, the pass rate was 78 percent.<sup>59</sup>

For those judges and prosecutors that failed, their careers in the judiciary were apparently over.<sup>60</sup> Many from this group declared later that they were not aware of the exam's "eliminary effect," and began lobbying for a second chance exam.<sup>61</sup> Important decision-makers, including the Kosovo President at the time, apparently agreed.<sup>62</sup> With one month remaining in its mandate, the IJPC dutifully carried out an instruction from the KJC to conduct a second ethics exam.<sup>63</sup> Shortly thereafter, the IJPC concluded its work. On 4 February 2011, the KJC issued a Decision<sup>64</sup> by which it lowered the criteria for becoming a judge and/or prosecutor for the applicants who failed to pass the mandatory Ethics Exam. It has since begun recruiting for the vacant judicial/prosecutorial posts.

The repeat exam, perhaps unsurprisingly, resulted in a significantly lower pass rate of 41 percent.<sup>65</sup> Still, some candidates who failed the first test passed the second time around. Even more troubling was the lowering of the passing rate for the second chance ethics exam even after all final results were posted. As a result all candidates were given three chances to pass a 'one time' vetting ethics exam.<sup>66</sup> It must be noted that there is no legal mechanism for the appointment of this batch of candidates. The vetting/reappointment process ended when the

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<sup>57</sup> UNMIK Administrative Direction 2008/2, Sec 2, para. 11.

<sup>58</sup> IJPC Report, note 53, *supra*, p. 3.

<sup>59</sup> Interview with the IJPC official, October 2010.

<sup>60</sup> A failed candidate could attempt to re-start their career by seeking acceptance into the Kosovo Judicial Institute (KJI), and completing the 15-month initial judicial education regime. It appears that a significant number of the unsuccessful judges have instead chosen to enter private practice.

<sup>61</sup> Even if the eliminary effect was clearly known, many judicial actors interviewed in the research for this report believed that a one-off exam should not be a singularly determinative event in a judge's career. Instead, it was felt that a judge's personal ethics should be evaluated holistically, taking into account professional relationships, the quality of judgements, background checks, interviews, etc. Only then would an accurate picture of the judge emerge. According to one former prosecutor (former, because he failed the exam), "the outcome has shown that ethically dubious people who are good at taking tests have remained in, while ethically-sound people who are less skilled in exams have lost their place on the bench for good." Interview with former prosecutor, November 2010.

<sup>62</sup> In a speech to the media the then-president stated of the ethics exam, "Another exam should be held for those that did not pass the first time. Many accidentally failed and others that were appointed should not have passed." Speech given on the occasion of the opening of class ceremony at the KJI on 1 September 2010.

<sup>63</sup> KJI Report, "Organisation, Drafting and Assessment of the Preparatory/Entrance Exam for the Potential Candidates for Judges and Prosecutors" (July 2010), p. 1, <http://igjk.rks.gov.net/repository/docs/Report%20for%20Preparatory%20Exam%202010.pdf> (accessed 23 August 2011).

<sup>64</sup> KJC Decision no. 01/051-13 (8 February 2011) <http://www.kgik-ks.org/?cid=1.95.183> (accessed 19 August 2011).

<sup>65</sup> KJC Decision no. 01/051-13, *ibid*, p. 1. Of the 181 who sat, only 75 were successful. The candidates were required to be successful on 75 percent (ie., 38 correct answers out of 50 questions). In a decision dated 2 February 2011, the KJC decided to lower the threshold to 70 percent, (ie. 35 correct answers) apparently in an effort to increase the numbers that passed. A similar step was taken after the first exam.

<sup>66</sup> KJC Decision no. 01/051-13, note 66, *supra*.

IJPC closed its doors at the end of October 2010. Once that process ended, the law precludes appointment to judicial functions in any way other than via the KJI. Those that passed the second exam may have been re-considered, but their judicial careers remain in limbo. Recognizing the disparity with the law and the necessity to deal with this pool of partially vetted applicants, the KJC decided to create hybrid criteria to become a judge or prosecutor. The KJC, by way of internal regulation, decided that those with at least three years of experience as a judge or prosecutor and who had passed either the first or second ethics exam could, if appointed, bypass the KJI Initial Legal Education Programme (ILEP).<sup>67</sup> However, due in part to advocacy efforts by the KJI, the newly appointed judges and prosecutors will still have to pass the Exam and successfully complete the Initial Legal Education Program before taking up their posts. The KJI has committed to training as many judges and prosecutors as necessary to fill all remaining vacancies.<sup>68</sup> It is hoped that this will address the immediate need for more judges and prosecutors in Kosovo. As noted, the Kosovo Prosecutorial Council, on 8 March 2011, opened vacancies for prosecutors' posts at all levels. The vacancy announcement closed on 22 March 2011.

All other candidates for judge or prosecutor would be required to pass a preparatory/entry exam and complete the KJI Initial Legal Education Programme.

2. Rejection of candidates by the president undermines re-appointment process and impacts judicial independence

In the vetting process a significant number of candidates appear to have been rejected by the president. In each successive stage,<sup>69</sup> the IJPC sent to the KJC the names of a sufficient number of candidates to fill the advertised vacancies. The only exception to this concerned vacancies reserved for non-Albanian candidates; in these cases, either an insufficient number of candidates applied or an insufficient number fulfilled all the requirements.<sup>70</sup> It is not entirely clear how many of these IJPC-recommended candidates were rejected by the KJC itself (the council voted separately on each candidate) and how many the president himself turned away later. It is clear that in every phase, the cadre recommended by the IJPC was not that which was ultimately appointed.<sup>71</sup> For example, in phase II the IJPC put forward names for most of the 109 vacancies.<sup>72</sup> Only 89 of these were appointed by the President of Kosovo, a rejection rate of 18.5 per cent of candidates that were selected by an internationally led process. Court presidents appeared especially problematic. The President of Kosovo rejected the candidate for the commercial court in Prishtinë/Priština. The KJC rejected the proposed candidate for the presidency of the district court in Gjilan/Gnjilane.<sup>73</sup> The proposed candidate for the presidency of the district court of Mitrovicë/Mitrovica was also not appointed, but that was due in part to the fact that no candidate had been put forward by the IJPC initially.

