

JUDICIAL  
ASSESSMENT MISSION  
II



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- Prepared by:
- USAID
- USOP
- OSCE

# JUDICIAL ASSESSMENT MISSION II

## Executive Summary

This report is the product of a joint US-OSCE assessment conducted in April 2001. The main goal of the assessment was to identify which components of the justice system impede the establishment of the rule of law in Kosovo, and to make recommendations to address urgent challenges as well as long-term needs identified.<sup>1</sup> The basic question posed by the team was: What should the justice system in Kosovo do to establish rule of law that it is failing to do, and how can we do it?

To answer this question, the team examined whether the current justice system performs four key functions that appear consistently where the rule of law is established:

- establish and maintain personal security and public order
- prohibit excessive concentration of political power through checks and balances
- defend individual and public interest against abuse of authority
- ensure equal protection by and treatment under the law

Team found that for each of these areas, the donor community has addressed most short term, emergency needs. The current needs identified in this report and related recommendations include building credible and effective institutions for the administration of justice, enhancing professional capacity in the legal community, and providing access to justice for all Kosovars. Moreover, now that at least a skeleton justice system is working, it is important for donors to focus on ensuring that the system functions independent of political influence, performs efficiently and ensures protection of important individual and community rights.

Without these critical elements in place, the justice system and judicial personnel in Kosovo will remain without a clear mandate or authorities, which in turn increases inefficiency and vulnerability to political pressure. Under-trained judicial personnel are more likely to make unfair or poor legal decisions resulting in unequal treatment of individual citizens or communities. This in turn fuels violent, extra-judicial resolution of disputes, which causes a lack of confidence in the current legal system that affects both governance and economic reforms. For these reasons a democratically oriented society with market-oriented economic structures cannot be established until the rule of law, and its associated framework, is achieved in Kosovo.

Toward this end, the report recommends four interrelated foci. The first is creating an independent judiciary. The second is building credible and effective institutions for the administration of justice including courts and disciplinary bodies. The third is providing equal access to justice, and the fourth is enhancing the professional capacity of the legal community.

To accomplish these goals, the team recommends a series of actions. The most critical recommendations from the report are summarized below in order of priority:

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<sup>1</sup> Principal Objectives of the team were: (1) to review and update the conclusions and recommendations of a Judicial Assessment Mission conducted in April 2000 in light of evolving judicial and legal reform efforts over the past year; (2) identify which components of the justice system impede the rule of law in Kosovo; (3) to review current and potential justice sector assistance options and interventions in light of obstacles identified; (4) to make recommendations addressing urgent problems as well as long-term needs identified in the assessment, and; (5) identify specific programming opportunities for future judicial and legal reform that expand upon or refine the current U.S. assistance program.

## **Judicial Independence:**

### Judicial system strategy (Rec #1)

*Judicial independence should be a key goal of the transition to self-government in Kosovo. The judicial branch should become increasingly responsible for its own affairs.*

*In the near term, this should include three actions: (1) UNMIK should develop detailed written plans for a transition period and an exit strategy, keeping in mind the important principles that are the foundation of any modern system of justice; (2) Court administration should be transferred to an administrative office of the courts, responsible to the KJPC or the Supreme Court, and (3) The judicial branch should have the authority to declare legislative and executive branch acts to be illegal and void.*

### Terms of Office (Rec #4)

*Judges should be given lengthy terms of office. This would provide judges with job security, greater prestige and minimize exposure to political pressure. Selection for the bench should then depend upon a competitive examination and successful completion of the professional training program now under development.*

### Judicial and Prosecutorial Discipline (Rec #11)

*UNMIK should ensure that its mechanisms for prosecutorial and (especially) judicial discipline comply with international standards. An international judge and a prosecutor selected by the SRSG should be appointed to supervise the international judges and prosecutors respectively. These supervisors should develop, adopt and implement disciplinary standards and processes for international judges.*

## **Effective Judicial Institutions:**

### Extra-judicial Detention (Rec #17)

*UNMIK should engage KFOR on the issue of extra-judicial detention to develop a plan to move its detention, adjudication and incarceration functions to UNMIK as soon as it is practicable. UNMIK should assign Regulation 2001/12 (terrorism) cases to international judges and prosecutors*

### Court Security (Rec #5)

*Appropriate security should be offered to and provided for any ethnic minority who is willing to work in the Kosovar judiciary. Guards should be available to provide after-hours security to all judges who receive threats of threats, and judges' families should be provided with close protection security when necessary.*

### Assignment of International Judges and Prosecutors (Rec #9)

*UNMIK should develop a detailed and specific regulation setting forth the standards under which international prosecutors and international judges will be assigned to a particular case, including a precise list of the categories in which such assignments by the SRSG would be warranted.*

*UNMIK should develop and implement transition plans to gradually phase out the use of international judges and prosecutors. Such plans should be developed together with Kosovar judges who must continue to assume more responsibility for the cases that the internationals are currently managing.*

Penal System (Rec #19)

*UNMIK should provide international correctional officers to staff the Quick Build Prison in Lipjan and assist in the training of local correctional officers. In addition, UNMIK should repair and renovate aging and inadequate detention facilities and Dubrava Prison. Finally, UNMIK should provide adequate facilities for juvenile and mentally ill persons in accordance with international standards.*

**Equal Access to Justice:**

The following first two recommendations are of equal priority:

Ethnic Minority Participation in the Judicial System (Rec #10)

*Diplomatic channels should be used to address the problem of financial incentives or disincentives provided by Belgrade authorities that undermine Serbian/Kosovar participation in the Kosovo justice system. A formal request should be made for Serbia not to withhold pensions from judges who join the formal judicial system in Kosovo, and not to finance a separate system of salaries.*

Access to Law (Rec #28)

*UNMIK should create an Office of Translation, fully staffed with skilled professional translators. The priority and main duty of the office should be to provide official translations of UNMIK regulations and administrative directions for distribution and publication in the Official Gazette. The objective should be to release copies of the Official Gazette as soon as possible after adoption of new regulations and administrative directives.*

Public Knowledge of Applicable Laws and the Justice System (Rec #30)

*UNMIK should ensure that non-emergency regulations and administrative directions take effect only after publication in the Official Gazette, thus allowing the public an opportunity to know and understand the applicable law before it applies. Any use of the exception for emergencies should be fully explained through an official public statement, and the explanation and regulation should be distributed immediately to all judges, prosecutors, and law enforcement bodies, and an effort made to inform other legal professionals (e.g., through the Chamber of Advocates).*

*A comprehensive public awareness campaign should be undertaken by UNMIK in coordination with donors and interested local partners such as the Law Faculty, Chamber of Advocates, legal aid organizations, and the Judges' Association to enhance public awareness of how the justice system works in Kosovo. This should include how laws are initiated, adopted, and implemented under the constitutional framework, and how a citizen can exercise his or her legal rights and responsibilities.*

## **Professional Capacity Building:**

### Training Judges (Rec #31)

*KJI should finalize its long-term strategy and develop a curriculum for training judges and prosecutors. The curriculum should include basic courtroom and case management skills, ethnic and gender sensitivity, training in interpretation of laws, and training in old and new substantive laws. KJI should also develop a more extensive induction or introductory training for new judges and prosecutors, as well as an initial course for prospective judges and prosecutors. KJI should also develop training for lay judges.*

### Training Attorneys (Rec #32)

*UNMIK, in coordination with the Chamber of Advocates, should develop a system for continuing legal education. This should be complemented by an UNMIK requirement in the form of a regulation for completing a minimum yearly level of legal education, including ethics as a key component. Trainers should expand their programs to ensure that training is available to all advocates.*

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## I. INTRODUCTION

1. At the end of NATO's air campaign in 1999, the United Nations Interim Administration Mission in Kosovo (UNMIK) introduced new security, legal, and political institutions in the province of Kosovo. 2. As a result, personal security and public order now depend upon UNMIK, the international NATO troops civilian police and the new Kosovo Police Service, and not on the Yugoslav military and security forces. 3. Assessing the rule of law in Kosovo by examining personal security and public order, checks and balances on political power, and equal protection under the law must be done in the context of a small province undergoing a post-conflict political transition managed by the United Nations. 4. Judicial independence, administration of justice, and equal protection under the law depend upon the political will and capacity of the U.N. and Kosovar emerging political institutions to uphold international human rights standards while continuing to promote meaningful autonomy and the corresponding transfer of authority to Kosovars agreed upon and required by UN Security Council Resolution 1244.

### A. The First Kosovo Judicial Assessment Mission (JAM I)

In February 2000, a U.S. interagency assessment team conducted an in-depth review of the many problems confronting Kosovo's judiciary, and issued a report with many short-term and long-term recommendations designed to support of the rule of law. The team worked closely both with UNMIK judicial authorities and OSCE personnel tasked with supporting the new legal system. The team met with newly appointed judges from nearly every court in Kosovo, and it used engineering expertise to examine the structural problems in each of Kosovo's courthouses and detention facilities, documenting court and penal system infrastructure needs province-wide.

This first team found a crippling uncertainty about which laws were to be applied in the province, little or no training available for judges or prosecutors who were inexperienced or had not worked as judges for more than ten years, and extremely poor working conditions in courthouses that were seriously damaged or stripped and lacked electricity or heat. A number of many courthouses were occupied by international organizations who used them as offices. Due process human rights concerns were not monitored and poor coordination between police and judges made initiation of cases difficult. Completion of criminal cases was made nearly impossible by the weakness of the confinement system. There was no security for judges, and many judges were not satisfied with their salaries.

The team urgently recommended clarification and dissemination of the applicable law with revisions to meet internationally recognized human rights standards, immediate training for judges, and repairs to the courthouse buildings to make them operational. The team also recommended that international organizations occupying courthouses vacate the premises or find acceptable alternative space for the courts. It urged the OSCE to begin effective human rights monitoring of the courts and keep statistics that would enable basic oversight of the system. UNMIK was urged to establish a process to remove judges who abused their positions. The team urged international donors to provide basic equipment for the courts including computers and security systems necessary to the basic functioning of the court system. Finally, the team recommended



boosting court salaries and prompt attention to deficiencies in the policing and confinement systems so crucial to the judiciary.

The team also noted long-term concerns for the judiciary including basic due process rights, rights of detainees, ethnic bias, lack of competent defense counsel, judicial corruption, and an inability to prosecute war and ethnic crimes. The team urged the development of strong professional organizations to support the legal system, better legal education, development of a bar examination, and significant attention to law reform and public education about the legal system.

Most of these recommendations were addressed. The U.S. Department of State funded a "Quick-Start" package of basic court equipment for each court that enabled judges to begin their work. The package included four computers for each court, photocopiers, printers, fax machines, typewriters, metal detectors, generators, and vehicles. These packages were delivered by June 2000 and have been enormously beneficial to the courts, enabling them to start functioning. Much of the recommended courthouse renovation has been completed, and alternative facilities have been provided in areas where the courthouses are still occupied. Jurisdictional questions have been resolved for the courts and judicial training has begun. The police have improved their relationship with judges and prosecutors. OSCE's trial monitoring has improved. OSCE-created institutions such as the Kosovo Judicial Institute and the Criminal Defense Resource Center have begun supporting the courts and the legal community through training and other services. The bar association is gaining strength and ABA/CEELI has assisted local judges in the formation of a judges' association. OSCE and UNMIK have held a bar exam. The UN has established a mechanism to investigate and punish judicial misconduct. Finally, the law faculty has modernized its curriculum with the assistance of the UN and the Kosovo Law Centre.

## **B. The Second Kosovo Judicial Assessment Mission (JAM II)**

In April 2001, a second U.S. interagency assessment team, together with OSCE, conducted interviews and site visits in Kosovo to update to the First Kosovo Judicial Assessment Mission. The team developed and implemented a uniform questionnaire, conducted interviews and met with and consulted with members of the judiciary and legal community across Kosovo, and met with as well as officials from UNMIK, OSCE, Council of Europe, KFOR, and NGOs engaged in rule of law activities. The team supplemented this information with information from other assessments of the justice system in Kosovo.

The second team found that court security is marginal and legal and structural reform has moved very slowly, if at all. Although judicial training has started, judges, prosecutors, and lawyers are desperately in need of additional practical training. Many simply need to learn how to work in an independent judiciary. The courts are all working, but whether justice is consistently being delivered is still debatable, many months after the end of the NATO bombing and the establishment of the United Nations Interim Administration Mission in Kosovo.

These problems persist in large part due to the low priority given to legal and structural reform efforts by the donor community during these past 12 months. This is due to three factors. First, the independence of Kosovo's judiciary is hobbled by the uncertainty of Kosovo's future independence legal status as a protectorate of the UN, the lack of an UNMIK "exit strategy", and the continued predominance of the SRS over the

judiciary. Together these factors have made UN officials reluctant to develop the judiciary as a fully independent branch of government. Second, there is well-founded skepticism about the capacity of the judiciary to independently manage judicial affairs. Finally, concerns remain about the impartiality of Kosovar judges based on OSCE court-monitoring reports. Nonetheless, for meaningful autonomy to be achieved, the independence and effectiveness of the judiciary, supported by a functioning justice system should be made a higher priority.

To achieve this, the next phase of donor assistance for rule of law in Kosovo should focus on four main areas. First, greater emphasis should be placed on creating an independent judiciary that will be able to provide an effective check and balance on a future, democratically elected executive and legislature. Second, protection of both individual and community rights should be promoted through support for effective and efficient judicial institutions with a capacity for sound court administration. Third, concrete steps should be taken to ensure adherence to international standards of equal protection and treatment under the law. Fourth, professional capacity building efforts should be continued and augmented. In addition, continuous support should be provided to institutions and activities such as the Kosovo Police Service and OSCE Human Rights Abuses Monitoring Effort that have demonstrated success in enhancing personal security and public order. An assessment of security needs, beyond the scope of this report, should also be conducted in the near future.

Without these critical elements in place, the justice system in Kosovo will remain without a clear mandate and authorities. Under-trained judicial personnel will be more likely to make unfair or poor legal decisions resulting in unequal treatment of individual citizens or communities. This in turn will fuel violent, extra-judicial resolution of disputes and cause a lack of confidence in the current legal system that affects both governance and economic reforms. A democratically oriented society with market-oriented economic structures cannot be established until the rule of law, and its associated framework, is achieved.

## **II. BACKGROUND**

### **A. Status and Structure of Kosovo Judiciary Prior to March 1999**

Prior to the 1999 conflict, Kosovo's civil law-based judicial system consisted of a Supreme Court, five district courts, two commercial courts in Pristina and Gjakova, and eighteen municipal and lower-level courts. After 1989, Serbian officials had excluded most ethnic Albanians from serving in this system except as private attorneys, and many resigned in protest. Subsequently, Kosovar Albanians did not serve as judges, prosecutors, or as members of the University of Pristina's law faculty, and University officials did not permit ethnic Albanian students to attend the University's law school. Kosovar Albanian law professors responded by creating (along with dismissed University administrative staff) parallel structures that became the semi-underground Albanian University in Pristina. Thus, Kosovar Albanian law faculty members continued to teach and award diplomas in law. However, the Serbian authorities did not recognize these, and graduates of the parallel university were not allowed to take the bar exam or practice law in Kosovo.

Before 1989, the Ministry of Justice had administered the bar exam in Kosovo. In 1989, Serbian officials abolished the Kosovo exam site, and Kosovar Albanians eligible to

take the bar exam (i.e. those who had graduated from the law school before the period of Serb repression began) were required to sit for the exam in Belgrade if they wished to be able to practice in Kosovo's courts.

After 1989, the pre-conflict mandatory bar association in Kosovo, called the Kosovo Chamber of Advocates, served primarily to register accredited lawyers who had passed the bar exam. The Jurists' Association, the more active organization, did not require passage of a bar exam for membership, and unlike the bar association, had representation outside of Pristina. The Jurists' Association served as a legal "think tank," providing comments and research on legal matters and legislation, and publishing books and a monthly law review.

In part due to the lack of Kosovar Albanian representation in the judicial system, Kosovar Albanians increasingly turned to the use of traditional alternative dispute resolution mechanisms, and particularly to Reconciliation Councils. These Councils, essentially an arbitration mechanism using village elders, effectively solved about one thousand long-standing blood feuds during the 1990s. While the need for the Councils has diminished with their success, they remain in existence today.

### **B. Status and Structure of Kosovo Judiciary Post-March 1999**

On June 10, 1999, after nearly three months of NATO air strikes, Serbian president Slobodan Milosevic agreed to withdraw all Yugoslav security forces from Kosovo, and UN Security Council Resolution 1244 authorized the Secretary General to establish an international civilian administration in Kosovo. On June 12, 1999, the Secretary General of the United Nations presented an operational concept for the UNMIK to the Security Council. In his follow-up report to the Council, on 12 July, the Secretary General presented a framework for the UN-led international civil administration, which vested in the UN Mission executive and legislative authority over the territory and people of Kosovo, as well as the administration of the judiciary. NATO troops moved in to re-establish security, operating as the "Kosovo Force" or KFOR. By mid-July, UN Special Representative of the Secretary General (SRSG) Bernard Kouchner took up office in Pristina, replacing interim SRSG Sergio Viera di Mello, and outlined UNMIK's plans for Kosovo's administration by the United Nations.

In an effort to develop a functioning, democratic society in Kosovo, at the Secretary General's direction, SRSG Kouchner was asked to coordinate and lead the efforts of four cooperating international organizations and agencies: the UN itself, the UN High Commissioner for Refugees (UNHCR), the Organization for Security and Cooperation in Europe (OSCE), and the European Union (EU). UNMIK created four "pillars" to implement the rehabilitation and reformation of Kosovo and assigned each international agency a pillar:

- Pillar I : humanitarian assistance, led by UNHCR
- Pillar II: civil administration, led by the United Nations;
- Pillar III: democratization and institution-building, administered by OSCE
- Pillar IV: economic reconstruction, managed by the European Union

Having fulfilled its mandate, UNHCR was taken out of the pillar structure. Because strengthening rule of law is seen as the highest priority in developing a functioning democratic society in Kosovo, UNMIK moved law enforcement and the judicial system from Pillar II to the newly vacant Pillar I, led by Deputy SRSG Jean Cady.