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<sup>67</sup> The Initial Legal Education Program (ILEP) is a curriculum dedicated to the potential candidates for future judges and prosecutors. The potential candidates, after passing the Preparatory/Entry Exam, are required to undergo the ILEP Program which consists of an intensive 15 month training program with a number of training modules. Upon completion of this program, the candidates are professionally prepared and ready to the function of a judge or a prosecutor.

<sup>68</sup> Interview with Director of KJI, April 2011.

<sup>69</sup> The vetting was conducted in three phases, with re-advertisements undertaken in the first two phases.

<sup>70</sup> Also, a number of applicants withdrew after selection. IJPC Report, note 53, *supra*, p. 13.

<sup>71</sup> IJPC Report, note 53, *supra*, p. 10.

<sup>72</sup> Again, with the exception of posts reserved for non-Albanian candidates.

<sup>73</sup> IJPC Report, note 53, *supra*, p. 15.



In Phase III there were fewer names rejected. By then Kosovo President Sejdiu had stepped down and the Acting President, Mr. Krasniqi, was responsible for appointments. But even the Acting President rejected the KJC's nominations, one of which was for the presidency of the Prishtinë/Priština municipal court. The reasons for these rejections were not made public, nor were they given to the nominees themselves. The lack of transparency in this aspect of the process prompted, perhaps correctly, media coverage that damaged the public's perception of the re-appointment process from the perspective of judicial independence.<sup>74</sup>

None of the above should be construed as an attempt to undermine the vetting process led by the IJPC. By all accounts, the application system, ethics exam, judicial entrance exam, background checks and the interviews were conducted without reproach. Rather, it is the heavy hand of the executive branch in rejecting thoroughly-vetted candidates for no known reason that casts a pall on judicial independence.<sup>75</sup> Failure to provide information about the vetting process is contrary to international standards, which clearly demand "merit, and objective criteria" to be referenced in all decisions concerning appointment and the professional career of judges.<sup>76</sup> Indeed, a comment in the European Commission's (EC) 2010 Progress Report: "[P]olitical interference in the re-appointment process and proposals made by the Kosovo Judicial Council [are] an issue of serious concern."<sup>77</sup>

The broader impact of the re-appointment process on judicial independence is only just coming to the fore. Judicial leadership across the whole of Kosovo has changed and includes a newly-composed Supreme Court and KJC, as well as new court presidents in every court. It will undoubtedly take some time for the appointees to settle into their new roles, but despite the deficiencies there is optimism that the vetting process will mark a positive moment in the history of the Kosovo justice system.

#### **D) Composition of the KJC**

Under the European Charter the body that makes key decisions concerning appointment, selection, sanction, and removal of judges and prosecutors should consist of a majority of voting members who have been elected by their peers.<sup>78</sup> The composition of KJC members does not fulfil this criterion. According to the constitution, only five of the 13 KJC members are elected by their peers.<sup>79</sup> And although of the remaining eight members, four of them will be judges appointed by other bodies – the fact that they are not elected by their peers means the composition falls short of European standards. On the positive side, the membership of the KJC does not contain, and cannot contain, a member of the executive branch, as some judicial councils in the region do.<sup>80</sup> In its 2010 Progress Report, the EC was critical of the

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<sup>74</sup> Published on the koha.net website: *In the Presidency are pulled out from the list several judges and prosecutors*, 25 October 2010.

<sup>75</sup> Both UNMIK Administrative Direction 2008/2 and the constitution give the president the prerogative to appoint judges and prosecutors, upon the recommendation of the KJC. Thus, a role for the president is foreseen in the law. The point, however, is the high number of rejections coupled with a lack of transparency regarding the basis for this rejection.

<sup>76</sup> See Venice Commission, *Report on the Independence of the Judicial System*, note 24, *supra*, para. 27.

<sup>77</sup> 2010 EC Progress Report, p. 10.

<sup>78</sup> See Article 1.3 of the European Charter. See also CoE Recommendations, (2010)12 para. 27.

<sup>79</sup> Article 108, European Charter, *ibid.*, para. 6 (1)

<sup>80</sup> For example, in the former Yugoslav Republic of Macedonia, Article 6(1) of the Law on the Judicial Council places the Minister of Justice *ex officio* on its 15-members body. Art. 6(1). However, in line with the European Charter, pursuant to Article 6(2), a controlling eight members of the council "are elected by the judges from their ranks." Equally, in Albania, the composition of the High Council of Justice includes both the President of the Republic and the Minister of Justice. It too, however, has a majority, controlling vote of

work of the KJC in the area of judicial independence, albeit providing little detail.<sup>81</sup> The composition of the KJC would meet European standards if a majority of the members of the KJC were elected by their peers, which currently is not the case.

## **E) Salaries**

The judiciary must be granted sufficient funds in order to properly perform its functions. Without sufficient funding the judiciary not only cannot attract qualified professionals to the bench, but also may make judicial actors vulnerable to external pressures. Principle 11 of the Basic Principles provides that “[T]he term of office of judges, their independence, security, adequate remuneration, [...], shall be adequately secured by law”.<sup>82</sup>

Until the end of 2010, salaries of judges and prosecutors had not increased since 2002 and a district court judge was earning less than 18 Euro per day (550 Euro per month gross).<sup>83</sup> A significant disparity in compensation packages between judicial, executive and legislative branch was evident. Judicial salaries were lower than the salaries of senior legislative and executive branch officials.<sup>84</sup>

However, with the passage of the Law on Courts, the financial situation for legal professionals improved on 1 January 2011.<sup>85</sup> The Supreme Court president’s salary is now tied to that of the Prime Minister. Other judges of the Supreme Court receive 90 percent of that amount, or the equivalent amount of a Minister, i.e., a gross salary of 1,271 Euro per month. The entire salary scale has been increased at similar increments, decreasing roughly 10 percent per rank. In some cases, the new scheme represents a 60 percent increase over previous judicial salaries.<sup>86</sup> These changes represent a significant improvement in the payment of the judiciary in Kosovo. It places the judiciary, executive and legislative pillars on the same footing and ensures the equal separation of powers.

## **IV. FUNCTIONAL INDEPENDENCE**

The discussion now turns from examining structural and institutional infringements on the Kosovo judiciary, to focusing on aspects confronting individual judicial actors. The report looks at whether judges are being confronted by pressures of an illegal or improper nature – either directly or indirectly. The first such influence to be considered is that of intimidation.

### **A) Physical Violence, Threats, Intimidation**

A recurring theme in the discussion of judicial independence in Kosovo is that of security. According to the Basic Principles, the security of judges “shall be adequately secured by

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judges elected by their peers. See Article 3, Albanian Law on the High Council of Justice. The decisions of these bodies are final as to selection of judicial candidates.

<sup>81</sup> “The Council has been unable to ensure the independence and impartiality of the judicial system.” EC Progress Report, 2010, p 10.

<sup>82</sup> Principle 11, Basic Principles, note 3, *supra*.

<sup>83</sup> American Bar Association (ABA) Rule of Law Initiative, “Judicial Reform Index for Kosovo”, Vol. IV, October 2010, p. 54.

<sup>84</sup> American Bar Association (ABA) Rule of Law Initiative, “Judicial Reform Index for Kosovo”, Vol. 3, August 2007, p31.

<sup>85</sup> Article 29, Law on Courts, note 7, *supra*.

<sup>86</sup> See ABA “Judicial Reform Index for Kosovo”, October 2010, note 85, *supra*, p. 64.

law.”<sup>87</sup> The Committee of Ministers of the CoE takes this provision further, requiring that “all necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.”<sup>88</sup> Although the provision in question does not come into full force until 1 January 2013, the Law on Courts explicitly provides for protection to threatened judges:

“Judges have the right to request from the Kosovo Judicial Council special protective measures for themselves and their families, where a threat to their life, or to the life of a family member, derives from or is the result of exercising their judicial responsibilities.”<sup>89</sup>

These provisions notwithstanding, the OSCE has become aware of a disconcerting number of incidents where parties to litigation physically attacked judges and prosecutors. These incidents prompted the OSCE to issue a monthly report in April 2010 on security of judges and prosecutors.<sup>90</sup> The situation has not significantly improved.

In the realm of judicial independence, equally troubling are the credible threats levelled against judges and their family members. The OSCE’s 2010 report reviewing war crimes cases contained a section devoted specifically to threats against local judges sitting on those cases.<sup>91</sup> EULEX has reported similar situations where, “the judiciary does not appear to have sufficient protection from outside interference. Kosovo judges work in a difficult environment where threats are made and pressure exerted.”<sup>92</sup> The EC noted the same phenomenon in its recent Progress Report.<sup>93</sup> A former prosecutor interviewed for this report was familiar with security threats having served at the Special Prosecutor’s Office in Prishtinë/Priština. While investigating an organized crime case, an associate of the primary suspect followed the prosecutor home once and threatened him in order to intimidate him into dropping the investigation, prompting the police to assign a close protection detail for him and his family.<sup>94</sup> The prosecutor apparently received so many threats that he purportedly kept a tape recorder next to his phone.

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<sup>87</sup> Principle 11, Basic Principles, note 3, *supra*.

<sup>88</sup> Recommendation R (94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (adopted 13 October 1994), Principle III (“Proper working conditions”). Note that this text was “updated” by COE Recommendation (2010)12.

<sup>89</sup> Article 30, Law on Courts note 7, *supra*.

<sup>90</sup> OSCE report *Intimidation of the Judiciary: Security of Judges and Prosecutors*, April 2010. <http://www.osce.org/kosovo/67676> (accessed 19 August 2011).

<sup>91</sup> “Numerous concerns have been raised by members of the local judiciary regarding threats of violence to them and their families while serving on such panels. These can manifest in the form of direct as well as indirect pressure for the purpose of intimidation, such as from the public at large or other officials utilizing political pressure. Local judges do not have the same level of close protection as international judges. As such, some members of the local judiciary have confided that they are thankful not to serve on war crimes panels because of this threat. For another OSCE report *Kosovo’s War Crimes Trials: An Assessment Ten Years On, 1999–2009*, May 2010, p. 26. <http://www.osce.org/kosovo/68569> (accessed 19 August 2011). See also the OSCE Report *Review of the Criminal Justice System: Protection of Witnesses in the Criminal Justice System, March 2002–April 2003*, (April 2003) p. 12. <http://www.osce.org/kosovo/12555> (accessed 23 August 2011).

<sup>92</sup> EULEX Press Statement *Deliberations are confidential*, 6 October 2009.

<sup>93</sup> EC Progress Report 2010 “In several instances, judges and prosecutors have refused to deal with sensitive cases. There have been reports of threats and intimidation against them.”

<sup>94</sup> Interview with former prosecutor, November 2010.

There is no shortage of security-related anecdotes. At an OSCE-sponsored roundtable on intimidation of the judiciary held in May, 2010, nearly every judge present had his or her own story of threat or attack. Some were related in starkly emotional terms, providing a poignant illustration of the judges' recurrent struggle with security issues.