After the air campaign ended and the period of UN administration began, the UN determined that responsibility for the judiciary and other rule of law institutions would be shared between UNMIK and the OSCE. UNMIK's judicial affairs office and legal adviser's office are, respectively, responsible for establishing a judicial system and promulgating the applicable laws. The OSCE, which is charged with democratization and institution-building, is responsible for training on judicial proceedings, human rights monitoring, and longer-term development of institutions such as the law school and bar associations.

One of UNMIK's first acts after the end of the conflict was to appoint new judges and prosecutors in a non-discriminatory fashion. Under Emergency Decree 1999/1 issued in June 1999, the interim SRSG appointed a Joint Advisory Council on Provisional Judicial Appointments, comprised of four Kosovars and three internationals, that was charged with nominating provisional members of an Emergency Judicial System. The SRSG appointed 55 judges and prosecutors on June 30, 1999. He also appointed three judges, one investigating judge, and four prosecutors to the Pristina District Court. The "Emergency Judicial System" was later expanded to accommodate three of the four remaining district courts that had existed prior to the conflict, with additional judicial appointments beginning on July 24, 1999. Mobile units of the Pristina District Court provided initial coverage of the remaining district court in Gjilan. UNMIK also established a provisional system for the administration of justice in Kosovo. Under this provisional system, judicial affairs were administered through two bodies: the Administrative Department of Justice (ADJ), led by an international co-head and a national co-head, and the Department of Judicial Affairs (DJA), led by an international. The two bodies were largely the same: they occupied the same premises, the international co-head of ADJ was the head of DJA, and many of the ADJ officers were also DJA officers. ADJ was responsible for the overall management of matters relating to the judicial system, court administration and the correctional service. DJA was responsible for other judicial system matters that remained under the purview of the SRSG, such as international judges.

To help with the development and administration of the Kosovar judicial system, the SRSG created a series of Pristina-based advisory committees. The SRSG created the Advisory Judicial Commission (AJC) to replace the emergency system's Joint Advisory Council on Judicial Appointments (referenced above); it was charged with recommending candidates for appointment as permanent judges and prosecutors. The AJC had eight Kosovar and three international members. In late fall 1999, the AJC interviewed approximately five hundred applicants for appointment to the Kosovar judiciary. As a result of AJC recommendations, as of December 2000, the SRSG appointed 398 judges and prosecutors.

In order to expand the role of the AJC and ensure complete unbiased and professional selection of the members of judiciary, in May 2001 the SRSG replaced the AJC with the Kosovo Judicial and Prosecutorial Council (KJPC). The KJPC interviews candidates and makes recommendations to the SRSG for appointment as judges and prosecutors, and also recommends disciplinary actions, including removal, to the SRSG. The KJPC is initially composed of five international and four Kosovar members.

Another body related to judicial discipline, the Judicial Inspection Unit (JIU), has been active since early in the year. The JIU is a section of DJA with the power to investigate judges and prosecutors on its own initiative, or at the request of the KJPC. The mandate

of the JIU includes judicial discipline, judicial performance, and making recommendations on judicial training. The JIU and the KJPC do not have authority over international judges, who are managed by the DJA's International Judicial Support Section. As a result of Regulation 2001/19 on the Executive Branch, the current DJA will become the Department of Justice (DOJ), while the current ADJ will become the Department of Judicial Administration (DJA), under the Ministry of Public Services.

Additionally, on September 7, 1999 UNMIK Regulation 1999/6 commissioned a Technical Advisory Commission on Judiciary and Prosecution Services (TAC), to advise on the structure and administration of the judicial and prosecutorial system. On December 13, 1999, the TAC, consisting of ten Kosovars and five international members, delivered to the SRSG its recommendations on the establishment of the civil and criminal jurisdiction of the district and municipal courts, as well as the establishment of Court of Appeals and a Supreme Court. After the establishment of the complete court and prosecutorial structure in Kosovo, during the first part of 2000, the Technical Advisory Council disbanded.

The OSCE, as a part of its rule of law and institution-building mandate, established the Kosovo Judicial Institute (KJI). KJI has a mandate to train judges and prosecutors. OSCE expects the KJI to become a local institution, and appointed its national co-director in March 2001 and held a formal inauguration. KJI conducted brief induction seminars for all newly appointed members of the judiciary. In addition to its induction seminars, KJI's continuous legal education program provides training seminars on specific topics of concern such as international human rights standards, forensics, and trafficking. KJI is developing a new specialized training program, or "magistrates' school," for those who have passed the bar exam and desire to become a judge or prosecutor. Regulation 2001/19 also places the KJI under the Ministry of Public Services.

The current court structure in Kosovo consists of the regular courts: a Supreme Court (14 judges), a Commercial court (10 judges), five District courts (total of 43 judges), and 22 Municipal courts (total of 131 judges); and the Minor Offences Courts: a High Court of Minor Offences (5 judges), and 22 Municipal Courts of Minor Offences (107 judges). In addition to the above Kosovar judges, there are twelve international judges: two at the Supreme Court, and ten among the District Courts. In addition to professional career judges, the courts also employ 617 lay judges, who serve one-year terms and sit on panels as the equals of the career judges. In addition, there are 51 career prosecutors plus six international prosecutors, organized in 13 Prosecutors' Offices. There are also 186 advocates.

### **C. Law Enforcement Entities and Correctional System**

In addition to the principal judicial institutions and personnel, there are of course many other actors in a properly functioning legal system, all with vital roles. These equally important players are the police and other law enforcement entities that begin any criminal process, and a correctional system that concludes it. As in any modern system, failure of any one of these parts would have an adverse impact on the system as a whole.

Security Council Resolution 1244 tasked NATO's KFOR troops with establishing a secure environment and ensuring public safety and order until the international civil presence can take responsibility for this task. Resolution 1244 also gave UNMIK the responsibility for performing basic civilian administrative functions where and as long

as required; maintaining civil law and order, including establishing a local police and deploying a temporary force of international police; and protecting and promoting human rights. Until the UNMIK civilian police force (CIVPOL) was mobilized, KFOR by necessity acted as the primary law enforcement entity. This role was accepted reluctantly, since KFOR is not designed as a police force but as a military force.

Once CIVPOL was mobilized and operational, KFOR's law enforcement activities became focused on the most egregious crimes (i.e. murder, limited investigator capacity). Most KFOR arrests are of suspect more or less caught in the act of committing a crime. KFOR has little ability to investigate past crimes. (By transferring the law enforcement authority to the international police, KFOR, exercising authority under the UNSCR/1244, is continuing to arrest and detain only those people alleged to have posed a threat to the safety and the security of Kosovo).

CIVPOL officers are drawn from the police services of close to fifty UN member nations. As of February approximately 5000 CIVPOL officers had been deployed throughout Kosovo. Former SRSG Kouchner stated repeatedly that several thousand more police are needed if they are to make a dent in crime, but member nations have been slow to respond to the call. CIVPOL are also hampered by coordination and training difficulties, exacerbated by language and cultural barriers: few CIVPOL officers speak Albanian or Serbian, and many have little experience in policing outside their native countries. As part of a long-term strategy to return authority for policing to the Kosovars themselves, UNMIK established a police school to train a multiethnic group of Kosovar police officers, but only several hundred of these Kosovar police have been deployed. To date, 3,873 police officers have graduated from the Kosovo Police Service School.

In the beginning, restarting the confinement system also posed problems for the international authority in Kosovo. As a result of destruction and, in places, damage from NATO bombs, there were few adequate secure facilities for holding pre-trial detainees or convicted criminals, and there were few trained detention facility guards. As a result in practice, primary responsibility for detaining prisoners fell to KFOR. In some KFOR sectors, prisoners lived in winterized tents in guarded parts of military barracks. There was only one functioning prison, located in Prizren. It had the capacity to hold only sixty prisoners, and the locally hired guards had little training and were consequently unarmed. Since then, much progress has been made in improving the confinement system and institutions. Institutions have either been constructed or renovated or are soon to be constructed.

#### **D. The Evolution of Applicable Law in Kosovo**

Until 1989, the criminal law applicable in Kosovo was the Kosovar criminal code, which was drafted and adopted by the largely Albanian Kosovar legislature while Kosovo enjoyed autonomy under the FRY constitution. The FRY criminal procedure code, which was passed in 1977 with the participation of representatives from Kosovo's Albanian community, governed procedure in criminal cases. In 1989, however, the Serbian Parliament revoked the Kosovo Criminal Code, an act which most observers agree was counter to the provisions of the 1974 FRY constitution. As a result, after 1989 the FRY Criminal and Criminal Procedure Codes, the Criminal Code of the Republic of Serbia, the Serbian law on Courts, and the Constitution of the Republic of Serbia

became the only laws applicable in Kosovo. Serbian became the official legal language, and all legal proceedings were held and publications were issued in Serbian only.

During the NATO air campaign, Serbian forces imposed martial law in Kosovo. After the UN took over civil administration at the end of the conflict, this changed. On July 25, 1999, SRSG Bernard Kouchner issued UNMIK Regulation 1999/1, which provided in Section 3 that:

The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with the standards referred to in section 2 [“internationally recognized human rights standards”], the fulfillment of the mandate given to UNMIK under UN Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.

UNMIK understood Regulation 1999/1 to mean that the law to be applied in Kosovo during the period of UN administration would continue to be those provisions of FRY and Serbian laws that were in force in Kosovo prior to the beginning of the NATO air campaign, insofar as these laws were consistent with internationally recognized human rights standards.

While Regulation 1999/1 was intended to adopt the simplest possible approach to restoring clarity about applicable law in Kosovo, it generated widespread opposition from Kosovar leaders, including many of the judges appointed to the Emergency Judicial System. To many Kosovars, the FRY and Serbian criminal codes were “Serb law,” forced upon them after the elimination of Kosovar autonomy in 1989, and, as such, unacceptable for political and symbolic reasons.

A period of uncertainty and dissension followed in the wake of UNMIK Regulation 1999/1, as UNMIK sought to persuade Kosovar judges and other political leaders to abide by Regulation 1999/1 until a new interim criminal code could be drafted and approved. Some Kosovar judges reluctantly accepted Regulation 1999/1, while others were unwilling to abide by it, either refusing altogether to conduct judicial proceedings or doing so using the pre-1989 Kosovar Criminal Code. As a result of the confusion and dissension, few judicial proceedings got underway under the Emergency Judicial System, and in those proceedings that occurred, different laws were applied by different judges.

In the meantime, in an effort to resolve the near-paralysis in the judicial system caused by the debate over Regulation 1999/1’s provisions on applicable law, on December 12 UNMIK issued Regulations 1999/24 and 25. Regulation 1999/24 stated that the applicable law would be “the law in force in Kosovo on March 22, 1989” prior to the ending of Kosovo’s autonomy. Regulation 1999/24 went on the state that if a “Subject matter or situation is not covered” by the March 22, 1989 law “but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory ... the court... shall, as an exception, apply that law”. Finally, Regulation 1999/25, also issued on December 12, repealed the controversial section of Regulation 1999/1 related to the establishment of applicable law.

In August 1999, former Special Representative of the Secretary General (SRSG), Dr. Bernhard Kouchner established the Joint Advisory Council for Legislative Matters

(JAC) in an effort to involve both Kosovars and international experts in the law-making process. The JAC acts as a consultative body with Kosovar and international legal experts in co-ordination with the UNMIK Office of the Legal Adviser and provides advice to UNMIK on proposed draft UNMIK regulations, the needs for new legal measures, the identification of discriminatory laws that require suspension, and the drafting of new legislation. The JAC experts include representatives from UNMIK Legal Adviser's Office, OSCE, Council of Europe, and ABA/CEELI.

Formally, the JAC is meant to have one week to comment on draft regulations provided to it. In practice, JAC members often only have a few days, and a substantial proportion of draft regulations are never sent to the JAC for comment at all, on the basis that there is insufficient time or that the regulations are too sensitive.

In addition to the advisory services provided on legislative work in different areas of law, a major project undertaken by the JAC has been the preparation of a new Criminal Code and a new Code of Criminal Procedure for Kosovo following a request of the SRSG in September 1999. This work has been carried out with the assistance of leading international and Kosovar experts in all the areas considered. The two codes have now been finished, reviewed by the JAC, and presented to UNMIK. The development and introduction of a comprehensive, fair and modern European criminal law and criminal procedure law that promotes the rule of law and protects the human rights of all, will be a major achievement of the JAC and all the national and international experts who have been engaged in building and consolidating the judicial system of Kosovo.

### **III. JUDICIAL SYSTEM ISSUES**

#### **A. The Role of the Judicial Branch**

##### 1. Judicial Independence

Management of Kosovo's judiciary in the past twenty-two months has been characterized primarily by a re-establishment of an old, archaic socialist system combined with daily crisis management that has focused on the problems of today with little eye to the future. It is difficult to discern any strategy for justice in the work of the institutions that are in charge of the Kosovo court system. In particular, UNMIK has paid insufficient attention to the future Kosovo system of justice. The adoption of a Constitutional Framework for the next phase of the international administration of Kosovo and election of a Central Assembly on November 17, 2001, suggest strongly that it is time to plan for the future, with detailed written plans for a transition period and an exit strategy, keeping in mind the important principles that should be the foundation of any modern system of justice.

The Constitutional Framework that has allowed for the election of the Kosovo Assembly contains both improvements and serious concerns for the judiciary of Kosovo's future. It is clear that the "justice sector" will continue to be directly administered by the SRSG. With security concerns, such control is to be expected, but it should not be used in any way to compromise the future independence of the judiciary. The anticipated expansion of international judges and prosecutors is a serious threat to judicial independence in Kosovo, though again perhaps necessary at this stage.

The quasi-independent Kosovo Judicial and Prosecutorial Council (KJPC) – with eventual local control – could be an important transitional body to an independent



judiciary if it is permitted to play an important role not only in judicial discipline, but also in advising the SRSG on other aspects of the court system. It is essential that this body be linked in some respect to the Supreme Court, which should oversee the administrative body in a future independent judicial branch.

Kosovo's future judiciary should be independent in all respects. An independent judiciary that is free from political control has proven to be the best safeguard of the rights of all citizens, and the rule of law must be guarded in all respects. Institutionally, it is important that there be a judicial branch of government that is managed by the judiciary. Of course, there must be checks and balances such as appointment and removal power, budgetary control, and legislative enactment of laws. But structural independence is key to preventing political officials from controlling judicial decision making. We urge that the judiciary be given sufficient independence in Kosovo so that it can fulfill its important function as the arbiter of disputes and the safeguard of all citizens' rights. Included in that set of responsibilities should be the power of the judiciary to declare acts of the executive and the legislative branches to be unconstitutional.

A smooth transition to this new era is important. Kosovar judicial officials should be brought more into governance roles. As indicated, the KJPC can be a good vehicle for broader consultation on regulations that impact the judiciary. The Supreme Court should be prepared for a more extensive governance role. There is often confusion as to the effect of new rules in Kosovo, and broad consultation and power sharing will be an important part of sustaining democratic governance when international governance has ended. Each organization or governmental entity that is managed by internationals should therefore have a clear and understandable exit strategy in place. The date of exit is far less important than the fact that there is a transition under way that reflects a broader involvement of Kosovars in governance of Kosovo.

The strategy should also reflect a willingness to allow substantial judicial autonomy in a future Kosovo. There are independence warning flags in the new Constitutional Framework, and that should motivate all stakeholders to work harder to ensure future judicial independence. Unfortunately, UNMIK recently took a step backward by shifting court administration services to the planned Ministry of Public Services.<sup>2</sup> There, not only will court services be managed by the executive branch, but they will be only one of many issues competing for priority at a busy Ministry.

### ***1. Recommendation:***

*UNMIK should develop detailed written plans for a transition period and an exit strategy, keeping in mind the important principles that should be the foundation of any modern system of justice. Judicial independence should be a key goal of the transition, with the judicial branch becoming responsible for its own affairs. This should include the transfer of court administration to an administrative office of the courts, responsible to the KJPC or the Supreme Court. In addition, the judicial branch should have the authority to declare legislative and executive branch acts to be illegal and void.*

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<sup>2</sup> Regulation 2001/19.

## 2. Outdated Judicial Roles

Judges should be neutral arbiters of disputes, and nothing more. However, courts in Kosovo continue to be occupied with tasks that are historically based, but that are unwarranted in modern society and take time away from the main business of the courts – deciding cases. Three key examples are advice to citizens, authentication of signatures, and criminal investigation.

Some judges set aside as much as one day per week in order to give advice to citizens. This is clear conflict of interests, given that the citizen could easily end up in court before the same judge, or one of his or her colleagues. This role should be played exclusively by private attorneys or legal services organizations.

Courts (registrars) additionally have responsibility for authenticating signatures. This is an important function in Kosovo with so many new documents being created that are important to government. However, there seems little justification for courts to perform this role, and it may also create a conflict, in that a court is likely to end up deciding some cases in which its own personnel authenticated signatures. In other countries, this authenticating role is performed by a person who is trained and licensed to authenticate signatures on legal documents, generally an attorney or a notary public.

Kosovar judges act as criminal investigators in the initiation of a criminal case, supervising the collection of the evidence to be used against the defendant. This responsibility compromises the independence of the judiciary, and the perception by the public of the judiciary as fair and impartial. Many Kosovar judges recognize this problem and will be supportive of proposed change in the criminal procedure code that will eliminate this role and give investigative authority to prosecutors. In fact, some investigating judges are declining to come to the crime scene, instead authorizing the police to perform evidence collection duties, so these reforms are already informally occurring. One District Court President said it was very important to eliminate the outdated investigative judge role, calling it a remnant of the communist period in Kosovo.