When asked the question directly, no judge or prosecutor interviewed expressed confidence in the ability of the existing security apparatus to protect them should a threat arise. That said, it was not so much the physical attacks in the courthouse they feared. It was outside and at home where they felt the most vulnerable.

### 1. Un-restricted access and ex parte communication

A troublesome dimension to the access and security problem is that a number of judges, particularly those hearing civil cases, hold hearings in their offices. In many instances the use of one's office is born of necessity, as courtrooms are unavailable. However, even when courtrooms are available, some judges choose to conduct proceedings in their offices. While it may be convenient to do so, holding court processes in such a location makes them more prone to interruption, limits public access to what should be public proceedings, and fosters a sense of informality.

Judges often have the same sense of hospitality and welcoming that is characteristic of the population at large. Many of those interviewed for this report explained that it is exceedingly difficult (on a cultural level) not to receive an acquaintance who comes calling in one's office. Yet this openness and accessibility leaves judges exposed to improper influence, as evidenced by a recent criminal fraud case monitored by the OSCE.

The defendant had been charged in four separate instances of criminal fraud for having presented herself as a representative of an international organization and eliciting funds from homeowners whose houses had been burned or needed reconstruction. OSCE monitors asked the judge whether the three other proceedings against the defendant, which are currently assigned to another judge, would be joined in consideration of judicial resources and efficiency. The presiding judge stated that he did not intend to join the proceedings. The judge shared with the court monitor that the defendant had visited the judge's office on several occasions, crying. The judge went on to explain that, if convicted in joined proceedings, the defendant would possibly face time in prison.

This anecdote raises further concern when viewed in light of the fact that this judge recently passed the reappointment Code of Ethics exam. The Code has a provision specifically requiring judges to avoid such contacts.<sup>95</sup>

Receiving parties into one's office appears not only to be a common practice, but in some instances even formalized. Several judges in Kosovo have "office hours" posted on their doors with the heading, "Pune Me Pale" which can be translated as "working with parties."

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<sup>95</sup> Article. 7, Code of Ethics and Professional Standards. "Except in cases provided by law, a judge shall avoid and discourage *ex-parte* communication. Upon occurrence of such communication the judge has to disclose promptly the relevant information to the other parties involved and, when possible, procure their attendance."

While it may be the case that these are executive judges<sup>96</sup>, or judges working on non-contentious cases, the door signs still leaves the impression that parties can, and in fact are encouraged to, visit their judge to discuss a case. This perception is detrimental to the appearance of judicial independence.

Ready access to judges and prosecutors has had even more far-reaching effects in Vushtrri/Vučitrn. There, the dislocated court of Mitrovicë/Mitrovica struggles to operate in the crowded conditions described above. The backlog of cases, combined with the frustrating lack of progress in individual cases, caused parties to seek alternative ways to move their cases forward. Some sought to speak directly with court presidents. Eventually, the judges retreated into a “panel” – a closed council, where reasoned arguments for case prioritization could be discussed amongst the judges themselves, free from outside influence.

Security arrangements in courthouses are improving, yet they can be easily subverted.<sup>97</sup> Another prosecutor described an instance where even after security measures were instituted at the courthouse – including cameras and metal detectors – family members of suspects would still find him in his office and would seek to discuss their cases with him. The family member would simply tell the court reception that they had a hearing that day in the minor offences court, for example, and once inside the building, would climb the stairs and find his office.

## 2. Improvements

The picture with respect to access and physical security of judicial actors is not entirely bleak. Three factors stand out as improvements that either are already, or should soon be, bearing fruit with respect to preventing further security incidents. First, USAID, the European Commission, and several other donors have assisted courthouses to enhance their security measures as a means of preventing violence and intimidation. Video cameras and metal detectors have been installed in all district courts and many municipal courts. Pilot courthouses are being refurbished to provide well-lit and properly organized reception areas where visitors are required to announce the purpose of their visit and pass through a security screening. These measures are not a panacea, nor are they implemented effectively in each premises<sup>98</sup>, but they are an improvement over the liberal access that was in place just a couple of years ago – and that still exists in some courts. With some additional deployment, accompanied by further training of guards, the existing gaps in courthouse security can be overcome.

Second, in every security incident reviewed by the OSCE, the alleged perpetrators were caught. A decisive and punitive response can act as a deterrent to others inclined to threaten or attack a judicial actor in the future. Also helpful as a deterrent would be decisive and clear public condemnation of such attacks – coupled with an affirmation of the independence of the judiciary – by members of the KJC and Kosovo’s political leadership.

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<sup>96</sup> Executive judges have the role of executing judgements rendered by other judges. For example, if a verdict provides that party A must pay party B a certain amount of money, the executive judge will ensure the transfer occurs, or will garnish wages, etc., until the debt is fulfilled.

<sup>97</sup> Security arrangements in most courts allow unfettered access to the entire building once past the security screening.

<sup>98</sup> ABA “Judicial Reform Index for Kosovo”, October 2010, note 85, *supra*, p. 58–59.

Third, and perhaps most compelling, is the advent of EULEX. The Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo provides for the transfer of cases to EULEX where “there have been threats to the Kosovo judge, to the witnesses or to the parties to the proceedings.”<sup>99</sup> The OSCE monitored one such transfer in 2009, where the suspects in an assassination attempt threatened the judges in open court.<sup>100</sup> The presiding judge’s request for transfer was granted, and a mixed panel of one local and two international judges eventually convicted all three suspects. EULEX continues to offer a viable outlet when a security-related challenge to the judiciary arises.

## **B) Politically Sensitive and High-Profile Cases**

Closely connected with the foregoing, but warranting a separate discussion in the ambit of judicial independence, are the politically sensitive and high-profile cases that come before both EULEX judges and the local judiciary. Such cases are difficult for any justice system, but particularly so for those emerging from conflict or of transition. When combined with Kosovo’s relatively small size, its close-knit communities and recent social upheavals, such cases pose enormous challenges to Kosovo courts. It is in these cases that the social pressure leading to the “anticipatory obedience” mentioned in the introduction is most heavily felt.

Seen in part from the inside, the 2009 EULEX report describes why certain cases were handed over to EULEX,

“The main reasons given [...] were the complexity of the case and unduly long criminal proceedings. In some instances the local judiciary was unwilling to try the case because of the defendant’s influential position in the Kosovo government. There was also a case in which defendants were former KLA members and there had been threats to the presiding judge. Some cases were ethnically sensitive and were taken over based on Article 3.4 of the Law on Jurisdiction.”<sup>101</sup>

The report went on to state that “The continued weakness of the local judiciary, in particular its incapability to deal properly with conflict related cases, [...] and the high probability of the involvement of organized crime in privatization matters, often accompanied by pressure exerted on local judges, calls for continued international involvement in this area of the administration of justice in Kosovo.”<sup>102</sup> A year later, EULEX’s assessment had not changed:

“[The Kosovo judiciary’s] readiness to participate or even take the lead in adjudicating cases of corruption or organised crime is often paralyzed by threats against themselves or their families. However, often enough the reluctance to participate in investigations and trials sometimes could also be interpreted as tacit disagreement with EULEX’s course of action in the field of justice.”<sup>103</sup>

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<sup>99</sup> Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, Article 3.5, March 2008. The threat must “reasonably lead to a belief that a serious miscarriage of justice would result if the case is not transferred.” The panels will usually be mixed with international and local judges.

<sup>100</sup> OSCE Report, *Intimidation of the Judiciary: Security of Judges and Prosecutors*, (April 2010) p. 4–5.

<sup>101</sup> Annual Report 2009 on the Judicial Activities of EULEX Judges, p. 30.

<sup>102</sup> Annual Report 2009, *ibid.*, p. 43.

<sup>103</sup> EULEX Programme Report 2010, p. 32.

OSCE has reported extensively on the difficulties facing the judiciary as it copes with the humanitarian law violations related to the conflict.<sup>104</sup> One such case is particularly revealing of the pressure judges come under when selected for such panels and why they attempt to avoid them.

Upon re-trial, an accused was convicted of war crimes in front of a mixed panel comprising one local and two EULEX judges.<sup>105</sup> The hearings were at times contentious, although the re-trial proceeded without significant incident. On the day following the reading of the verdict, the local judge made a statement to the press to the effect that he had been outvoted by the two EULEX judges, that the evidence against the accused was insufficient, and that the guilty verdict was, in his view, unlawful.

The judge was quickly suspended by the KJC Office of Disciplinary Counsel, for having breached the confidentiality of deliberations in his revelation of the panel's vote. EULEX also reacted publicly against the incident.<sup>106</sup> Not widely noted in the press was that the judge later went to his colleagues and reported that he had been threatened with death unless he renounced the verdict.<sup>107</sup> He produced a police complaint in support of his allegation and in fact the perpetrator was later caught and convicted of the crime.

As a defence to such pressures, some legal professionals appear willing to go to extraordinary lengths to avoid working on cases involving influential or high-profile personalities.

“Self-determination” activist’s case: The person in question was the well-known founder of the “Vetëvendosje” (Self-determination) movement. While being prosecuted for public order offences related to demonstrations he organized, this activist opted to boycott the proceedings, reject international involvement in his case and refuse legal representation. His case was eventually heard by a mixed, three-judge panel. The local member called in sick for an extended period and information conveyed to the OSCE indicated that the president of the court was unable to replace the judge because no other local judge was willing to take over the case. Moreover, no local lawyer would defend this activist *ex officio*. The

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<sup>104</sup> OSCE Report *Kosovo's War Crimes Trials*, note 93, *supra*, found, *inter alia*, that a failure to prioritize and a perception of bias hindered the proper adjudication of war crimes cases.

<sup>105</sup> The defendants were high-level political figures. One of the three, although convicted in the first instance, remains a member of the Assembly of Kosovo. If or when the conviction becomes final, he must give up his seat. According to article 70(3)(6) of the constitution, Article 70(3)(6), an Assembly of Kosovo member's mandate ends when “the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime.”

<sup>106</sup> In a press release, EULEX stated that the case raises major issues, one of which was that “the Kosovo judiciary does not appear to have sufficient protection from outside interference. Kosovo judges work in a difficult environment where threats are made and pressure exerted. EULEX calls on all institutions concerned – especially the Kosovo Judicial Council – to strengthen their commitment to ensuring that prosecutors and judges may work in an environment free from any kind of threats, pressure or promises.” EULEX Press Statement – *Deliberations are confidential*, 6 October 2009. EULEX apparently also was displeased with the Prime Minister's position on the case, see Lawrence Marzouk, “Leaked Memo Slams Kosovo PM's Interference in Judiciary,” *Balkan Insight*, 5 June 2010.

<http://www.contemporaryrelations.eu/1557/leaked-memo-slams-kosovo-pms-interference-in-judiciary>. (accessed 22 August 2011). The Prime Minister had commented during a government session that the defendants in this war crimes case were innocent.

<sup>107</sup> Interview with person familiar with the case, 11 January 2011 in Prishtinë/Priština.

court appointed several lawyers, but they all either failed to appear, or if they appeared, they later withdrew without satisfactory justification. Even the head of the Kosovo Chamber of Advocates withdrew from representation.