The judges' role at the beginning of a criminal investigation should be to oversee to ensure fairness, but only resolve disputes and approve search warrants or wiretaps. It is the prosecutor who should carry the role of developing the investigation working together with the police. The need for such a change has been recognized, and incorporated into the draft Criminal Procedure Code, which will substantially reduce the role of the investigative judge.

### **2. Recommendation:**

*UNMIK should simplify and clarify the role of the courts. Court activities should be limited to deciding legal disputes properly brought before them, and to administrative work related to the court.*

*Judges should cease giving legal consultations to the public. Members of the public should turn to private advocates or legal aid offices and NGOs for serious legal consultations. The creation of functioning criminal and civil legal aid programs will allow indigent persons a path to legal assistance even in the absence of direct access to judges.*

*UNMIK should remove from courts the responsibility for authenticating signatures and other documents. One method would be to consider the creation of a notary profession, which would be composed of individuals*

*who have not taken the bar exam (but may have had legal training).  
Notaries could authenticate signatures, give advice on minor matters, and  
represent persons in civil cases of low value (as any citizen can do now).*

*UNMIK should press ahead with prompt adoption of the criminal procedure  
code, with its near abolition of the investigative judge, and transferal of the  
investigative power to prosecutors under supervision of the appropriate  
judge.*

### 3. Court Monitoring

In the First Judicial Assessment Report, the OSCE was cited for failing to establish an effective system for monitoring the actions of Kosovo's court system. Fortunately, that situation has changed. The OSCE has aggressively established a monitoring system that has been able to report accurately about concerns with how criminal cases are being handled in the District Courts. The OSCE's periodic reports are very useful indicators of serious problems within the court system that must be addressed. Court monitoring is a very effective tool to help Kosovo's judiciary improve its performance.

The largest problem now facing the Court Monitoring Project is that it is simply too small a program to cover Kosovo's courts. Court monitoring should be expanded. Currently, it is only monitoring the most serious of Kosovo's criminal cases. Those cases would obviously be the highest priority for any monitoring program, but much is happening in Kosovo's municipal and minor offenses courts that beyond the watchful eye of human rights monitoring. At current staffing of six monitors, it seems unlikely that the OSCE can even keep pace with the growing number of criminal cases in the district courts. The OSCE simply needs more qualified monitors or programs that provide monitoring assistance to the OSCE. The unit is not receiving seconded employees at this time, and there is a real need to expand this very helpful and necessary program. The Court Monitoring unit has played an important role in monitoring some of the work of international judges and prosecutors. Since there is no inspection unit watching these important participants in the judicial system, the OSCE is critical for such review. At times, the OSCE has faced serious cooperation problems with both ADJ and the judiciary. Access to court schedules, court files, times of schedule hearings, and courtrooms has not always been freely given. Any lack of cooperation with this important monitoring program is unacceptable. The level of cooperation has improved recently. ADJ and the OSCE should work together to ensure continued access. Kosovo needs much more, not less, court monitoring. The entire system needs improvement and it needs to eliminate many of the serious human rights concerns that keep repeating. This is a good program for Kosovo that could be much better with stronger support.

## **B. Administration of Courts**

### 1. Court Staffing & Caseload

Virtually all courts complain that they have insufficient staff (both judges and support staff) to handle their workload. To some extent, this is borne out by case statistics from FY 2000 and 2001 gathered by UNMIK. Yet the absolute number of cases, estimated to be 71,000 per year,<sup>3</sup> is not terribly high. This appears to be the result of two factors.

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<sup>3</sup> ADJ Statistical report for second quarter, 2001. This number is drawn from the quarter report of criminal, juvenile criminal, and civil cases in the municipal and district courts only. It does not include

First, it is not clear how many hours a day the court personnel are working. Official UNMIK hours are from 8:30 to 17:00.<sup>4</sup> However, actual working hours may be substantially shorter, from 9:30 to 15:00 or even less. Overall there is a lack of reliable information about the working hours of the courts. ADJ expects to soon adopt and implement a circular on "Attendance registers and monthly reporting procedures for staff employed under the Kosovo Consolidated Budget", and to increase the staff in its personnel office to allow greater oversight of staff.

### **3. Recommendation:**

*UNMIK should develop accurate information about the actual working hours of the courts and staff attendance. UNMIK should further develop an incentive and sanction structure to encourage full time attendance by all staff and establish appropriate working hours. The rate of caseload processing should then be examined in light of new information about whether courts are maximizing their efficiency.*

## 2. Judicial Salaries and Terms of Office

The team found that Judges in Kosovo continue to be dissatisfied with their salaries and those of their staff. However, judges recently received a raise, and new monthly salaries are as follows: The highest paid member of the judiciary, the President of the Supreme Court and the Chief Prosecutor are paid 1,230 DM, while other members of the Supreme Court and Kosovo Deputy Prosecutors receive 1,158 DM. District Court Presidents, District Chief Prosecutors, and the President High Court of Minor Offences receive 1,085 DM, while District Court judges, District Deputy Prosecutors, and High Court of Minor Offences judges receive 1,014 DM. Municipal Court Presidents and Municipal Chief Prosecutors receive 970 DM, while other Municipal Court judges and Municipal Deputy Prosecutors receive 870 DM. Municipal Minor Offence Court Presidents receive 822 DM. Municipal Minor Offence Court judges receive 714 DM. Court administrators are paid 420 DM, while court staff members receive less, in the range from 1,800 DM to 270 DM per month.

While these salaries may be low by international standards, they are comparable to those of neighboring countries, and are set at levels that UNMIK considers sustainable. In fact, judges receive higher salaries than any other Kosovar public servants with the exception of UNMIK Department co-Heads. However, judges correctly point out that UNMIK cleaning staff (those not paid from the Kosovo Consolidated Budget) may earn twice a top judge's salary. This income disparity is demoralizing to some members of the judiciary. (According to the Administrative Department of Justice, forty judges have quit for reason of low salary.) Yet while it is clear that the large international presence in Kosovo has skewed salary scales, there is no real evidence that judicial salaries are insufficient to sustain a reasonable standard of living. Furthermore, in its effort to develop a viable budget, Kosovo's Central Fiscal Authority (CFA) has opposed increasing judicial salaries.

In terms of tenure, judges in Kosovo are currently serving nine-month terms that expire on 31 December 2001. Previously, the judges were serving three-month terms, an

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other 'cases' usually reported, such as investigations, appeals against investigations, payment orders, land registers, execution of judgments, inheritance, non-contentious, or 'various' cases. It also does not include the minor offences courts or the Supreme Court.

<sup>4</sup> A departure from the traditional hours of 7:30 to 15:00.

outrageously short period that affected even the scheduling of cases. The plan after 31 December 2001 will be to provide the judges with indefinite terms until a new Kosovar legislative assembly can determine the length of terms.

In considering arguments that judicial salaries in Kosovo are too low and fuel corruption, it is important to note that in most countries, an able attorney can earn more than a judge. Arguably, other factors are more important to making judicial positions attractive, including job security, the prestige of the position, and a personal commitment to upholding the law.

International administrators in Kosovo are in the process of determining appropriate terms of office for the judiciary. On the one hand, shorter terms of office make sense given the time needed for judges to develop skills and experience during the period of transition from a centralized system of government in which influential party members determined judicial outcomes to one characterized by an independent judiciary. On the other, the sooner that lengthy appointments of qualified judges can be determined based on an objective set of criteria, the sooner judges will be able to act without being subject to undue or inappropriate influences.

#### **4. Recommendation:**

*Judges should be given lengthy terms of office. This would provide judges with job security, greater prestige and minimize exposure to political pressure. Selection for the bench should depend upon a competitive examination and successful completion of the professional training program now under development.*

### 3. Court Security

The Kosovo judiciary is fortunate that there has been no serious incident of injury to any judges or prosecutors. While security in the courthouses has improved slightly since February 2000, this is only because there is minimal security now and there was none at that time. The "Quick-Start package" provided by the Department of State provided each courthouse with walk-through metal detectors for the main entrance. Kosovo Police Service officials have been assigned to serve as courthouse guards during business hours. Policies on searching courthouse visitors, however, are inconsistent. Some courts are protected by guards who require all visitors to be monitored by the metal detectors. In other courts, visitors are not searched or even questioned when the alarm sounds. In some courts, visitors can easily bypass the metal detectors (as the team experienced first-hand). Although the team was told that courthouse security is improved during high-profile trials, security needs to be provided equitably for the simple reason that the most serious security breach can occur when it is least expected.

Courthouses have other serious security problems. Exterior doors remain open during business hours, easily permitting visitors to bypass the metal detectors and guards. During warm weather, many of the first floor windows are open.

In terms of personal security, a number of judges and prosecutors report receiving serious threats from members of their communities. In a system that faces challenges from organized crime and political violence, such threats are not surprising. In fact, one of the reasons why only a handful of minority judges and prosecutors have accepted the positions reserved for them is that the ethnic minorities fear for their security.

No judicial system can be independent without consistent and reliable security for court officials. A judges' extreme reluctance to even acknowledge these threats, much less report them to police officials, underscores the seriousness of the situation. Unless the security needs of judges and prosecutors as well as the general security in courthouses is addressed, important criminal justice goals will continue to be compromised.

**5. Recommendation:**

*Guards should be available to provide after-hours security to judges who are the recipients of threats, and judges' families need to be provided with close protection security when necessary.*

*Appropriate security should be offered to and provided for any ethnic minority who is willing to work in the Kosovar judiciary.*

*A judicial and prosecutorial police security service should be developed to provide courthouse security, judicial security, and prisoner transportation. The Police Academy is well suited to develop such a police-training course. If the courthouse security service is part of the police rather than responsible directly to the courts, it should be a special separate unit of the police.*

*Courthouses should be better secured. All visitors entering the courthouses must be checked by guards and metal detectors. Other exterior doors should remain locked. First floor windows need to be grated to prevent unauthorized entry. At least one security guard should be on duty at all times and all guards need to be professionally trained in courthouse and personal security methods.*

**4. Management Systems**

**a. Accounting, Budgeting, Personnel, Procurement and Case Tracking**

Virtually all court support services are performed and provided by the ADJ, the functional equivalent of a Justice Ministry within the Executive Branch. This means that individual courts do not have the capacity or authority to make most purchases, nor to hire staff.<sup>5</sup> While some courts say that ADJ services have improved of late, many courts remain unhappy with the services they receive.

UNMIK has begun to address the quality of court administration services, with a decentralization program, and a USAID-funded contractor working to develop improved court administration systems. However, the extent of ADJ control over judicial branch support seriously threatens the independent functioning of the judiciary. Furthermore, it remains unclear whether the new systems under development will be controlled by the judicial branch, rather than ADJ. As mentioned, UNMIK has further aggravated this problem by transferring court administration services to the new Ministry of Public Services. This change is a step *backwards* from ADJ management, and is a serious threat to judicial independence.

**6. Recommendation:**

*ADJ should plan to turn over management of court support services to an administrative office of the courts, under the supervision of the Supreme*

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<sup>5</sup> Court presidents are kept informed of the hiring process, and are invited to serve on hiring committees.

*Court or the Kosovo Judicial and Prosecutorial Council. The courts should submit a self-developed unitary budget to the Central Fiscal Authority. The executive or legislative branches of government would then have the authority to increase or decrease the overall amount of the budget, but not to make changes targeted to individual courts.*

#### b. Case Assignment

Court presidents assign cases according to a variety of systems in Kosovo. In some courts, assignment follows a set order: each case is assigned to the next judge in a sequence. In other courts, the president may consider the nature of the case and assign it to a judge with experience in the area. For any case, assignment is not strictly random, leaving room for bias on the part of Kosovar or international judges or prosecutors to intrude, or, equally important, for the appearance of bias. In addition, the courts are divided into civil and criminal chambers whose capacities are not fully utilized. In some courts, the chambers are separate – presidents will not assign a civil case to a criminal judge nor vice versa. In other courts, the presidents do take workload into account and may assign a civil case to a criminal judge if the civil judges are overloaded.

#### **7. Recommendation:**

*Cases should be assigned randomly. When automation of the courts is sufficiently advanced, special software may be used for this purpose. In the interim, the court presidents should make use of other random assignment systems. Presidents should make use of free capacity within one chamber when it is needed for the other, regardless of the nature of a particular case.*

#### c. Notice Delivery

Previously, the Civilian Police Force (CIVPOL) was responsible for delivering court notices and other documents. With the return of a functioning postal system, they no longer perform this function except in exceptional circumstances.<sup>6</sup> However, court staff have complained that they do not have sufficient funding for postage, do not have long-term contracts with the post office, and do not have sufficient staff or vehicles to deliver notices directly. As a result, documents are not delivered in a timely manner, creating scheduling and fairness concerns. The problem is complicated by recent changes in street names, and the movement or absence of large numbers of people. ADJ foresees a total of 159 messenger positions for courts and prosecutors in Kosovo, of which 125 are currently working. In addition, ADJ has now arranged a contract for direct postal service for courts and prosecutors.

#### **8. Recommendation:**

*ADJ should help the courts to resolve the issue of notice delivery, whether through messengers or through negotiation of post office contracts.*

#### 5. Assignment of International Judges and Prosecutors

Since February 2000, international judges and prosecutors have been appointed to sit in each of Kosovo's district courts, beginning with the Mitrovica District Court. International judges and prosecutors are essentially employees of the DJA, which can

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<sup>6</sup> They continue to deliver summonses.

assign and remove them at will. Currently, 12 international judges and 5 international prosecutors are working in Kosovo at the direction of DJA. Plans are now being discussed to increase international involvement in the judiciary through additional judges and prosecutors.

Although international judges and prosecutors are still needed in Kosovo, the presence of these officials is a direct affront to the independence of Kosovar judges and prosecutors. It also has the unintended effect of delaying the day when Kosovo's judicial system becomes competent and strong enough to take full responsibility for administration of the justice system. There is also a very real concern, expressed by judges interviewed, that the manner in which the international judges and prosecutors have approached their work in Kosovo has led to tensions and conflict with the local judges that could have been avoided through more careful and sensitive administration. Moreover, international intervention in court proceedings should be kept to an absolute minimum, using clear standards for appointment and case assignment, and using local judges and prosecutors as much as possible in the selected cases.

When the team raised the question of why international judges and prosecutors still necessary, the primary reason cited was that certain cases cannot possibly be handled fairly by Kosovar judges and prosecutors, given ongoing ethnic tensions and biases. These include cases in which ethnic minorities are criminal defendants, cases in which war crimes are alleged, cases involving KFOR, cases in which political violence is threatened, and cases in which organized crime figures are charged.

Nevertheless, the manner in which the international judge and prosecutor have intervened in these cases in some instances has been inappropriate. Unnecessary conflict has understandably developed, including a burning resentment among judges and prosecutors at the international "interference." A more careful system for recommending assignment of cases could help to prevent future tensions. Although the DJA does have informal criteria that it uses for recommending assignment, the criteria are not widely known. Moreover, if everyone understands the rules, there will be greater acceptance among Kosovar judges of internationals in the court system. Overall, the relationship between international and Kosovar judges must be formalized and standardized by regulation so that everyone knows what the rules are. Furthermore, international judges should be available for limited, specialized work, and should not be used for routine cases that can easily be handled by the Kosovar judiciary.

Significantly, the only district court in which there has been no apparent tension is in Gjilan, where the previous international judge simply took assignment of cases on a rotation like the other judges and, as a result, was accepted and worked well with his colleagues. Overall, while it is clear that the use of international judges and prosecutors is necessary during the current period of political transition, it must be recognized that international judges threaten the independence of the judiciary and in many respects pose an actual barrier to improving the system they are employed to help.

#### **9. Recommendation:**

*UNMIK should develop a detailed and specific regulation setting forth the standards under which international prosecutors and international judges will be assigned to a particular case, including a precise list of the categories in which such assignments by the SRSG would be warranted. At a minimum, the informal criteria used by the DJA for recommending assignments should be widely distributed and consistently followed.*



*International judges and prosecutors should comply equally with these criteria. DJA should recommend assignments either to the SRSG or to the PDSRSG in the new Pillar One. Changes of venue are appropriate in some instances, but decisions to change venue should also be made according to a prescribed set of standards.*

*International judges should be available only for limited, specialized work, and should never be used for routine cases that can easily be handled by the Kosovar judiciary.*

*International judges and prosecutors should be knowledgeable about the criminal law and Kosovar court procedures. UNMIK should develop an appropriate training and evaluation system for international judges and prosecutors with sufficient independence from DJA. Such a system could be overseen by an appointed international judge or the International Judicial Support System.*

*UNMIK should develop and implement transition plans to gradually phase out the use of international judges and prosecutors. Such plans should be developed together with Kosovar judges who must continue to assume more responsibility for the cases that the internationals are currently managing.*

*Since international judges and prosecutors are a barrier to the improvement of the system they are there to help, the assignment and coordination process should be administered in a much more sensitive fashion with attention given to building mutual respect instead of mutual resentment.*

## 6. Ethnic Minority Participation in the Judicial System

Despite the best intentions of UNMIK for the appointment of ethnic minorities as judges and prosecutors, few ethnic minorities are employed today by the Kosovar court system. The system is comprised almost entirely of Kosovar Albanians; only four Kosovar Serbs are working as judges within the system at this time.<sup>7</sup> There is also a small number of Kosovar Serb lawyers who represent primarily Serb defendants, and there are even greater numbers of Kosovar Serb members of the Kosovo Police Service. But the judiciary has been unable to recruit and employ Kosovar Serbs.

There are four primary reasons for this failure. First, Serbian authorities have interfered, using a variety of methods to prevent Kosovar Serbs from accepting appointments. Second, Kosovar Serbs fear for their security outside of the ethnic enclaves where they live. Guarantees of protection have been insufficient thus far to allay this fear. Third, there is some resistance from the Kosovar Albanian community to reaching out to employ Kosovar Serb judges, although in communities such as Kamenica interviews with municipal judges indicated a strong sense of professional camaraderie and commitment to a multi-ethnic bench. Fourth, no Kosovar Serbs are being trained in the

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<sup>7</sup> Minority participation includes:

Of 349 Judges and Prosecutors in Kosovo, 25 non-Albanians, of which:

4 Serb Kosovars - 3 Judges and 1 Prosecutor

5 Turk Kosovars- 2 Prosecutors and 3 Judges

11 Bosniak Kosovars - 10 Judges and 1 Prosecutor.

69 of the 349 are women (20%).

Serb participation includes: one typist in Kamenica, one municipal prosecutor in Gjilan and one minor offenses judge in Vushtrii.

law today at the University of Pristina Law School.<sup>8</sup> Moreover, although UNMIK has tried to find Kosovar Serbs willing to work in the judiciary and a number have been appointed as judges and prosecutors, relatively few have accepted these appointments. The improvement of general conditions for the work of judges and prosecutors such as salaries, security and others will encourage Serbian judges to join the Kosovo judicial system, but a more determined and innovative effort is needed to create a multiethnic, fair system of justice.

While it is difficult to pin down exactly what kind of pressure has been exerted by the Serbian government in Belgrade to discourage Kosovar Serb participation in the judiciary, the team found convincing evidence that such pressure is exercised systematically. In some instances, it takes the form of “pressure” not to cooperate originating from Belgrade, including orders to refuse to recognize the authority of UNMIK in Kosovo. In keeping with this policy, since the withdrawal of Serbian authorities from Kosovo in June 1999 Serbia has continued to “handle” Kosovar legal disputes from the courts in Serbia as well as in the Serbian enclaves in Kosovo. This is commonly known as the “parallel” system. Under this system, disputes or old cases arising within the jurisdiction of a Kosovar court are handled in an assigned court in Serbia and the courts in Serbian enclaves. In addition, there are “shadow” courts apparently operated in Serbian enclaves within Kosovo, in Zubin Potok, Leposavic, Gracanica, and Strpce. “Judges” and employees of these courts are said to be paid by the Serbian Ministry of Justice. Some Kosovar Serbs who were serving as judges and court employees in Kosovo during the 1990’s are apparently still serving, at least on paper, as judges and court employees and are said to be paid by Serbia. If Kosovars were on the register as being court employees on March 24, 1999, they retain an eligibility to receive salaries and pensions from Serbia, and are paid through the Serbian Ministry of Labor.

Overall it is clear that the Serbian government in Belgrade has been exerting influence on qualified Kosovar Serbs who might otherwise be willing to accept appointments as judges, prosecutors and court officials. This situation should be highlighted with the government in Belgrade to stop or minimize pressure and payments. While most of the Kosovar judges and prosecutors who worked in Kosovo in the 1990’s are now living in Serbia, there are qualified Kosovar Serbs in Kosovo who should continue to be encouraged to work in the Kosovo judicial system. The disbanding of the parallel system could also result in court equipment, files, and libraries being returned to Kosovo.

The Kosovar judges and prosecutors interviewed insist that they welcome Kosovar Serbs in the court system. These statements of support have been consistent throughout the months that the current system has been operating. Yet while there are examples in some areas of Albanian and Serb officials working together well, the hostility and ethnic bias that persists in these communities is equally obvious.

#### **10. Recommendation:**

*UNMIK or other international entities should work to establish cooperation with Serbia to eliminate the dual system that has limited Kosovo’s ability to establish a multiethnic judiciary. Diplomatic channels should be used to*

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<sup>8</sup> A parallel institution called “Pristina University” operates in Vranje, Serbia, and all Serbian students from Kosovo are studying there. A “Pristina University” also opened recently in North Mitrovica, but the nature of the courses and student body is still unclear.

*address the problem of financial incentives or disincentives provided by Belgrade authorities that undermine minority participation in the Kosovo justice system. A formal request should be for Serbia made not to withhold pensions from judges who join the formal judicial system in Kosovo, and not to finance a separate system of salaries.*

*The new Kosovo Judicial Council should ensure that Codes of Ethical Conduct for judges and prosecutors address ethnic discrimination in any form as an ethical violation punishable by removal from office, and the Kosovo Judicial Institute should include ethnic sensitivity training in its training on ethical issues. The OSCE should develop similar training for all court personnel.*

## 7. Judicial and Prosecutorial Discipline

Many judges and prosecutors are performing their tasks well, but others have poor skills, and little or no training. Together with inadequate facilities and antiquated laws, these problems have resulted in poor performance and inappropriate actions that require investigation and resolution.

UNMIK has established two bodies to help resolve these issues: the Kosovo Judicial and Prosecutorial Council (KJPC) and the Judicial Inspection Unit (JIU). The KJPC is charged with making recommendation to the SRSG on selection, removal, and discipline of prosecutors and judges. While its makeup is not specified in relevant regulations, it is currently composed of five internationals and four Kosovars appointed by the SRSG. The KJPC may investigate disciplinary matters directly, may request that the JIU investigate, or may accept information from the JIU.

While the KJPC is a relatively independent body, the JIU is an agency of the ADJ charged with investigation of disciplinary matters and with making recommendations on improvements in training or practice. The JIU may initiate investigations of its own accord, or at the request of the KJPC.<sup>9</sup> The JIU has three international and one local investigator, and funding for additional local investigators is pending. The KJPC can conduct disciplinary hearings, which allow important due process rights, including the right to counsel and a hearing for accused judges and prosecutors. While the KJPC can recommend disciplinary measures, the SRSG has final authority for all decisions on discipline and removal.

The KJPC has prepared draft Codes of Conduct for judges, lay judges, and prosecutors. While the codes have been long in development, opportunity for public comment was limited to two weeks. The newly established Judges' Association organized a roundtable and provided comment along with other organizations, but more time would have been beneficial to vet and refine such important documents. At present, no official disciplinary code or inspection process exists for international judges and prosecutors. The SRSG has not yet approved the final Codes.

The creation of the KJPC and development of the Codes are major steps forward in the transition to competent Kosovo judicial and prosecutorial services. Judges and prosecutors need not fear a disciplinary process so long as it is fair, understandable, and

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<sup>9</sup> As of May 2001, 26 complaints had been accepted for review, 7 investigations were complete, and discipline was recommended in 5 cases.

extends due process without interfering in rulings: if a decision in a case is incorrect, that problem can and should be easily corrected by an appeal.

Overall, an independent judiciary needs absolute assurance that it has decisional independence. However, both the lack of clear procedures and criteria governing the actions of the KJPC, and the creation of the JIU call this independence into question. Furthermore, contrary to international standards such as the "European Charter on the Statute for Judges", the KJPC is not required to be composed of a majority of judges, leaving open the possibility of an appearance of improper influence. More importantly, the JIU is an executive branch agency charged with making recommendations on discipline of the judicial branch - a process with great potential to undermine judicial independence, especially given the almost complete dependence of Kosovar judges on the ADJ in other matters.

### ***11. Recommendation:***

*UNMIK should ensure that its mechanisms for prosecutorial and (especially) judicial discipline comply with international standards such as the UN Basic Principles on independence of the judiciary, the European Charter on the status of judges, Recommendation R (94) 12 of the Council of Europe Committee of Ministers to member states "on the independence, efficiency and role of judges," and the Consultative Council of European Judges' "Framework Global Action Plan For Judges In Europe."*

*The DJA's International Judicial Support Section should develop, adopt and implement disciplinary standards and processes for international judges. Rather than DJA, an international judge and a prosecutor selected by the SRSJ should be appointed to supervise the international judges and prosecutors respectively.*

### **8. Cases Prior to March 1999**

Some courts have a substantial backlog of cases from before the beginning of UNMIK's presence in Kosovo. The courts have dealt with this problem in different ways, depending on their individual circumstances and on the decisions of the court president. In many cases, the relevant files are missing, thought to have been taken by Serbs during the conflict.<sup>10</sup> In other cases, files are held in buildings occupied by international organizations, but are not accessible to the courts. Inaccessible files are a particular problem in criminal cases, since some civil cases can be reconstructed from documents maintained by the parties.

The team found that most courts have either ignored these past cases (if files are inaccessible), or have re-activated cases only on the request of a party. Although applicable law specifies that most inactive cases expire after a period of years, there is an extension in extraordinary circumstances. While the conflict clearly qualifies as an extraordinary circumstance, the duration of the consequent extension is not clear. Those courts that have old files have substantial but disorganized archives. However, the courts do not have an effective policy for determining when they must keep and when they may destroy old documents. Courts therefore face a daunting task of organizing and storing a very large number of old documents. This is especially problematic for the large number of courts operating in cramped or otherwise inadequate facilities. Some

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<sup>10</sup> It may be that these files are held by the "parallel system" of Serbian courts covering Kosovo.

archival spaces have large piles of disorganized files simply piled on the floor, sometimes in damp or even wet conditions. Document retrieval is made difficult in part by the sheer number of files that must be maintained.

### **12. Recommendation:**

*The Supreme Court of Kosovo should issue an interpretation of the law on file retention, defining the dates of the extraordinary circumstances of the conflict and the consequent cutoff dates for activation. Alternatively, given the nature of the circumstances, those courts with access to files should conduct public information campaigns alerting the public to the opportunity to pursue old cases, and giving a brief description of the procedure for doing so. The notice should alert parties that they may reactivate a case if they contact the court within 30 days. Any cases not reactivated within this period should be closed permanently. The notice alternative may require substantial additional funding, and budget or donor support should be confirmed before the process is begun. Adoption of this recommendation would clarify the question of how to deal with old cases, and could substantially reduce the number of cases pending before the courts.*

*The ADJ should also draft a regulation describing document retention timelines for courts.*

## **C. The Administrative Department of Justice and the Department of Judicial Affairs**

### 1. Focus and Strategy

The ADJ and DJA are frequently criticized for having no clear focus or strategy for transferring their authority to Kosovar individuals and organizations in the future. Kosovo's many crises, and the enormous task of transforming an archaic justice system have certainly contributed to this lack of direction. Nevertheless, it is critical for ADJ and DJA to develop an overall strategy for the justice system. This plan must provide goals and timetables for the development of the judiciary and an exit strategy that includes measurable benchmarks for a gradual transition to Kosovar control. Crisis management is important, but a clearly communicated strategy for the future will be of enormous benefit to the future of justice in Kosovo. (See Recommendation 1)

### 2. UNMIK Immunity

Legal immunity has been extended by regulation to staff of UNMIK, the OSCE, and international Civilian Police who are working in Kosovo. While this protection is warranted due to the special role played by international staff in Kosovo, both Kosovar and international judges are confused about the reach of the immunity granted. For example, several judges interviewed noted to the team that international staff fail to appear in court when summoned.

### **13. Recommendation:**

*UNMIK should instruct its staff to respond to court demands and should take disciplinary action if they do not. International immunity should not be compromised, but Kosovar judges should decide whether or not it applies a particular case based on applicable law and regulations.*

### 3. Interference with Courts

Several courts noted that judges had been told not to enforce the new license plate regulation against Kosovar Serbs because the Serbs do not want to display the UNMIK plates. UNMIK plates are apparently not recognized in Serbia and some of the enclaves have been issuing their own license plates. Regardless of the merits of the situation, it is never a good idea for international authorities to directly contact the courts seeking selective dismissal of criminal cases. Instead, the larger problem should be solved by working with Serbia to permit UNMIK-issued plates to be recognized and to stop separate plates from being used by Serbs in Kosovo.

Some judges also expressed the opinion that KFOR is trying to force them to issue drivers licenses in cases in which the court claims that individuals are falsifying records. KFOR should not be intervening in such cases, and second, the courts should not be the agency issuing drivers licenses, if that is indeed the case. That is a role for municipal administrators, not the courts.

#### **14. Recommendation:**

*KFOR should not intervene in individual cases.*

### 4. Court-Appointed Counsel Caps

Currently, UNMIK places an upper limit of 500 DM per month payments to court-appointed defense lawyers. Such a cap does not encourage thorough, effective representation on the part of defense attorneys. The cap is in place because UNMIK does not want to pay defense lawyers more than it pays the judges. While it is important to pay judges well, it is also important to ensure that defendants receive vigorous, effective legal counsel.

#### **15. Recommendation:**

*Especially in light of recent raises in judicial salaries, UNMIK should not place limits on total monthly payments to court-appointed defense lawyers. Limits should be placed only on the number of cases that defense counsel can handle at one time.*

### 5. Expert Testimony in Criminal Cases

Kosovo's judges rely heavily on court-appointed experts to provide testimony in criminal cases. For a significant period of time, UNMIK only authorized payment of 3 DM per hour for the work of these experts. At that price, many experts refused to work. Although the price has recently been raised to 10 DM per hour for some experts,<sup>11</sup> they continue to balk at working for that price. Although the courts have been able generally to attain expert testimony, there have been long delays as judges work to persuade experts to assist the court. ADJ recently took the first step to address this problem by compiling a list of experts willing to work for the official rates.

#### **16. Recommendation:**

*KJI and others involved in judicial training should work with judges to reduce their reliance on court-appointed experts. UNMIK should work with the judiciary to set a fee schedule that varies the rate for expert witness*

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<sup>11</sup> Those with a university degree and a specialization in their area of expertise. All others continue to earn 3 DM/hour.

*according to the expertise in order to take into account supply and demand factors affecting the cost.*

## **D. Criminal Law Issues**

### 1. Political Violence and Extrajudicial Detention

Armed groups of ethnic Albanians operating outside of Kosovo have engaged in military combat and guerilla warfare in the Presevo Valley in Serbia as well as in the Tetevo Region of the Former Republic of Macedonia (FYROM). Commencing in late 2000, the Liberation Army of Presevo, Medveda, and Bujanovac (UCPMB) along with several splinter groups engaged Serbian police forces in the Ground Safety Zone (GSZ) in southern Serbia. The purported goal of the UCPMB is to seize the Presevo Valley and annex it to Kosovo.

During the same time frame, ethnic Albanians have been engaged in combat with FYROM police and military forces in the Tetevo Region of FYROM. These groups are attempting to force changes in FYROM polices that affect Macedonian Albanians. These groups receive logistical and financial support from former KLA members as well as from organized crime groups operating in Kosovo.

In November of 2000, U.S. KFOR began apprehending suspected members of the UCPMB in the Gjilan region of Kosovo. However, U.S. KFOR arrest criteria require the soldier to establish the suspect is actively supporting violence, or actually engaged in violence. In practice, arresting soldiers look for armed individuals, military uniforms, camouflage paint and presence near the GSZ with no legitimate reason.

Initially, U.S. KFOR presented arrested persons to the Gjilan District Court for prosecution under the applicable laws in Kosovo. However, U.S. KFOR lost confidence in the Kosovo judicial system to adjudicate these matters impartially after several adverse court decisions to release individuals who were obviously involved in the fighting in the Presevo valley. KFOR then began to exercise its authority under United Nation Security Council Resolution (UNSCR) 1244 to detain individuals, without judicial order, who pose a threat to the safety and security in Kosovo. U.S. KFOR constructed a secure detention facility on Camp Bondsteel with a capacity of approximately 132 male detainees. This facility is considered the most secure detention center in Kosovo. (In the past, UNMIK has also used the Camp Bondsteel detention center to house high-risk detainees and sentenced prisoners.)

As of April 2001, the Camp Bondsteel detention center had 107 male detainees, both adult and juvenile, nine of whom had been presented to the Kosovo judicial system and ordered released. In an effort to avoid countermanding the orders of the UNMIK court, U.S. KFOR does not present detainees to the UNMIK judicial system unless it is willing to comply with the court's order. It is worth noting that U.S. KFOR has planned to increase the capacity at the Camp Bondsteel detention center to 198 in the near future.

U.S. KFOR has adopted limited procedural safeguards for the detainees. Within 72 hours of the detainees arrest, U.S. KFOR transports the detainee to the detention facility at Camp Bondsteel; Intelligence Officers debrief the detainee to determine the threat to KFOR; the Legal Affairs officer prepares a staff packet which contains the circumstance of capture, threat to security, description of detainees violent acts or support of violent acts; the Provost Officer then reviews packet; next the Chief of Staff to Commander

U.S. KFOR reviews the packet and makes a recommendation to Commander KFOR. Lastly, the Commander KFOR determines whether the detainee is to be released or held for a maximum of 30 days. Every 30 days, the approval process from the Provost Officer to the Commander KFOR is repeated.

In late March 2001, German KFOR captured approximately 100 ethnic Albanians in the Prizren region, who were suspected of fighting in the Tetevo Region of FYROM. German KFOR detained them for approximately 72 hours, released 56 and turned 44 over to UNMIK for prosecution. An international investigating judge ordered their detention for 30 days for further investigation. UNMIK has sent 22 of them to Dubrava and is detaining 22 at the detention center in Prizren. On May 10, 2001, a majority international panel of the Supreme Court reversed the investigating judge and ordered all of the detainees released because the international judge failed to interview the suspects individually prior to ordering them detained and the international judge failed to issue an order commencing the investigation, both violations of applicable law.

On June 14, 2001, UNMIK enacted Regulation 2001/12 On the Prohibition of Terrorism and Related Offences. This regulation prohibits the use of violence to coerce a government or international organization or to endanger or intimidate a defined civilian population. On August 25, UNMIK adopted Regulation 2001/18 On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders. The new regulation allows a commission appointed by the SRSG to invalidate detention orders in certain circumstances. There is no appeal from the Commission's decision.

***17. Recommendation:***

*UNMIK should engage KFOR on the issue of extrajudicial detention to develop a plan to move their detention, adjudication and incarceration functions to UNMIK as soon as it is practicable. UNMIK should assign Regulation 2001/12 (terrorism) cases to international judges and prosecutors*

**2. Organized Crime**

Anecdotal evidence indicates the existence of numerous criminal, para-military, and extremist political organizations that are engaged in trafficking arms, women, drugs, and stolen cars, as well as kidnapping and extortion. Although Kosovo experienced organized criminal activity before the armed conflict in 1999, the current problem has been linked in some cases to former KLA fighters and existing political parties. A direct consequence of this link is efforts to bribe or intimidate local judges and prosecutors to prevent interference with organized criminal activity. Currently, Kosovo lacks sufficient criminal intelligence capability to produce hard data on the scope of this problem. The dearth of data is exacerbated by the reluctance of victims, local judges and local prosecutors to report organized crime problems for fear of retaliation.