The cases initiated after the 2004 march riots are particularly illustrative of the social pressure facing the judiciary. As reported by OSCE monitors<sup>108</sup>, the justice system struggled on multiple levels to deliver rule-of-law outcomes in those cases. Delays were commonplace, several of which resulted in the statute of limitations lapsing.<sup>109</sup> Witnesses, including police officers, were uncooperative; yet local judges rarely ordered punitive measures.<sup>110</sup> Even upon reaching a conviction, sentences were lenient and some sentences even fell below the legal minimum.<sup>111</sup> Mitigating and aggravating factors were not applied properly.<sup>112</sup> Appeals were equally problematic, with delays extending over several years.

Another case involved allegations that former KLA members threw Molotov cocktails at a government building. Apparently due to the status of the defendants and the political nature of the case, prosecutors at the district court of Prishtinë/Priština were reluctant to deal with it.<sup>113</sup> An indictment was eventually filed by an EULEX prosecutor. More than a year later a confirmation hearing was scheduled; however due to unclear circumstances surrounding whether or not the defendants had in fact received the indictment, the hearing was indefinitely postponed.

Whether they succumbed to social pressure or to threats or intimidation, the patterns described are indicative of a judiciary that is unable to exert its independence when confronted with a high-profile case. The current practice is to surrender such sensitive trials to EULEX judges. In the interim, the judiciary must prepare itself. Despite the clear challenges posed by “political” cases, the Kosovo judicial cadre has to muster the wherewithal to treat all litigants equally and within the legal framework, irrespective of their status. It is precisely with unpopular or politically difficult cases that a judge must remain steadfast in asserting the role of the courts as neutral arbiter.

### **C) Interference from the Executive at the Functional level**

Freedom from interference in the performance of judicial proceedings represents a basic guarantee within the concept of functional judicial independence. The notion is premised upon a separation of powers between the executive, legislative and judicial branches of government. Article 6 of the ECHR is interpreted as prohibiting executive or legislative authorities from giving binding instructions to the courts in the exercise of their functions.<sup>114</sup> As to whether courts have jurisdiction to determine a matter, the Basic Principles are clear

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<sup>108</sup> OSCE Report, *Four years later: Follow up of March 2004 Riots Cases before the Kosovo Criminal Justice System*, (July 2008) <http://www.osce.org/kosovo/32700> (accessed on 23 August 2011).

<sup>109</sup> OSCE Report, *Follow up of march 2004 Riot Cases*, *ibid.*, p. 9–12.

<sup>110</sup> OSCE Report, *Follow up of march 2004 Riot Cases*, *ibid.*, p. 8. OSCE monitors recorded a case where EULEX judges ordered the prosecution to initiate perjury investigations.

<sup>111</sup> OSCE Report, *Follow up of march 2004 Riot Cases*, *ibid.*, p. 12–16.

<sup>112</sup> OSCE Report, *Follow up of march 2004 Riot Cases*, *ibid.*, p.15–16. The primary difficulty being a failure to consider an ethnic, religious or racial motive for many of the crimes. Mischaracterizing the crimes to achieve a lower punishment also appeared in monitored cases.

<sup>113</sup> In its 2010 *Programme Report*, EULEX refers to this phenomenon as “pre-emptive abstention”. See p. 9.

<sup>114</sup> *Beaumont v. France*, ECtHR judgment of 24 November 1994.



that the judiciary “shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”<sup>115</sup>

### *1. Interference in civil-property cases*

Since the OSCE last reviewed the issue of judicial independence in 2002, there have been individual instances of executive interference in areas that are the exclusive purview of the judiciary.<sup>116</sup> The well-publicized issue of the large number of property compensations claims filed in the municipal courts by Kosovo Serbs who left Kosovo upon the outbreak of hostilities in 1999 provides a case in point.

More than 22,000 lawsuits related to the 1999 conflict were filed in 2004 against UNMIK, KFOR, municipalities and individuals, just before the five-year statute of limitations was set to run.<sup>117</sup> The claims sought compensation for property damages, alleging that the respondents were responsible for protecting the property that was damaged or destroyed during the fighting or its aftermath. Faced with this overwhelming caseload, the UNMIK DoJ – who at the time had exclusive competency for justice matters within Kosovo under Resolution 1244 – wrote to the presidents of the Supreme court, district and municipal courts “asking” that “no case be scheduled [...]”.<sup>118</sup> The judiciary duly complied with the request. Six years later most cases still have not been processed by the courts.<sup>119</sup>

Whether to process the cases should have been a decision for the courts, not the executive.<sup>120</sup> The fact that both the local and international judges’ contracts were at the time of the

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<sup>115</sup> Principles 3 and 4, Basic Principles, note 3, *supra*.

<sup>116</sup> OSCE Monthly Report, *Actions by UNMIK and municipal authorities improperly interfere with the independence of the judiciary* (July 2007), p. 3, <http://www.osce.org/kosovo/26468> (accessed 19 August 2011); OSCE Monthly Report, *Failure to execute search orders due to intervention by UNMIK authorities affects independence of the judiciary* (September 2006), p. 1; and OSCE Report, *Review of the Criminal Justice System: Protection of Witnesses in the Criminal Justice System, March 2002–April 2003*, (April 2003) p. 29, <http://www.osce.org/kosovo/12555> (accessed 23 August 2011).

<sup>117</sup> The lawsuits are based on Section 180(1) of the Civil Obligations Act (1978 SFRY “Zakon o obligacionim odnosima,” applicable by virtue of UNMIK Regulation 1999/24 and 2000/59 On the Law Applicable in Kosovo), and which reads in relevant part: “Responsibility for loss caused by death or bodily injury or by damage or destruction of another’s property, when it results from violent acts or terror or from public demonstrations or manifestations, lies with the [...] authority whose officers were under a duty, according to the law in force, to prevent such loss.”