Despite these threats, some local and international judges and prosecutors interviewed in the field reported to the team that they are unable to effectively handle serious cases that involve former KLA, current Kosovo Protection Corps (a.k.a. TMK) and others closely associated with certain political parties because prosecution of these individuals in many cases leads to threats directed at judges and prosecutors and their families. Unlike international judges and prosecutors, local judges and prosecutors do not receive any additional security other than those measures present at the courthouses where they



work. Victims and witnesses are hesitant to come forward and report criminal conduct for many of the same reasons - threats, intimidation, and a lack of protective services. The resulting lack of cooperation from the community creates an obstacle to police trying to investigate organized crime. This is particularly problematic since the investigating police lack alternatives such as electronic surveillance, undercover operations and the use of paid informants. UNMIK has addressed these lacks in part through the adoption of a new organized crime regulation.<sup>12</sup> Finally, the prison facilities in Kosovo are currently inadequate to handle major criminal figures. The top security prison in Kosovo, Dubrava, in Istok, would need additional renovation to provide adequate security.

**18. Recommendation:**

*UNMIK should adopt regulations permitting investigators to use judicially approved electronic surveillance.*

**3. Penal System**

Judges and prosecutors interviewed by the team indicated that detention space does not affect their ability to detain or sentence individuals to prison. When asked, they had not seen the issue of prison capacity as an impediment, nor did any of the judges respond that they had any cases in which the accused was sentenced to confinement but was unable to find a place.

The one voice that assertively points out penal system deficiencies is UNMIK's Penal Management office. According to Penal Management, the prisons in Kosovo have been neglected and continue to remain low on UNMIK's priority list. It was noted that the limited funding available to reconstruct Kosovar infrastructure has been focused on more politically appetizing institutions such as courts, schools, and hospitals that have received the lions share of the attention.

According to this office, continuing to neglect prison capacity and detention facilities could have a devastating effect on the justice system, and in turn on the rest of society. Detention facilities throughout Kosovo are reaching capacity. If the current rate of imprisonment continues, detention facilities will become overcrowded in the near future. Already, the current correctional facilities in Kosovo are inadequate to handle major criminal figures. Renovations are necessary to create a secure environment that will not permit the escape of high profile prisoners. To compound these matters, the international community along with local judges and prosecutors are working together to make the criminal justice system more effective and efficient. This could translate into more prisoners.

At a cost of approximately \$5 million (USD), recently pledged by the European Agency for Reconstruction, Penal Management can construct a "Quick Build Prison" in Lipjan that can accommodate 200 pre-trial detainees at all security levels. This facility would be near the Lipjan prison that currently incarcerates female and juvenile prisoners, and mental patients under civil commitment. Lipjan is approximately 20 minutes South of Pristina and near Gjilan, a smaller urban center. The current plan is to construct a modular facility that could incarcerate 200 pre-trial detainees, sentenced prisoners, Albanians, Serbs, and Category A prisoners. Penal Management estimates they will need approximately 60 trained international correctional staff to run the facility. The

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<sup>12</sup> Regulation 2001/22.

facility would be manufactured in Europe, shipped to Kosovo in pieces and erected in five months.

The Penal Management Office further noted the unique challenge posed by women and children in Kosovo's prisons. Many women sentenced to prison are sole care providers for their infants. Currently, the Lipjan Prison is not capable of properly dealing with infant children. Separating the mother and child requires orphanages when children would be best placed with their mothers. A suggested solution would be the development of "Mother and Baby" units. These units would allow mothers in prison to properly raise their children and not create undue burdens on society and the child by placing them in orphanages.

With regard to juvenile offenders, Lipjan facility is supposed to house juveniles. However, due to a lack of security measures, Lipjan management has refused to accept older juveniles sentenced to juvenile prison, and for the time being they are housed in Dubrava or in Mitrovica prison, together with adults, though held in separate cells. According to the applicable law on the execution of criminal sanctions, reinforced by the international human rights standards, juvenile offenders should be housed in a separate facilities established to serve the purpose of the rehabilitation and education of juveniles in conflict with the law, aiming at their reintegration into society and decrease of the scale of recidivism.

Still another challenge to the prisons system is mentally ill and developmentally disabled prisoners. Currently, there are 8 cases of mentally ill prisoners. These individuals require more staff and funds to properly maintain them in custody. Proper attention to these cases must also be addressed.

In an effort to find appropriate sentences and alleviate some of the strain on the prisons, Penal Management is also working to promote alternative forms of sentencing. In certain cases, alternative forms of sentencing can play an important role. Prison may not be the most practical or desired form of punishment or best corrective measure in every case. Examples of alternative forms of sentencing include community service, training courses, and help groups. These options could be a tremendous alternative to unnecessarily using valuable prison space, while at the same time improving the community and rehabilitating individuals convicted of crimes. Penal Management is actively searching for social workers to help in prisons and in alternative forms of sentencing. Social workers play an important role in helping to create a positive environment and rehabilitate individuals serving their sentences.

Penal Management has a long-term goal of turning its responsibilities over to the local community. Currently, Penal Management oversees a staff of 700 to take care of 600 inmates. In an effort to turn these responsibilities over, Penal Management is training local staff to take on roles of penal management.

***19. Recommendation:***

*UNMIK should provide international correctional officers to staff the Quick Build Prison in Lipjan and assist in the training of local correctional officers. In addition, UNMIK should repair and renovate aging and inadequate detention facilities and Dubrava Prison. Finally, UNMIK should provide adequate facilities for juvenile mentally ill persons in accordance with international standards.*

#### 4. Law Enforcement

The mandate of the UNMIK police is to maintain civil law and order in Kosovo through the deployment of international law enforcement personnel. This includes the establishment and capacity building of local Kosovo police force. UNMIK has made considerable progress in these areas with the establishment of 44 police stations, the deployment of approximately 5,000 international police and 3,800 local police, the deployment of special police investigation units and the assumption of primary responsibility for law enforcement in 3 of the 5 regions (in Pec and Mitrovica, KFOR maintains primary responsibility for law enforcement).

However, during the assessment mission the team learned from prosecutors and judges that much improvement is needed. While incoming international police do receive training at the CIVPOL Induction and Training Center, they are generally not properly trained on the applicable law in Kosovo, and therefore hinder the prosecution of cases. UNMIK plans to address this through additional seminars on certain aspects of criminal law.

UNMIK police officers also fail to meet their responsibility to translate all police reports and records into Albanian and Serbian. They also reportedly fail to bring arrested persons before an investigating judge in 72 hours, which is both a violation of applicable law and of human rights standards. Judges further report that police have an inconsistent record in delivering summons for witnesses, an essential requirement of a functioning judicial system. Although the assessment team found that in some regions the police commanders and leaders of the court meet regularly to resolve these issues, the police cooperate with the local court leadership in all regions. The most troubling problem is failure of the police to investigate and solve serious crimes.

##### **20. Recommendation:**

*UNMIK should improve the training of incoming international police officers on the applicable law. It should also enforce the rule requiring prompt translation of reports as well as the rules of criminal procedure.*

#### 5. War Crimes

With the arrest of Slobodan Milosevic and the ongoing search for war criminals throughout the Former Republic of Yugoslavia, Kosovo continues to draw international attention. The forum for these trials has been a point of debate. In addition to the war crimes that Slobodan Milosevic and others around him have been accused of, the conflict in Kosovo left behind a large number of cases that could be classified as war crimes involving lesser known actors. The International Criminal Tribunal for Yugoslavia maintains jurisdiction over the Former Yugoslavia (ICTY), including the province of Kosovo. However, its focus continues to be largely on the political and military leadership and on those individuals accused of the most serious crimes. As a result, ICTY's limited scope, the domestic judicial system in Kosovo is now faced with the challenge of addressing the multitude of war crimes not currently contemplated by ICTY. How to best pursue this challenge remains a topic of intense debate, both locally and internationally.

##### **21. Recommendation:**

*The International community should assist with the investigation and prosecution of war crimes by providing targeted training to judges,*

*prosecutors and defense counsel and by providing trained investigators and forensic expertise. UNMIK should assign these cases to international judges and prosecutors only until the capacity of the Kosovar judicial system is improved. Finally, the international human rights community should continue to monitor and report on these cases.*

## **E. Civil Law Issues**

Approximately fifty percent of cases in Kosovo in 2001 were civil cases. In the future, the number of cases relating to commercial law should rise as UNMIK issues regulations on bankruptcy, business registration, collateral, mortgage, and other issues.

Surprisingly, given the novelty of some of the new regulations for Kosovars, judges and advocates expressed confidence of their ability (and that of their peers) to handle most areas of civil law, including commercial law. Given timely, well-designed training in interpretation of the new laws, this confidence and ability should continue.

### 1. Business Registration

While business registration under the new commercial law framework is planned as an essentially administrative procedure, it has traditionally been a function of the courts in Kosovo. UNMIK originally planned to follow tradition in setting up a new business registration procedure under the (minimal) supervision of the Commercial Court, but Regulation 2001/19 "On the Executive Branch", gave responsibility for business registration to the Ministry of Trade and Industry

#### **22. Recommendation:**

*Business registration should remain with the Ministry of Trade and Industry.*

### 2. Dinar Conversion Rates

Many applicable laws include old Dinar limits defining both jurisdictional limits and court fees and fines. There is no clear method for converting these rates into DeutschMarks. The result is an inability to use some extraordinary legal remedies, and uncertainty about which courts have jurisdiction over which issues. Because of the jurisdictional confusion, District courts have been handling most cases of this nature. ADJ has attempted to revise all of the laws on a case by case basis, noting that a single exchange rate cannot be set, since the laws were all adopted at different times. Administrative Direction 2001/10 resolved this issue for many of the old fees.

#### **23. Recommendation:**

*UNMIK should immediately adopt a decision or administrative direction describing how remaining Dinar fees are to be converted to DeutschMarks. This would clarify jurisdictional limits for court fees and fines.*

### 3. Execution of Judgments

Some judges cited interference by CIVPOL in the execution of civil judgments. This appeared to relate particularly to property issues. Courts noted that most other problems with CIVPOL had lessened, but that CIVPOL officers generally had little knowledge of the applicable law.

**24. Recommendation:**

*UNMIK should develop focused training for civilian police on applicable law related to execution of judgments.*

4. Property

Currently, by some estimates there are between 60,000 and 100,000 property settlement claims active. The Housing and Property Directorate (HPD) is responsible for property disputes related to the period from March 23, 1989 to October 13, 1999. All other disputes are to be decided by the courts. While many courts are fully aware of these jurisdictional boundaries, some expressed confusion. Regardless of the body responsible, few (about a dozen) cases have in fact been resolved. These are without doubt extremely complex questions, yet neither UNMIK nor the courts appear to have made any progress in resolving them. UNMIK has issued a detailed regulation on this matter,<sup>13</sup> but it appears that more is needed. Property issues that remain unresolved will cause people to lose faith in the legal system, and could eventually lead to criminal violations if persons begin to take matters into their own hands.

**25. Recommendation:**

*KJI should include property issues as one element of training for judges, to make sure that all judges understand which cases they should be handling, and which should be handled by HPD. HPD should begin to make final determinations on the large number of outstanding cases.*

5. Inheritance

The applicable law on inheritance in Kosovo is gender neutral. However, for traditional reasons, title to property is often registered in the name of a man. One consequence of this is that when a woman is widowed, she may have no property in her own name. When a relative dies, a woman may not feel able to come forward to claim a share of the inheritance, unless it is for the benefit of her children. Also, a court cannot begin an inheritance determination until it receives a death certificate from the municipality. Some municipalities are failing to produce or deliver this certificate.

**26. Recommendation:**

*ADJ should adopt a procedure for inheritance under which all major heirs (e.g., spouse and all children) are called to court. This would encourage women to claim property in their own names, rather than allowing it to be claimed by their male relatives. In addition, UNMIK should require all municipalities to send a death certificate to court within a certain timeframe, or allow heirs to bring a suit requiring that the municipality do so. This would allow final, formal disposition of property.*

**F. Legislative Drafting**

One of the most significant problems plaguing the judicial system in Kosovo is the continued reliance on archaic laws and procedures that date from the period of socialist rule in Yugoslavia. Apart from SRSG regulations and international conventions,

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<sup>13</sup> Regulation 2000/60.

socialist law is all that exists. Kosovo has also lacked effective law-making institutions and procedures. This has severely affected the administration of justice.

The first Judicial Assessment Mission Report urged the rapid completion of the newly-drafted criminal code and criminal procedure code, both essential to an effective criminal justice system. The two codes have now been finished, reviewed by the JAC, and presented to UNMIK.

### 1. Process

Legislative drafting is most effective when it is an inclusive process, taking into account the views of all stakeholders. Some form of public participation is essential to this process, which may include several phases ranging from stakeholder input on initial drafts to general public input on near-final ones. Giving the public an opportunity to participate in drafting results in better final regulations, because all viewpoints are considered, and potential pitfalls or obstacles to implementation are discovered early on. In addition, participants have substantially greater “ownership” of such laws, and so will not only be more likely to comply themselves, but will be more likely to police others.

In contrast, most legislative drafting in Kosovo is done by individual UNMIK departments, with review and final approval by the office of the SRSG and the UN in New York. A Joint Advisory Committee on Legislative Matters (JAC) composed of Kosovars and internationals reviews some final draft regulations, and does some original drafting. However, many important regulations are not presented to the JAC for reasons of political sensitivity<sup>14</sup> and timing. Often the JAC is not even aware of laws that are being drafted until they are presented to the JAC, with a few days allowed for comment.

While the JAC was originally envisioned to have concurrent working groups on different areas of law,<sup>15</sup> as a practical matter, it has focused its attention on one or two issues. For example, the JAC has completed new Criminal and Criminal Procedure Codes, and is at work on a Juvenile Code. This work has consumed the attention of the JAC to the exclusion of needed civil laws. There is no list of prioritized laws needing attention, nor any schedule of future activities.

With the election of the Kosovo Assembly, virtually all-legislative drafting should now be handled by the Assembly or the Government. UNMIK's Pillar 4 has recently attempted to offer guidance to the Assembly in prioritizing needed commercial laws.

#### **27. Recommendation:**

*A non-partisan Legislative Drafting Office (perhaps a transformed JAC) should be created in the Assembly or Prime Minister's office, and given enough resources to operate effectively.*

### 2. Access to Law

One of the fundamental principles of the rule of law is that all laws must be accessible to the people subject to them in order to be valid. Nearly all judges and prosecutors interviewed had access to applicable laws, the Official Gazette, and the Index of

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<sup>14</sup> Note: politically sensitive regulations are precisely those in most need of local comment.

<sup>15</sup> Working groups were created for criminal law, commercial law, property and housing, administrative law and local administration, and civil law and related matters.

Applicable Laws issued by ABA/CEELI's Secretariat, which provides translation and distribution services,<sup>16</sup> office space, and secretarial support to the JAC. The Secretariat also produces a regular tri-lingual Index of regulations and administrative directions. Most judges and prosecutors and some advocates indicated that they had and used a copy of the Index.

According to Regulation 1999/1, "UNMIK regulations shall be issued in Albanian, Serbian, and English. The regulations shall be published in a manner that ensures their wide dissemination by public announcement and publication." Distribution of the full text of regulations and administrative directions is performed by the Department of Public Services (DPS) in the form of the Official Gazette. While DPS is required to issue official translations in English, Albanian, and Serbian, it does not have a fully staffed translation office with staff trained in legal terminology. As a result, the Official Gazette is regularly issued several months late. Nonetheless, most judges and prosecutors, and some advocates, indicated that they have the most recent publications of the Official Gazette, or can purchase it at post offices.

New regulations and administrative directions are meant to be distributed to judges and prosecutors by ADJ; however, compliance has been spotty. Overall, legal professionals' report having good access to the text of most applicable laws, but access to translated regulations and administrative directions is significantly delayed.

**28. Recommendation:**

*UNMIK should create an Office of Translation, fully staffed with skilled professional translators. The priority and main duty of the office should be to provide official translations of UNMIK regulations and administrative directions, for distribution and publication in the Official Gazette. The objective should be to release copies of the Official Gazette as soon as possible after adoption of new regulations and administrative directives.*

**3. Public Participation**

Public participation in the drafting of regulations and administrative directions is generally limited to the activities of the JAC, the group of experts appointed by UNMIK. There is no other formal mechanism for public participation in government decision making at the provincial level, and no firm requirement at the municipal level. The Constitutional Framework for Kosovo contemplates a legislative power in both a provincial assembly and the SRSG. It is not clear what role, if any, the JAC will play in the new structure, or how the public will be able to participate in drafting.

**29. Recommendation:**

*UNMIK should develop a public participation mechanism that allows for publication of summaries or text of draft regulations and administrative directions, opportunity for meaningful public comment, and genuine consideration of submitted comments. Concurrent with this, it would be valuable to adopt a regulation allowing public access to most government held information. Adoption of this recommendation would lead to better-drafted regulations, greater public acceptance, and better compliance with the law.*

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<sup>16</sup> For draft regulations, administrative directions, and other documents

#### 4. Effective dates

In part because of the lack of public participation, the public has little notice of pending regulations, and little ability to prepare for their impact. This is compounded by the fact that regulations generally take effect directly on signature by the SRSG. As noted above, regulations are not available in translation until a considerable time after signature, leading to a long period when neither the general public nor the judges know what the law is.

#### **30. Recommendation:**

*UNMIK should provide that non-emergency regulations and administrative directions take effect only after publication in the Official Gazette, thus allowing the public an opportunity to know and understand the applicable law before it applies. Any use of the exception for emergencies should be fully explained through an official public statement, and the explanation and regulation should be distributed immediately to all judges, prosecutors, and law enforcement bodies, and an effort made to inform other legal professionals (e.g., through the Chamber of Advocates).*

### **G. Training**

#### 1. Training Judges

The Kosovo Judicial Institute (KJI), under the direction of the OSCE, has been established to coordinate training for Kosovo's judges and prosecutors. The KJI has recently moved into a training center that has all of the necessary equipment for high quality training. While it lacks a long-term curriculum and strategy, it has a dedicated staff that has recently begun to look at these issues. The largest obstacles for the KJI are turnover of the internationals that work with the KJI, uncertainties about the institute's budget, and the enormous task of training and retraining Kosovo's judges.

It is obvious to all that observe trials in Kosovo that many of the judges and prosecutors need substantial training. They need to learn how to be independent judges and prosecutors, they need basic courtroom skills training, they need ethnic and gender bias sensitivity training, and they need substantive training not only on existing laws, regulations and conventions, but also on the new laws that will soon be applicable. In short, they need a lot of help.

It is worth noting that many of Kosovo's judges had experience as judges until 1989. However they served in a system vastly different to what is envisioned in Kosovo today. Many simply do not know what is expected of an independent judge in a democratic society. This should be remedied not only by extensive training sessions offered through the KJI, but also by programs that bring experienced judges to Kosovo to teach and mentor the Kosovars, as well as by sending Kosovar judges abroad to observe how an independent judiciary works. It is going to take time to teach Kosovar judges how to be judges, and no quick fixes should be expected.

The need to interpret laws is one critical example of a responsibility normally assigned to independent judges which has been difficult for Kosovar judges to understand and apply in practice. It is the judges' function to interpret and apply the law as enacted by the legislative or executive branches. However many Kosovar judges remain mired in the socialist system, believing that the judge's role begins and ends with applying the



law. This causes delays in the handling of cases because judges suspend their work on a case until a legislative or executive body issues an “interpretation of the law.” Many judges are still looking for commentaries that have traditionally been attached to laws, reflecting the intent of the author. Some judges are declining to interpret UNMIK regulations that are unclear to them, resulting in further delays while they wait for interpretations from UNMIK that are not likely to be made. Moreover, judges need to understand that it is their role to interpret the law using the best tools they can find. Training and mentoring are the best antidotes for this way of thinking.

Many of Kosovo’s judges and prosecutors also lack basic courtroom and case management skills. Participative, skills building courses in which judges and prosecutors are taught by experts and then have the opportunity to practice their skills and receive constructive advice would be useful. Written procedural manuals should be part of skills training so that judges can keep on learning when they return to their courthouses.

In addition, court monitors report many examples of bias toward ethnic minorities in the judicial system. It is difficult to gather objective evidence on this point, but some degree of hostility obviously exists. Judges and prosecutors need to understand how such actions are destructive to the rule of law, to Kosovo, and to their own future as judges. Ethnic bias should be clearly prohibited by the judicial code of conduct with sanctions.

Training is also necessary on gender-related legal issues, particularly substantive training on equality and sensitivity. Despite the law’s mandate of equality, Kosovar women have universally found it difficult to enjoy equal rights. Kosovo is a historically patriarchal society, particularly in matters of property ownership, divorce, paternity, domestic violence, shelter, and child custody. Rape victims in particular, due primarily to cultural bias, continue to be badly treated by the court system, including the judges. Training for judges on these subjects is absolutely necessary. The appointment of more female judges, especially at the District Court level, would also be advisable for UNMIK. Special efforts to recruit and train women to be judges and prosecutors would help hasten the demise of this discriminatory, patriarchal tradition.

Overall, judicial and prosecutorial training is one of the most critical tasks facing the Kosovo judicial system. It needs to be given significant attention and resources.

### ***31. Recommendation:***

*KJI should develop a long-term curriculum. The curriculum should include basic courtroom and case management skills, ethnic and gender sensitivity, training in interpretation of laws, and training in old and new substantive laws. KJI should also develop a more extensive induction or introductory training for new judges and prosecutors, as well as an initial course for prospective judges and prosecutors. KJI should also develop training for lay judges.*

## 2. Training Attorneys

Prior to the war, there were approximately 500 attorneys in Kosovo. Now there are 186 lawyers registered with the Chamber of Advocates. As noted by the President of the Chamber, “One of the most significant obstacles to justice in Kosovo is that for 13 years

we have not produced new lawyers.”<sup>17</sup> Today, at least 1,097 jurists are waiting to take the Bar exam. Yet, according to the President of the Chamber, the ADJ has been a difficult partner in expediting administration of the bar exam. For instance, according to the President, after one year of negotiations, the previous director of ADJ asked whether the jurists had really graduated from a law faculty, which in the President’s view highlighted the slowness and skeptical tone of her counterparts at the ADJ.

In addition to promoting administration of the Bar exam, the Chamber is currently planning a series of seminars for new advocates in applicable laws organized jointly with ABA/CEELI and the Council of Europe, which have already conducted several seminars on topics including criminal law and international human right standards for Kosovo’s 186 attorneys. The Criminal Defense Resource Center, Advocats Sans Frontieres, and other donors also organize ad hoc training courses for advocates. The Chamber highlighted the critical need at this stage of the continuing legal education effort beginning with a program for trainers-of-trainers who could continue to conduct such seminars and broaden training activities. Finally, the Chamber noted that some advocates are trained repeatedly and training should be better targeted. (Donor organizations are reportedly providing ample funds for advocates’ training).

**32. Recommendation:**

*A system for continuing legal education should be developed by UNMIK in coordination with the Chamber of Advocates. This should be complemented by an UNMIK requirement in the form of a regulation for completing a minimum yearly level of legal education, including ethics as a key component. Trainers should expand their programs to ensure that training is available to all advocates.*

## **H. Institutional Development**

### 1. Chamber of Advocates

The Chamber of Advocates, an NGO, has the sole authority to license attorneys in Kosovo; non-members are generally restricted to acting in low value civil cases<sup>18</sup> or giving legal advice out of court.<sup>19</sup> The Chamber currently has 186 members. Judges and prosecutors may not join the Chamber, nor may attorneys employed by private enterprises, though these may represent their enterprise in court in most matters.<sup>20</sup> The number of advocates is expected to increase greatly as the bar exam is given. The Chamber has a minimal structure, consisting of a President, a Board of Directors, and a Secretary; of whom only the Secretary is a full time employee. Activities are funded by a registration fee of 900 DM, monthly dues,<sup>21</sup> and outside grants.

The Chamber has moved into new office space. Thirteen active members of the Chamber<sup>22</sup> recently completed a CEELI-funded study trip to the United States to study

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<sup>17</sup> At the same time, all members of the Chamber have experience as lawyers, prosecutors and defense attorneys representing clients before the Federal Court of Yugoslavia in criminal cases.

<sup>18</sup> If they have graduated from law school.

<sup>19</sup> If they have passed the bar exam.

<sup>20</sup> In commercial, labor, property, and economic crime cases.

<sup>21</sup> The requirement for dues is not actively enforced for Serb members who have left the province and would have difficulty sending the payments.

<sup>22</sup> Including Serb and other minority members.

Bar Association organization, with a special focus on committee structures. The European Agency for reconstruction (EAR) has begun a large civil legal aid program managed by the Chamber of Advocates.

**33. Recommendation:**

*The Chamber of Advocates should focus on developing a long-term strategy, and on institutional development, such as a strong committee structure. Once these goals are accomplished, individual committees will be able to devote more time to member services, praktikant training, the bar exam, and legal reform*

2. Kosovo Judges' Association

The Kosovo Judges' Association (KJA) was formally established in May 2001, after a series of regional meetings found that judges had a very high level of interest in a body that would represent their interests in various fora. With support from ABA/CEELI, the KJA organized regional and founding meetings, drafted by-laws, and commented on the disciplinary code proposed by the KJPC. The group intends to stress professionalism, provide training seminars for judges, publish case practice handbooks, and advocate judges' interests. Membership fees are anticipated to be 5 DM per month.

The KJA plans to focus on professionalism and judicial independence issues. Such a focus is strongly encouraged and should be a central part of each of the organization's meetings. In addition the KJA should push for needed improvements in judges' working conditions, in particular salary and term-length improvements. No organization is currently providing such assistance to Kosovo's judges, and their voice needs to be heard. The new organization should also turn its attention to the significant problem of how to recruit more minority judges for the Kosovo legal system. Although there is a role for the KJA to play in advising on the development of a Code of Ethical Conduct, judicial disciplinary proceedings should be handled under the direction of the Supreme Court, not a voluntary association like the KJA.

The KJA can play an important role in helping determine what training is needed by Kosovar judges, but should work closely with the Kosovo Judicial Institute, which is tasked with providing judicial training. It need not duplicate the work of the KJI. Ultimately, the KJI should be under the direction of the Kosovo Supreme Court, and the KJA can provide guidance and assistance to the training organization.

The KJA could also play an important social role for Kosovo's judges. Frequent meetings of the organization, particularly meetings that allow the judges significant time to get to know one another, will be important in building camaraderie within the judiciary.

**34. Recommendation:**

*The KJA should focus mainly on judicial independence and professionalism. However, it should also act as a voice for judges on issues such as working conditions, training, and discipline, though training and discipline should be managed by the Supreme Court. The KJA should also consider how to attract more minority judges to the profession to reflect Kosovo's demographics.*

### 3. Other Associations of Jurists

Unlike the Chamber of Advocates, any law graduate may be a member of the Jurists' Association, and in fact automatically becomes one immediately on graduation. Because of this, the Association includes most legal professionals. The Association does charge dues of 20 DM/mo., but it is unclear how or whether the dues are collected. The Association is organized into six professional commissions: economic, labor, legislative drafting (normative acts), organization of the political system, civil law, and criminal law. The commissions offer professional opinions and recommendations on laws, and offer legal services to municipalities. The Association provides its services on a volunteer basis.

A Female Jurists' Association also exists, consisting of about 14 jurists who lecture in villages on children's rights, women's rights, the Ombudsperson, and inheritance issues. The Association has had some support from international donors.

#### **35. Recommendation:**

*A newly established Prosecutors' Association should be supported. The organization of the prosecutors as a group for professional development and the establishment of consistent prosecutorial policies is an important step forward for this important but often overlooked group within the justice system.*

### 4. Criminal Defense Resource Center (CDRC)

While there are many skilled defense lawyers in Kosovo, their access to resources is limited and skills may be not competitive with those of international judges and prosecutors, given their inability to practice under the Milosevic regime. Moreover, OSCE legal monitors have reported observations of widespread and systemic denials of the right to effective assistance of counsel. In answer to this obligation of UNMIK authorities, the OSCE has established a Criminal Defense Resource Center, which serves to advocate the rights of the accused, while at the same time working with local defense counsel to build capacity. The Center provides legal expertise, offers technical and logistical support, and makes regular assessments of Kosovo defense capacity and needs. The composition of the Center includes international experts and national legal advisors.

#### **36. Recommendation:**

*The CDRC should market its services to criminal defense lawyers and continue to provide training for them.*

### 5. Ombudsperson

UNMIK Regulation No. 2000/38 of June 30, 2000 established the Ombudsperson Institution of Kosovo. Under this regulation, any person in Kosovo has the right to complain to the Ombudsperson regarding violations of human rights and abuses of authority. The jurisdiction of the Office of the Ombudsperson to investigate cases of abuse extends to the interim civil administration (UNMIK) or any emerging "central or local institution," but does not include the institutions of KFOR. The Ombudsperson also has the authority to conduct investigations on her/his own initiative upon receiving information indicating that human rights violations or abuses of authority may have incurred. Upon conclusion of an investigation, if the Ombudsperson finds any

violations or abuses of authority, he/she is to make recommendations to the respondent parties about appropriate measures to take, including the suspension of any administrative decisions found to be resulting in irreparable prejudice to the rights of the applicant; the Ombudsperson may also recommend to the competent authorities that disciplinary or criminal proceedings be initiated against any person.

Designed to provide a mechanism for the “review and redress” of human rights abuses by authorities, the power of the Office of the Ombudsperson lies less in its legal authority to prosecute cases, and more on its ability to engage governmental and international institutions on behalf of the applicant. For example, all persons and entities subject to the jurisdiction of the Ombudsperson (including civil servants) are required to provide the Ombudsperson with preferential assistance in the course of its investigations, including the provision of relevant information, files and documents, as well as access to premises. Should such assistance not be forthcoming, the Ombudsperson is authorized to “notify the highest authority with jurisdiction over the matter.” The Ombudsperson may also ask for assistance from the police and KFOR if it is necessary to secure an investigation or to protect applicants.

The Office of the Ombudsperson is currently headed by an international appointed by the SRSG, with a small local staff as well as three deputy directors (one international, one Kosovar Serb, and one Kosovar Albanian). All services offered by the Ombudsperson are free. One of the development priorities of the Office is to establish field offices in selected locations throughout Kosovo; currently the Ombudsperson relies upon the regional field offices of the OSCE to serve the role as Ombudsperson Liaison Officers. While an adequate solution in the interim, this means that regional OSCE staff are performing dual tasks and reporting to two different authorities, not a satisfactory solution for the long-term.

The Office of the Ombudsperson appears to be fulfilling an important function in that it gives Kosovars a channel to voice their concerns about the governing institutions, both international and local. Within its first three months, the Ombudsperson provisionally registered 159 applications from individuals complaining about violations of their human rights or abuses of authority, and opened five *ex officio* investigations. The Office has also issued a number of special reports to the SRSG, including one on the compatibility of the implementation of UNMIK regulation No.2000/47 (granting immunity to KFOR and UNMIK personnel) with recognized international standards. The report concluded that UNMIK regulation No. 2000/47 is incompatible with recognized international standards, and made several recommendations, including that the regulation be amended to limit the immunity of UNMIK and KFOR in their institutional capacities. What actions result from this report and its recommendations remain to be seen.

In terms of infrastructure, the budget of the Office of the Ombudsperson must be sufficient to open and/or staff more field offices, independent of the OSCE, if it is to overcome the problem of lack of access for Kosovars who live outside Pristina. Many are unable financially to travel to Pristina, or in the case of Kosovar Serbs, unable to travel safely outside their enclaves. The issue of limited access is also exacerbated by the fact that the Pristina office has no fax and only one telephone line. Security at the Pristina office should also be improved.

While Regulation No. 2000/38 establishing the Office does not give it jurisdiction over KFOR, it does foresee the Ombudsperson entering into an agreement with the

Commander of KFOR (COMKFOR) in order to investigate cases involving the international security presence. To date, no such agreement has been reached. We should highly recommend such an agreement, especially given the recommendations of the Special Report concluding that KFOR's unrestricted immunity is incompatible with recognized international human rights standards. According to the Ombudsperson's own data, and in our conversations with judges and lawyers, complaints concerning abuses by KFOR and/or its personnel rank high among the Kosovar population.

Lastly, the regulation establishing the Office itself raises the troubling issue of the Ombudsperson's credibility and independence. In particular, the regulation assigns the SRSG potentially conflicting roles in that the SRSG is a party against whose subordinates an individual can complain to the Ombudsperson, the SRSG is the person to whom the Ombudsperson refers cases when the alleged abuser fails to take measures recommended by the Ombudsperson, and the SRSG is the person to whom the Ombudsperson addresses his/her annual report. Thus, the Office of the Ombudsperson must have structural and financial separation from the government and other international institutions.

**37. Recommendation:**

*The Office should have a strategy whereby adequate financing will be secured through the Consolidated Budget Authority and an exit strategy that will ensure local ownership by appointing more locals to its staff, including lawyers and investigators.*

6. Kosovo Law Centre

The Kosovo Law Centre (KLC) was established by the OSCE Human Rights and Rule of Law division as an NGO designed to serve as an independent legal think tank devoted to the "cultivation of professional legal skills by providing technical and material assistance to the legal community." According to its OSCE mandate, the KLC is to focus on: (1) compiling laws (tri-lingual) for the decision-makers who interpret laws; (2) seminars and training; (3) developing a law library that contains relevant international conventions and agreements for use by scholars, students, and international organizations; and (4) reforming and modernizing the law faculty. The KLC is staffed by national legal advisors and is co-managed by one international and one national. While the KLC receives funding from the OSCE, it relies on voluntary contributions from donors to cover its programming costs.

The current focus of the KLC is primarily the reform of the Pristina Law School, with the understanding that the reform of such a crucial department can serve as a role model for the reform of other university departments. As such the KLC has been working to introduce a curriculum reform, including streamlining the courses offered and assisting in offering new courses needed, e.g., international human rights law. Above all, the KLC is attempting the wholesale restructuring of the law school course of study (see following section on the Law School for further information).

One way the KLC has chosen to facilitate the teaching of needed courses, which current faculty members are not able to teach, is to reach out to the international community in Kosovo, seeking volunteers to co-teach courses with law professors. The KLC is also planning to offer a clinical education program for second and third year students as a pilot program. The KLC has also been active in seeking opportunities for Pristina Law School students to study abroad or attend seminars offered at European and US

universities. Many of these programs are summer schools that may not be very attractive for students because there is no agreement between the Pristina Law School and international Universities for credit acceptance.

Recently the KLC opened its law library, with legal texts donated by other universities and donor countries. It intends to provide a computerized link between other libraries in Pristina, including the Law Library as well as the Human Rights Center of the University of Pristina Library.

The KLC can doubtless serve many useful purposes. As with all structures created by the international community, caution must be exercised to ensure that it not become a parallel structure that could undermine indigenous efforts and structures. For example, the clinical law education program should not become a structure parallel to Law School efforts; it is not clear why the KLC itself is offering this program instead of enabling the indigenous Law professors to offer such a program.