<sup>118</sup> Letter from UNMIK DoJ to Presidents of all Kosovo Courts, DOJ/DD/449/lh/04, 26 August 2004. Claims would not lie as against UNMIK or KFOR due to their immunity from legal process in any event. UNMIK Regulation No. 2000/47 *On the Status, Privileges and Immunities*. Also, the claims against municipalities would also not likely proceed as the municipalities in question – those named in the lawsuits – also did not exist at the time of the events in question. Cases against individuals could have, and should have, gone forward. Complicating matters further, many judges told OSCE that they interpreted the letters as precluding action also on cases related to the 2004 March riots. See OSCE Report *First Review of the Civil Justice System* (June 2006) p. 42, <http://www.osce.org/kosovo/19401> (accessed 19 August 2011). Perhaps in an effort to rectify this situation, just over a year after the first letter, the DOJ wrote again to the court presidents. The second letter told the courts to proceed with cases against “identified natural persons,” and also with claims “for damage committed after October 2000.” *Letter from UNMIK DOJ to Presidents of all Kosovo Courts*, DOJ/JDD/04562/ia/05, 15 November 2005.

<sup>119</sup> EULEX has since become seized of this issue and is advising the local courts. Cases are moving forward; the bulk of them are being dismissed.

<sup>120</sup> The ECtHR has ruled that the executive branch may suspend a large number of cases that fall into a similar pattern and that threaten to overwhelm a court. However the suspension must be temporary (with an

intervention dependent upon the executive for renewal undoubtedly made this interference all the more effective.

This situation has since been addressed by both the Ombudsperson<sup>121</sup> and the Human Rights Advisory Panel (HRAP).<sup>122</sup> In an opinion adopted in March 2010, the HRAP found that UNMIK had violated Article 6(1) of the ECHR and ordered compensation be paid to the claimants for non-pecuniary damages.<sup>123</sup>

Contrary to that of UNMIK, EULEX's role – although “executive” with respect to the judiciary – has been crafted in design and in law to separate it from executive branch functions. Combined with the legislative reforms described above, a better balance between the judicial and executive powers now exists in Kosovo, and this should preclude a repetition of the events just described.<sup>124</sup> Yet, it cannot be said that the institutional framework was solely at fault for the violation in the above-mentioned property claims. Upon receipt of such a “request” from the executive branch, it is incumbent upon the judiciary to assert its independence. While assistance with logistical and administrative matters in the face of such a potentially overwhelming caseload might be a welcome gesture from the executive, the decision on whether to move forward with cases is that of the judiciary alone.

## 2. Interference by municipal authorities

The civil judges who try property dispute cases are vulnerable to improper interference. Not only are the issues highly charged both emotionally and financially, they frequently have a political dimension. In Viti/Vitina municipality, the conflict's protagonists have been the mayor's office and the municipal courts. The case of the Hunting Club “Drenusha” is illustrative:

In 2008, the municipality issued a decision to take control of the property on which the Hunting Club “Drenusha” was located. The municipality shortly thereafter seized the property and moved the municipal department of education onto the site. The Hunting Club “Drenusha” filed suit and convinced the court (upheld on appeal) that they had the stronger claim to the property. The actual ownership of the parcel was not determined in the suit, but “possession” was

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indication of time limit), be founded in the law, and measures to rectify the problem must be timely introduced in a timely manner. See *Acimovic v. Croatia*, No. 61237/00, and *Multiplex v. Croatia*, No. 58112/00. However, UNMIK failed to comply with these limitations.

<sup>121</sup> See Ombudsperson Institution in Kosovo, *Fifth Annual Report 2004–2005 addressed to the Special Representative of the Secretary-General of the United Nations*, 11 July 2005, available online at: <http://www.ombudspersonkosovo.org/repository/docs/E6050711a.pdf> (accessed 19 August 2011).

<sup>122</sup> The Human Rights Advisory Panel examines complaints of alleged human rights violations committed by or attributable to the United Nations Interim Administration Mission in Kosovo (UNMIK) and makes recommendations to the Special Representative of the Secretary-General (SRSG) in Kosovo when appropriate.

<sup>123</sup> See the Opinion of Human Rights Advisory Panel in Case Nos. 38/08, 58/08, 61/08, 63/08 and 69/08; Petko Milogorić, Milislav Živaljević, Dragan Gojković, Danilo Ćukić and Slavko Bogičević, adopted on 24 March 2010, [http://www.unmikonline.org/human\\_rights/documents/Decisions/eng/Opinion\\_240310.pdf](http://www.unmikonline.org/human_rights/documents/Decisions/eng/Opinion_240310.pdf) (accessed 22 August 2011).

<sup>124</sup> Article 8(2) of “Council Joint Action,” 2008/124/CFSP, 4 February 2008, states clearly that EULEX Head of Mission shall exercise command and control “without prejudice to the principle of the independence of the judiciary and the autonomy of prosecution when considering the discharge of judicial duties of EULEX judges and prosecutors.” Of note, EULEX is currently active in assisting the local judiciary to process these cases. Interview with EULEX judge, Prishtinë/Priština, January, 2011.

granted to the Hunting Club. The municipality refused to comply with a municipal court order to vacate, and EULEX was eventually asked to assist with executing the judgment. A successful eviction, led by a EULEX judge, was carried out in July 2009. The next day, the municipality held an emergency session, re-allocated the premises to the department of education and ordered the police to evict again the Hunting Club “Drenusha”, which it did two days later.

Meanwhile, the municipality had filed suit in district court Gjilan/Gnjilane in an effort to prove their ownership. In a fully-fledged trial with witnesses and all available evidence examined, the municipality failed in that attempt. The district court, comprised of one EULEX judge, ordered the Hunting Club “Drenusha” back into the premises.<sup>125</sup> Shortly before the next eviction was to occur, masked perpetrators captured the building’s guards, planted explosives and blew the building up.