There is a similar concern with the current experiment of soliciting volunteers from the international community to co-teach courses at the Law School. In all likelihood, these are not trained law professors and at best they are merely knowledgeable in the area of their work. While such substantive expertise is surely welcome, it is not so clear how such efforts will benefit the Law School in the long-run given its need to have courses taught by accredited educators as will be necessary for their recognition by international universities. Similarly, it is not clear that having non-professional educators co-teach with local educators will necessarily aid in enhancing their pedagogical skills.

Law school reform is important for the development of the legal community in Kosovo. The goals of the KLC are admirable; however, its methods may be problematic, if they do not have sufficient buy-in from the local legal community, especially the law school faculty.

**38. Recommendation:**

*The KLC should ensure that it works closely with the Law Faculty to enhance its efforts at reforms in a way that builds local institutional capacity. One way might be to assist in developing Albanian-language textbooks that reflect European legal standards, or to work with the existing legal scholar community to develop their legal journal. KLC should also work to support the Law School in implementing projects the Law School may start with US Universities, including the clinical program that will be established by US professors.*

7. Law School

The Faculty of Law was founded in 1961, and became part of the University of Pristina in 1970. In June 1991 the Serbian Parliament introduced the so-called interim measures at the University by appointing Serb leaders in the University and faculties. Within six months, all the Albanian staff and students were expelled from the University, including forty professors and assistant professors from the Law School. As with the other University faculties, for the next eight years the Law Faculty continued working in private houses and buildings under extremely difficult conditions. In February 1999 the building of the Law School was once again made available to the existing Albanian parallel law faculty. The building and its inventory, including library holdings, had been

deliberately damaged. The Law School has since resumed teaching courses, with a faculty of forty-nine, and 2,800 students.

In order for the Law Faculty to fulfill its role as the only institution of higher education in Kosovo responsible for legal education, while meeting international standards of higher education, it will require outside assistance, particularly in terms of infrastructure and curriculum reform. The Law School has been quick to reach out to the international community for help in re-starting their educational program. With funding from the US Office of Transition Initiatives and the assistance of the ABA/CEELI program, some immediate repairs to the building were made. A delegation of law professors visited US law schools, signing cooperative agreements with all four. The Law School delegation signed agreements with the following US Universities: Chicago Kent College of Law, Illinois Institute of Technology, Minnesota University, College of Law, Michigan State University, Detroit College of Law, and William Mitchell Law School. All these institutions agreed to cooperation in the reform of curriculum, including the start of more practical courses such as a Clinical Program and Legal Writing and Reasoning, as well as development and computerization of Pristina Law School library, Student/Faculty Exchange Programs, and other areas of mutual interest. Because of lack of sufficient funds both parties agreed to draft project proposals and apply for funds from NGOs and governmental organizations in Kosovo and the US. The delegation also meet with International department of Georgetown University with whom they discussed possibilities of future cooperation.

The European Commission authorized Euros 4.4 million for the reconstruction of Pristina University. In December 1999 the OSCE Rule of Law division signed a bilateral agreement with the Law Faculty whereby both sides committed themselves to assisting and instituting educational reforms. And on January 21, 2000 six international institutions (OSCE, ABA/CEELI, CoE, Kosovo Foundation for Open Society, World University Service Austrian Committee, and the German Academic Exchange Service Pristina Office) signed a Multilateral Action Plan (MAP). In June 2000, the Kosovo Law Centre (KLC) assumed the mandate of the legal education support from the OSCE Rule of Law division, thereby taking on the task of coordinating the reform efforts at the Law School, including implementation of the MAP.

The MAP is designed to provide a “flexible blueprint” integrating, defining and coordinating donor and recipient activities on the basis of mutual commitments by both donor and recipient. A three-phased program, each phase is supposed to be assessed at the end, highlighting prior achievements in order to make any necessary modifications for the next phase. Feedback is to play an important role in the process. To the best of our knowledge, no such assessments have been made and there are indications that feedback between the KLC and the faculty has not been sufficient. Some faculty members have complained that they feel like passive recipients to reform efforts. Indeed, allegations were made by some faculty members that those faculties who do not agree with reform efforts would not have their one-year contracts renewed. Some pointed to the case of the Acting Dean who was allegedly removed from his office for “lack of cooperation” with the reform efforts.

A Law School faculty committee was recently formed to develop alternative proposals to those put forward by the KLC. Most agreed that they do not object to the substance of the reforms, but the process. In particular, they feel a better method of curriculum reform would be to examine different systems among the universities of the former



communist countries in order to adopt those most suited for Kosovo, and that being forced to rigidly adopt one system (the Bologna model) may not be the best method for Kosovo conditions.

**39. Recommendation:**

*Reforms in the Law Faculty teaching curriculum need to be coupled with assistance for the faculty to develop the skills needed to teach new courses with modern pedagogy. The Law Faculty should be consulted and engaged as an active partner in reforms. The Law Faculty should also actively encourage participation by Kosovar Serbs in the Law School.*

**I. Access to Justice**

**1. Access to Courts and Legal Representation**

A small number of Kosovar NGOs and associations, including a women's organization known as NORMA and the Chamber of Advocates, are providing legal services to meet the need for legal representation in Kosovo. While none of these organizations could offer precise estimates of the degree of unmet need, the Kosovar Chamber of Advocates estimates that in 30%-40% of civil cases, citizens lack the financial means for representation. The Chamber has begun an EAR funded project to provide legal aid.<sup>23</sup>

NORMA works to increase women's awareness of their legal rights through workshops and radio programs, provides input to applicable laws, and provides legal protection including counseling and representation. Issues of particular significance for women in Kosovo include property rights, divorce custody battles and paternity suits. NORMA operates on a fee-for-service basis using a sliding scale as well as providing free services, but has not yet become self-sustaining and relies on support from the donor community. Both organizations share the view that the legal system generally provides access to justice. In their view social attitudes form the greatest barrier to access to justice for women.

The team also confirmed with these organizations that institutional dispute resolution mechanism function outside the court system in Kosovo, in collaboration with formal justice sector institutions. Under this system, disputes are referred to local reconciliation councils who have 30 days to recommend an appropriate solution to the courts. Out of court settlements can also be reached.

Finally, as mentioned above, the OSCE has created a Criminal Defense Resource Center intended to provide legal expertise and resources to criminal defense attorneys.

**40. Recommendation:**

*UNMIK should consider how to enhance the accessibility of legal aid, both criminal and civil, in conjunction with EAR, the Chamber, and the Criminal Defense Resource Center.*

**2. Bar Exam**

Under applicable law in Kosovo, persons must pass a bar exam in order to work as an advocate, a judge, or a prosecutor. The same exam, plus a praktikant<sup>24</sup> requirement,

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<sup>23</sup> A fee will be charged for daily representation.

<sup>24</sup> One or two year legal internship.

serves for all three professions. Under the law, the Ministry of Justice is responsible for holding and scoring the exam. However, no bar exam has been given in Kosovo since 1989, and over one thousand law graduates now await the opportunity to take the exam. This contrasts with about three hundred thirty judges, fifty prosecutors, and one hundred eighty serving advocates. It is likely that even more potential applicants exist, and ABA/CEELI has supported ADJ and DJA in developing a comprehensive list. Some municipalities have no advocates, and must rely on advocates in larger towns, though there may be several persons in the municipality who could act as advocates, given the chance to take a bar exam.

ADJ, the logical successor to the Ministry of Justice, and DJA have been planning a bar exam for over one year. However, internal conflicts about the nature and format of the exam initially blocked progress. In the meantime, students continue to attend law school and complete praktikants, and the number of potential clients continues to rise.

In late April, the then ADJ co-head Nekibe Kelmendi decided to press ahead with a bar exam, and appointed a commission charged with preparing and holding the exam and preparing materials for it. OSCE and various donor organizations, in cooperation with the KJI, have provided training to sixty exam takers chosen for the mid-December exam that was recently given. Subsequent exams for sixty to seventy persons will be given every three months thereafter.

**41. Recommendation:**

*ADJ should Substantially revise its exam plans, and should give the exam more frequently and to more people, with the objective of eliminating the backlog of eligible exam takers by early 2003.*

3. Public Trust and Legal Rights Awareness

Public awareness of legal rights under Kosovo's evolving justice system is high to the extent that judicial institutions are easily accessible in some communities where judges devote a significant amount of time to legal consultations and advising. For example, at the Municipal Court in Vitia, interviewees noted that under the previous communist system of justice "awareness of human rights collapsed," but that today the number of cases received indicates local citizens' growing awareness of their rights and how to access justice institutions. The Municipal Court judges noted that these include Serbian minority inquiries regarding court proceedings to resolve issues of inheritance. This view was echoed by interviewees at the Gjakova Municipal Court and elsewhere, where there is a relatively high level of public support for and understanding of the judicial process at the local level.

By contrast, the President of the Chamber of Advocates stressed that "citizens are not yet aware of the availability of legal aid" in Kosovo. Overall, it is still difficult to ascertain accurately the level of legal rights awareness in Kosovo. As one interviewee explained, the difficulty in assessing the degree of public trust in the formal justice system and legal rights awareness in Kosovo could simply be public attitudes: until there is a very serious problems, the average Kosovar will not seek legal aid but relies instead on traditional codes and rules of conduct.

Although UNMIK has formal responsibility for educating the Kosovar public on the judicial process, no one interviewed by the team mentioned any knowledge of UNMIK legal education programs. The OSCE has systematically monitored and reported on

court functioning and human rights protection. These reports have become perhaps the most broadly discussed and circulated rights awareness and education tool in Kosovo. Finally, as noted above, a few Kosovar NGOs have undertaken activities aimed at increasing public knowledge of citizens' legal rights and how to exercise these, but without clear results.

Overall, knowledge on the part of the international community as well as local NGOs regarding the degree of need and impact of these programs is limited.

**42. Recommendation:**

*Funding should be provided to a Kosovar or international NGO to conduct a systematic review or survey that ascertains the degree of public awareness regarding legal rights and access to legal aid or dispute resolution mechanisms. This should inform the donor community's policies and, depending on the findings, provide the basis for an expansion of public awareness campaigns through the media and relevant associations.*

4. Language Issues

Judges interviewed noted that the right to be tried in a citizen's native language is related to that of judicial independence. They noted that for trials involving minorities, interpreters were provided and court documents translated into the language of the relevant party. However, the OSCE monitoring section reports and first-hand observations by team members show that interpretation is often poor, and that international judges especially have difficulty understanding what has been said,<sup>25</sup> or simply mistakenly state the testimony when giving their formal summary. Even good interpreters are simply tired from having to work continuously, rather than in shifts, and it is not surprising that they make mistakes. Others may be good general interpreters, but do not have a good grasp of the legal language used in courts.

A related language issue is access to law. UNMIK regulations are generally effective on the day they are signed by the SRSG. Some of these are posted on the Web soon afterwards, but only in English. It can be half a year before Serbian and Albanian translations (of questionable quality) are issued, making it near impossible for even the most punctilious citizen to know what the law is that they must obey

**43. Recommendation:**

*UNMIK should hire sufficient skilled interpreters that they will be able to work in regular shifts, thus providing quality translation all day long. If there are not enough interpreters, UNMIK should seriously consider training more.*

5. Access for Citizens with Special Needs

Several judges and attorneys as well as internationals responsible for detention facilities noted that the needs of the developmentally disabled were not being met. The UNMIK Penal Management Section reports that at the Lipjan detention facility for women and juveniles, approximately 75 developmentally disabled detainees are housed and receiving some psychiatric services, though these may not be appropriate to their needs.

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<sup>25</sup> Some international judges are also said to have difficulty with English.

The Section is currently elaborating an MOU with the Health Department in Lipjan to train nurses to care for this population as patients rather than detainees.<sup>26</sup>

**44. Recommendation:**

*Appropriate facilities and services should be provided immediate for populations with special needs. A review of recommendations of the UNMIK Penal Management Section should be expedited as soon as possible.*

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<sup>26</sup> A similar problem exists in the United States. Often developmentally disabled and drug-dependent citizens are detained for minor offenses directly related to their condition. In most of these cases, detention becomes a substitute for social welfare services, which would be more appropriate.

## Appendix 1

## Infrastructure and Other Needs of the Kosovo Judiciary

<b>Facility/Staff Required</b>	<b>The Importance Of The Facility/Staff</b>	<b>Cost Of The Project And Financial Commitment</b>	<b>Current Status</b>
QUICK BUILD DETENTION CENTER (QBDT)	It is crucial that this object is build as the current detention facilities cannot provide enough spaces for pre-trial detention except for individuals charged for very serious crimes	Costs are estimated at \$5 million (USD). ERA has agreed to fund this project. Kosovo consolidated budget will cover operating costs.	Penal Management is preparing detailed tendering documents.
SPECIAL SECURE UNIT	There is a need for a suitable facility for high-risk (category A) prisoners. The plan is that Block I in Dubrava recently refurbished to become a Special Security Unit	The UN will source funding of the International Correctional Officers. Until the International Correctional Officers are provided the SSU will not be operational.	
Blocs 4 and 5 at Dubrava Prison	Because of the new legislation prisons are receiving 60 new inmates per month. As the Quick Build Prison will not be ready until next year there is a need for the repair of Block 4 and 5 which can than serve as long term solution. Otherwise we will be forced to spend resources on short term solutions (including converting the hospital at Dubrava into a detention facility)	Both Blocs require 750,000 to 1,000,000 DM to be spent on repair.	
Prisoner Escort Service International Manger National drivers 39 Special vehicles 35	The role of the service would be to transport prisoners from institutions to courts, as well as between institutions. The establishment of the service will reduce CIVPOL commitment to this duty.	Estimated cost of 6 million DEM with an estimated operating cost of 1.2 million DEM. Kosovo Consolidated budget will cover the operating costs for the subsequent years.	
International staff 14 International staff are required for current and future institutions	There is a need for 14 additional international correctional officers to complete the staffing of each institution including the planed Quick Build Prison. It is crucial to provide international staff as least for the first year at the QBP.	The UN will seek to fund the additional international correctional officers, but because of saving measures and cutbacks donor funding is also sought.	

<b>Facility/Staff Required</b>	<b>The Importance Of The Facility/Staff</b>	<b>Cost Of The Project And Financial Commitment</b>	<b>Current Status</b>
The need for a Psychiatric Program 1 Inter. Psychiatrist, 1 Inter. Social Worker and 8 Local Psychiatric nurses.	There is a need for proper Psychiatric Program to deal with mentally ill prison population. This Program will be handed over to local administration after the first year of capacity building work.	KCB will fund subject to priorities and UN will fund internationals again subject to priorities being determined.	
International Judges and Prosecutors  Phase I 7 Inter. Judges 4 Inter. prosecutors	As law enforcement becomes more effective and a greater progress is made is tackling organized crime, corruption and removing individuals who are unfit for public office the need for a fair, effective and speedy justice will be required. The existing caseload has led to a slowdown of the judicial process. With the adoption of new initiatives by Pillar I more international judges and prosecutors will be needed.	UN funding has not to date been provided although the issue is being addressed.	
Additional inter. support staff 5 Inter. Legal Officers 7 Inter. Interpreters 5 Inter. Secretary		UN funding for these positions has not been yet provided, although the issue is being addressed	
Secure court house for organized crime cases	In order to be able to deal with organized crime a safe courthouse is required. This will include facilities for in-camera proceedings, protection of witnesses, secure facility for detainees and other specific measures relating to the trial.	Detailed cost analyses still to be carried out.	

<b>Facility/Staff Required</b>	<b>The Importance Of The Facility/Staff</b>	<b>Cost Of The Project And Financial Commitment</b>	<b>Current Status</b>
Fully Operational Judicial Inspection Unit Under UN: One intl. LO/judicial inspector One local LO One intl. Interpreter One Language assistant One administrative assistant Under KCB: Two local judicial inspectors with the same salary as SC judge	It is very important that Judicial Inspection Unit including Kosovar judicial inspectors functions fully, otherwise judicial personnel will not be effectively investigated undermining judicial capacity to perform its function.	The US has funded equipment for the Unit	Although not yet fully staffed JIU has received 43 complaints of misconduct for investigations out of which 22 have been completed and 21 are still ongoing. The KJPC adjudicated two of these complaints and found that the acts of misconduct were established. A judge was removed and another one has been warned and reprimanded. A judge and a prosecutor were suspended too.
Refurbishment and upgrading of judicial buildings	Many buildings need urgent security work to be undertaken. The lack of adequate facilities has in many cases impeded the normal functioning of the justice system.	5 million DM (Funding has already been committed by donors EAR, USAID, French government, but there is still shortfall of 5 million DM)	
Establishment of a Minority Affairs Unit One coordinator One Legal Officer One Minority Affairs Officer One Local MAO One translator/interpreter	It is central to the mandate to create multiethnic judiciary. This Unit will properly address minority issues relating to judiciary. Issues to deal will be minority judges, recruitment of minority court personnel and minority access to courts.	Not yet defined	
Creation of the specialized unit in the Kosovo Police Service for the protection of the judiciary	The unit will be involved in Internal security, Courthouse security, Personnel security, protection of the victims and witnesses, investigating threats and corruption upon judges and prosecutors.	4.75 million DM (salaries 1.5 million DM 400 police officers, goods and services 1.05 million DM, capital outlay (vehicles, communication equipment, pistols, uniforms) 2.2 million DM. The DJA has not received any commitment yet.	