The case drew widespread attention when both the municipality and the municipal court sought help from central government authorities and the KJC. The ICO and KFOR were also involved in an effort to maintain security and ensure that legal processes took their course. Those efforts provoked vitriolic responses from the municipality, which took its case to the media, levelling all manner of accusations against the courts and the international community.

That the executive branch at the municipal level would ignore judgements of the court – including those rendered by EULEX – is unconscionable. It is the role of the judiciary to provide clarity in precisely this type of individual-versus-government matter. While court decisions may be challenged by all possible legal means, a local government usurping judicial functions is detrimental to the judiciary as a whole and to the independence of the judiciary in particular.

## **V. CONCLUSIONS**

A competent, independent and impartial judiciary is absolutely fundamental to the rule of law in Kosovo. Economic stability, security, and the protection of human rights in Kosovo depend upon the proper administration of justice which in turn depends on the ability of the judiciary to render its decisions unaffected by improper influence. Over the past decade Kosovo’s judicial institutions have made important progress in bringing their structural and legislative framework into line with European and international standards. All sitting judges and prosecutors have been thoroughly vetted by an internationally supervised process, which could – the above-noted interference in the process notwithstanding – mark a turning point for the judiciary as it provides a fresh start to both the institution itself and each newly (re)appointed judge or prosecutor. Moreover, with the advent of the new Law on Courts, judges’ tenure is secure and their salary is now comparable with their executive branch counterparts. The restructured KJC – despite remaining weaknesses in how its membership is appointed – is well positioned to defend the institution against usurpation of judicial authority. Emerging from this confluence of structural reforms, then, is an opportunity for the judiciary to (re)assert its independence.

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<sup>125</sup> Of note, the EULEX judge was the same judge that ordered the eviction of the municipality in the initial case.

Yet, it remains to be seen whether these efforts will ultimately alter the public perception that the institution remains largely under the influence of others – be that domineering political actors, criminal groups, personal/family connections, or broader social pressures. The social and political atmosphere in Kosovo brings the issue of physical security for judicial actors to the forefront of any discussion on independence. Firstly, the apparatus that provides security in the resource-poor facilities that house Kosovo’s judicial institutions needs upgrading. Secondly however, another aspect of security – one intimately linked to the (dis)respect afforded to judges in Kosovo society – remains worrisome. As described at length in this report, politicians at all levels, litigants as well as interested parties consider it acceptable to pressure and influence the judiciary, be that individual judges or the institution as a whole.

This report has demonstrated that culture plays a significant role in the functioning of the judicial system in Kosovo, and remains a notable influence upon judicial independence. Insofar as a shift in the cultural paradigm of Kosovo vis-à-vis the judiciary is necessary to rectify this state of affairs, such change will not come easily and could take decades. Individual judges and the judiciary as a whole have an important role to play in this process, but judicial actors have not sufficiently asserted the independence necessary to earn the respect that is due the institution in the face of improper influence. Likewise, the KJC has not always vociferously responded to attacks against individuals and the institution, nor sought similar reactions from the legislature and the executive. Meanwhile, insufficient steps have been taken to shore up procedures within the courthouse in order to curtail the types of access and relationship issues that give rise to improper influence – or the impression of such.

Identifying weaknesses is the first step to overcoming them. The aim in this report has been to assist the Kosovo judiciary in addressing these threats to its independence, to determine how the OSCE and others can help in that effort, and most importantly, to look at the ways the judiciary can help itself. It is with these ends in mind that the OSCE presents the following recommendations.

## **VI. RECOMMENDATIONS**

### **To the Judiciary:**

- The KJC should use objective criteria, always considering merit and integrity, when selecting future judges. These criteria should be determined by law and not internal regulations.
- The KJC should advocate and defend the judiciary’s material and financial position, to ensure adequate facilities, salaries, and resources. An adequate number of courtrooms and a separate closed area for judges’ private offices should be a priority.
- Court presidents and the KJC should meet periodically with those responsible for court security and review security measures. Detailed plans should be crafted and periodically updated to confront existing and future threats to the physical security of judicial actors.

- The KJC should implement a strategy to address all security concerns raised by judges, with the police and other relevant interlocutors to further improve security in and outside the courthouse.
- Court presidents should institute periodic meetings among the judicial staff to review measures that can decrease improper influence. For example: restrict the access of the public to judges' private offices and screen all phone calls to judges.
- Judges should use the courtrooms for all trials, with the only possible exception being non-contentious proceedings. This will discourage ex-parte communication and reduce security threats. Presidents of courts should ensure a functional, co-ordination/scheduling system for using courtrooms in order to avoid scheduling conflicts.
- The KJC and KJI should require continuous legal education training on ethics for judges. This training should highlight that judges should not act in "anticipatory obedience" to external influences.
- Judges should disregard requests from the executive or legislative branch to not proceed in the scheduling of cases before the court.

#### **To the Assembly of Kosovo:**

- The Assembly should consider amendment of the existing legislation to:
  - Remove the probationary period for new judges in line with recommendations of the Venice Commission and related European standards so that judges have guaranteed tenure until mandatory retirement age or the expiry of their term of office. (Needless to say, disciplinary measures stemming from misconduct, up to and including removal from office, should be applied regardless of tenure.)
  - Ensure that the composition of the KJC is in line with the European Charter in that a majority of the members of the KJC are elected by its peers.

#### **To the Government:**

- In any case where a judicial nominee is not appointed, a detailed written decision should be issued clearly defining the reasons for the non-appointment. This decision should be delivered to the KJC in a timely and transparent manner.
- Obey court orders and judgements. Only challenge the courts' decisions by legal means.