<b>Facility/Staff Required</b>	<b>The Importance Of The Facility/Staff</b>	<b>Cost Of The Project And Financial Commitment</b>	<b>Current Status</b>
Legal Database with Applicable Law	The lack of the applicable law readily available (1989), and other regulations seriously impede the work of the institutions. Most of the Official Gazettes are not available to judges or prosecutors. The Legal Database (KS-LEX) will be a shared database to include applicable law and other legal materials.	270,000 DM  The Finish government will provide technical assistance to implement this project. Kosovo Judicial Institute is one of possible institutions to cooperate in this project	
Case Management Information System	Case management system in Kosovo needs to be modernized and brought up to European standards. IT application is the core of any administrative court case related computerized process. This application is aimed as a limited functionality tool at one courthouse that can be expanded in other courthouses.	390,000 DM  The cost estimate covers only the first pilot implementation. The Finish government will provide the technical assistance to implement this project once funds are made available. Efforts will be coordinated with the team (USAID) that is currently working in the Department of Judicial Affairs.	
The establishment of the Kosovo Forensic Institute	At the moment medico-legal needs of the judicial system are served by the Institute of Forensic Medicine of the University Hospital in Pristina. The physical facilities are far below acceptable standards. The Kosovo Forensic Institute will perform: Medico-legal autopsies on murder victims, the examination of victims of assaults and other analyses.	Needs are as follows: 630,000 DM for advanced equipment, A Project Manager, A Deputy Project Manager, Local Language Assistant  A total \$600,000 (USD) was committed by the Swiss government for this project. The regular budget of the future institute will be approved by the CFA. Canadian government has seconded a Project Manger.	

## Appendix 2

## Infrastructure and other needs for Kosovo Judicial Structure

### **1. Quick Build Detention Center**

The building of QBDC is planned for May 2001. It is crucial that this objective is achieved, as the current detention facilities cannot provide enough spaces for pre-trial detention apart for individuals charged with very serious crimes. ERA has agreed to fund this project. Penal Management are preparing detailed tendering documents (Sep/01). Kosovo consolidated budget will cover operating costs.

### **2. Special Secure Unit**

There is a definite need for a suitable secure facility for high-risk (category A) prisoners in Kosovo. The plan is that Block I at Dubrava is refurbished and turned into a Special Security Unit. The UN will source funding for the international correctional officers and a case has been submitted to Director of Administration. Until the international correctional officers are provided the SSU will not be operational.

### **3. Blocks 4 and 5 at Dubrava Prison**

Because of the new legislation prisons are receiving 60 new inmates per month. As the Quick Build Prison will not be ready until next year there is a need for the repair of Block 4 and 5 which can then serve as long term solution. Both Block require 750,000 to 1,000,000 DM to be spent on repair.

### **4. Kosovo Correctional Service/Escort Service**

Any expansion of detention space will require additional international and local correctional officers. The Escort Service alone will need 60 more correctional officers. Funding for additional local correctional officers will be sought from KCB, and operating costs if the program is accepted for funding. In respect of vehicles needed (35 vans with security adjustments) funding is being sought.

### **5. International staff needed**

There is a need for additional 20 international correctional officers to complete the staffing of each institution including the planned Quick Build Prison. This is very important in line with the possible adoption of new legislation related to different forms of crime. The UN will seek to fund the additional international correctional officers, but because of saving measures and cutbacks donor funding is also sought.

### **5. Psychiatric Program**

There is a need for a proper psychiatric program to deal with Kosovo mentally ill prison population. After the first year of capacity building the program to hand over to local administration. At the moment there is no UN funding for this project. It includes 2 International Psychiatrists, 1 International Psychologist, 1 International Social Worker and 8 Local Psychiatric Nurses. KCB will fund subject to priorities in the overall funding program being determined. UN will fund internationals, again, subject to priorities being determined.

### **6. Additional International Judges and Prosecutors**

The existing caseload for the international judges and prosecutors has led to a slowdown of the judicial process (AUSJ/Sep/01). With other initiatives being prepared to fight the crime. Therefore there is a need for an increase in the number of International Judges and Prosecutors. A case for funding was submitted and a phased approach has been adopted. In total 7 International Judges and 4 International Prosecutors are needed for phase one and two (according to AUSJ by Sep/01).

Support staff needed for those two phases is as follows: 5 International Legal Officers, 7 International Interpreter/translators, 5 International Secretary. UN funding for these positions to-date has not been provided although the issue has been addressed.

**7. *Secure Courthouse for organized crime cases***

There is a need for a specific courthouse to manage serious cases of organized crime in an efficient way. This would enable in-camera proceedings and protection of witnesses. One possibility is that it is part of a QBP. The funding remains to be resolved.

**8. *Fully Operational Inspection Unit (JIU)***

The US State Department funded equipment for the Unit (computers, a car). So far 43 complaints lodged, 22 investigations completed and 21 are on going. The KJPC already adjudicated two complaints and found that the acts of misconduct were established. A judge has been removed and two temporary suspensions pronounced. In order to fully function the following staff is needed: 1 International LO, 1 Local LO, 1 International Translator, 1 Language/legal Assistant, 1 Administrative Assistant and two Local Judicial Inspectors.

**9. *The Refurbishment and upgrading of judicial buildings***

Most judicial buildings in Kosovo suffer from structural damages including war-inflicted, neglect and poor maintenance. Funding has already been committed by donors (European Agency for Reconstruction, USAID and French Government), but there is still a short fall of 5 million DM.

**10. *Establishment of Minority Affairs Unit***

This Unit will address minority issues that affect the judiciary. The Unit will first collect relevant data regarding the treatment of minorities within the judicial system. The cost and funding have not yet defined.

**11. *Honorarium for Judges and Prosecutors***

A supplemental honorarium of 1000 DM per judge or prosecutor is recommended by the AUSJ in order to preserve the independent judiciary

**12. *KPS Special Unit to protect the judiciary***

The cost for this Unit is 4.75 million DM, and according to AUSJ report/paper the US Government is very interested in this project. DJA has not yet been notified of any commitment.

**13. *Legal Database***

There is a need for a legal database where all the applicable law and judgements will be shared by courts in the form of a CD-ROM, as all the courts have computers and CD-ROM drives. The cost for this project is 270,000 DM and Finnish Government is ready to provide technical assistance to implement this project.

**14. *Case Management Information System***

IT application is at core of any administrative court case related computerized process. The cost is 390,000, and Finish Government will provide technical assistance to implement this project once funds are available. This project is to be coordinated with USAID experts on court administration working in the Department of Judicial affairs.

**15. *Establishment of the Kosovo Forensic Institute***

The sum of 630,000 DM is needed for advance equipment. The Swiss Government committed a total of \$600,000. Other staff needs are the following: Project Manager,

Deputy Manager and a Language Assistant. The Project Manager is currently seconded free of charge by the Canadian government. Regular budget for the Institute remains to be approved by the CFA.

## Appendix 3

## A Summary of Traditional Mediation in Kosovo and Other Bodies with an Interest in Mediation

Kosovars have traditionally solved some disputes using a mechanism with elements of both mediation and arbitration. The mechanism has a long historical basis, and to some extent is still utilized as a means of alternative dispute resolution (ADR) outside official governmental institutions. The distinction between mediation and arbitration was not and is not made in terms that we understand today. Depending on the case different approach would be taken. This period goes deep into the Ottoman time when Albanians sought to avoid the involvement of the Ottoman or foreign ruler's officials in resolving disputes between individuals and families (disputes between families were more common). Life was generally governed by a body of common law known as the Kanun of Leke Dukagjini - a gathering of cases that have been decided by the Council of Elders (an ad hoc body) or a single well known "*pleqnare*" (village elder), such as Leke Dukagjini (XV century). This is how the unwritten case law was build and used by well-known members of the public, whose decision was binding for the parties. It was only codified in modern time by a well-known Albanian scholar and priest father Shtjefen Gjecovi. While in previous centuries the "Kanun" was the only regulator of life in general, from trade to blood feud cases, as the time went by its importance greatly diminished. With WW II, and changes introduced in Europe, new laws were promulgated and education improved, thus pushing traditional common law way of solving disputes to the margins of life.

### **I. Traditional methods**

Nevertheless, the traditional mechanism for settlement of disputes is still used from time to time, especially with the view that court system still is not fully efficient. While court procedure may last for years, the traditional process can give a solution in weeks or months.

There is not a single traditional way of solving disputes in Kosovo that can be brought under the modern understanding of the term mediation, arbitration, or providing good services. Instead, there are a number of different methods.

#### **A. First method - similar to providing good services**

If there is a dispute between two persons (usually two families), a third person or persons will be called to keep communication open between the parties, conveying messages from one side to the other with the aim of resolving the dispute. This facilitator would suggest their ideas if they feel it will help to resolve the case, but mutual agreement would be needed to accept any proposal. Usually people that will act as facilitators of shuttle-negotiations would be person/persons that know both sides. If an agreement is reached, the third party involvement will end, if not a possibility of putting the case before an ad hoc Elders Council is open.

#### **B. Second level/"Pleqnia" (ad hoc Elders Council) - similar to arbitration**

After unsuccessful completion of first level of third party involvement, if parties agree they may put their dispute before the Elders Council by agreeing on the members of the Council and the binding nature of the Council's decision. Both parties will have an

opportunity to put forward their arguments and witnesses will be heard. After the informal procedure is completed, the Council will make the decision that is binding on both parties. No means of enforcement exists apart from moral condemnation from the community. This form of dispute resolution is closer to arbitration than to mediation and was widely used in Kosovo. During the period of time when court system in Kosovo was functioning it was used less and vice versa, as the trust in the system decreased it was used more.

### **C. Reconciliation Councils and their hybrid nature**

As the situation in Kosovo deteriorated with the abolition of the autonomy, Albanian Kosovars turned more to the traditional way of resolving disputes, especially blood feuds. Reconciliation Councils were established Kosovo-wide in 1990. In the period from 1990 to 1994, approximately 1700 blood feud cases were resolved/parties reconciled. In the traditional mechanism of dispute settlement ("*Pleqnia*" - Elders Council), usually well-known and respected people from the community in the region/area would take part in resolving the dispute (not at the national level). Because of the deteriorating political situation in Kosovo, living conditions deteriorated too. A great need was felt to deal with so many unsolved conflicts/disputes (mostly blood feuds) that will increase the ability to peacefully resist the Serbian rule and avoid Serb-run courts. A campaign of solving all cases of blood feud and other serious conflicts Kosovo wide was initiated with pressure being applied by the Central Reconciliation Council in Pristina. Members of the Reconciliation Council would visit the families many times and in great number and put a great deal of pressure on both parties (especially the victim's family) to accept the settlement. This was not the case with the traditional way of solving disputes.

### **D. Conclusion**

There were few mechanisms of solving disputes in an alternative matter apart from official bodies in Kosovo, but there was no mediation as we understand today with formalized procedure and trained mediators. Nevertheless experience can be drawn from both above-mentioned traditional forms as well as from the Reconciliation Councils that operated in the last decade. In this manner a modern mediation mechanism and bodies can be established that will cooperate with courts and other agencies in determining the nature and the number of cases that are suitable for mediation. With the court efficiency increasing there is a favorable environment for the modern mediation mechanism to be built taking into account advantages that mediation has over court procedure.

## **II. Current situation and NGO-s/bodies dealing with mediation**

USAID funds a mediation program implemented by Partners for Democratic Change International, and its local counterpart, Partners Kosovo. The program (part of a larger center funded by the Dutch government and the Open Society Institute), aims to make mediation services available to Kosovars by training local mediators. The program draws on other local organizations and on the above traditions. Some of the other local organizations involved in the field are described below.



## **E. The Center for Protection of Women and Children in Prishtina**

The Center is trying to fill the gap felt in dealing with issues related to women and their protection, domestic violence, and protection of children from negative effects that domestic violence and other family problems have on them. The Center runs a shelter for women, an internet center and other health programs to meet the needs of women and children. The Center provides mediation services in solving disputes involving family relationships. According to Partners they are keen to collaborate in mediating cases and to advocate for mediation.

### 1. "NORMA" - the Association of Legal Aid for Women

The NORMA Association apart from providing legal aid, is involved in mediation in areas such as marital relations, child support maintenance, disputes between parents and children, and some property rights cases they feel as being suitable to be resolved by mediation. Within three months NORMA has mediated in 10 cases of which 4 were successfully resolved. According to Partners NORMA has expressed an interest to cooperate in providing mediation. It appears that NORMA prefers to use the mediation/reconciliation model based on legal framework, whereas Partners' model would rely less on legal framework and more on mediating through direct dialogue between the disputing parties.

### 2. Council for the Defense of Human Rights and Freedoms

While main task of the CDHRF when it was established in 1990 with the initiative of Mr. Adem Demaci, in 1990 until 1999, was to collect information on human rights violations perpetrated by Serb regime, CDHRF did engage in mediation of disputes. One of the reasons was the total lack of trust in the Serb-run courts and the need to solve as many cases as possible by non-court-related mediation. Many prominent members of CDHRF were members of Reconciliation Councils. CDHRF is still active in mediating issues that involve a violation of human rights.

### 3. Kosovo Law Center

KLC was funded by OSCE in 2000 and is led by Gani Oruci, also on the Partners board.. KLC could play a role in raising awareness about the mediation and ADR in general. According to Partners, KLC is extremely interested in family mediation and any training related to mediation.

### 4. Housing and Property Directorate

The HPD was specifically set up to create an impartial and independent mechanism for resolving claims on residential property using local and international expertise. There are over 100,000 documented cases, of which 2,000 have been formally lodged with HPD. All the cases can be divided in three categories, of which one<sup>27</sup> may be suitable for mediation. However based on UNMIK Regulations 1999/23 and 2000/60, HPD is granted sole jurisdiction to resolve these property issues. Mediation is used in certain cases and with the consent of both parties, though HPD at this point has no

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<sup>27</sup> Cases involving an informal property transaction transacted between March 23, and October 13, 1999, that was unlawful under discriminatory laws, but which would have been lawful under non-discriminatory laws.

mechanism to refer cases elsewhere for mediation. Once the claim is filed with the HPD it cannot be referred elsewhere. Therefore only cases that are not yet referred to HPD or cases that are withdrawn are potentially suitable for mediation service.

#### 5. Municipal Court

According to the President of the Municipal Court in Prishtina, local courts are overcrowded with thousands of disputes. Many of these cases are suitable for mediation, and he suggested that it would be appropriate to start with few targeted pilot areas. Partners has decided to target cases falling under civil codes related to inheritance, illegal marriage (under 18 years of age), divorce and child custody, and juvenile crime.

#### 6. Reconciliation Councils

More than 1,700 cases of different disputes were solved from 1990 to 1994. The Councils are still active. Mr. Cana, co-founder of the Reconciliation Movement together with Anton Qeta (now deceased), has solved himself 15 cases last year. These Councils have formal structure but they lack funding. Partners hopes to learn from Councils, especially in terms of access to rural disputants and cultural sensitivity. There is a real possibility of cooperation between Partners and Councils in sharing of case referrals.

#### 7. Mediation Committees

The Mediation Committees are contained in UNMIK regulation 2000/45 to serve as mediating bodies to resolve violations on the part of Municipal assemblies. In practice there is a group of three selected mediators in each village. If the dispute cannot be successfully resolved it goes to regional Council of Mediators and if the dispute is not resolved it reaches Mediation Committees, an elected body of four mediators.

## Appendix 4

## The Kamenica Courthouse

### A Model of Physical and Administrative Infrastructure

Construction of a new courthouse for Kamenica was begun in 1998, but abandoned due to the lack of interest of the municipal authorities. The courthouse, a two-story structure in the center of Kamenica, was left with only the concrete infrastructure and floors in place. The unfinished building is a good site for the two courts in Kamenica (Municipal Court and Minor Offences Court), which between them have six judicial positions and a yearly caseload of approximately 600 criminal and 90 civil cases.

USAID assistance program includes project supporting both infrastructure development and rule of law, and in late 2000, the Community Infrastructure Program (CISP) began considering renovation of the courthouse as a potential project, to be developed in cooperation with USAID's court administration contractor, NCSC/DPK. Important features of the project for USAID included: an area with a unique ethnic make-up of 70% Albanian Kosovars and 30% Serb Kosovars; a small and manageable caseload; and the support of judges in favor of modernization of their working practices.

While at USD 367,000 the project was much larger than the usual CISP projects, the courthouse held a unique appeal for USAID. Not only was Kamenica an unusual stable mixed ethnic area, the ability to build the interior of the courthouse from the ground up would allow it to be a showplace for both a user-friendly court and for modern court administration techniques.

As befitted a courthouse designed to be open to the public, there was substantial community input in the design of the court itself. Local judges were particularly involved in both reviewing draft plans, and making suggestions to improve them. Once the basic plans were approved by CISP, NCSC/DPK, and the local judges, they were turned over to the CISP engineering contractor, Parsons.

In addition to local input, financial sustainability is a central feature of all CISP projects. While the courthouse was an unusual project in some ways, the requirement for sustainability remained, and was captured through a Memorandum of Understanding between USAID, the Municipality of Kamenica, and the UNMIK Administrative Department of Justice, whereby USAID agreed to provide design, construction materials, labor and construction services through Parsons, and UNMIK and the Municipality committed to support and use the courthouse as intended.

In addition to the physical component of the courthouse, it was also intended to show the benefits of a sound court administration system. Under contract to USAID, NCSC/DPK's has the task of designing an integrated administrative infrastructure for the Kosovo courts. The contract calls for NCSC/DPK, working as part of the UNMIK justice department, to develop new systems for budgeting, accounting, procurement, personnel, case tracking, strategic planning, facility management, and physical and evidentiary security. All are to be developed using a combination of NCSC/DPK's expert knowledge, and the input of working groups of local judges, court staff, and legal professionals. The goal of the project is to modernize and make efficient Kosovo's old Yugoslav court administration systems, replacing them with systems under the control of the courts themselves, making the courts not only more effective, but much more independent from the other branches of government - an essential element of rule of law.

The timing of the inauguration of the new courthouse is ideal. With about half the contract completed, NCSC/DPK has just finished the development of many new administrative systems. The systems will be piloted in a few Kosovo courts, notably the Kamenica courts, and the Gjilan District Court. In particular, the Kamenica courts will be pilots for records management and fines and fees software - modules of a planned overall case management system. In addition, the archives, filing, and register systems will be substantially reformed, thanks in part to the ability to design offices for efficient traffic flow and documentary security.

In sum, the Kamenica courthouse has successfully brought together two different USAID programs to build a community-driven and designed project that can serve as a model for all of Kosovo of the potential public face and operations of a modern Kosovo justice system.