



**Organization for Security and Co-operation in Europe
Mission in Kosovo**

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**Observations And Recommendations Of The
OSCE Legal System Monitoring Section:**

**REPORT 2 -- The Development Of The Kosovo Judicial System (10
June Through 15 December 1999)**

Pristina, 17 December 1999

Introduction

As the third pillar in the UNMIK structure, the OSCE Mission in Kosovo is tasked with institution building, including the development of democratic institutions necessary to support the rule of law in Kosovo. The OSCE is also taking the lead role in monitoring, protecting, and promoting human rights in the province.

Pursuant to this mandate, the Department of Human Rights and Rule of Law has developed a programme for monitoring the functioning of the legal system in Kosovo. Through the Rule of Law Division's Legal System Monitoring Section, OSCE legal monitors have observed court proceedings; met regularly with judges, prosecutors and defence counsel; and have otherwise been in close contact with those involved in the legal system to monitor its functioning. OSCE legal monitors serve as independent, unbiased outside monitors. They do not represent the civil administration, any defendant, or any other group or individual.¹ The Legal System Monitoring Section will release periodic reports on its findings, with the goal of protecting and promoting human rights, encouraging improvements in the administration of justice, and suggesting systemic changes to the legal and judicial systems as necessary and appropriate. The Legal System

¹ In the event of any OSCE conflict of interest in a particular matter, OSCE legal monitors will: (1) announce the conflict; (2) withdraw from observation in the matter; and (3) recommend that another competent body undertake the observation.

Monitoring Section will avoid rendering opinions on the merits of cases currently under adjudication, unless this is necessary in a particular case to avoid human rights violations.

Issue

This report highlights some of the serious obstacles to the basic functioning of the emergency judicial system and recent initiatives undertaken to address these obstacles. This report covers the period from 10 June 1999 to 15 December 1999 and updates the discussion of the judiciary contained in the OSCE Report, Kosovo/ Kosova: As Seen, As Told, Part I and II (December 1999).²

Development of Kosovo's Emergency Judicial System

When UNMIK arrived in Kosovo in June there was no functioning court system. Many of the judges and prosecutors who worked in Kosovo during the previous ten years were no longer in the province. Many of those remaining were seen as unacceptable to the population because of their role in the former Serbian system. Others lacked appropriate knowledge and experience for the task. Thus, one of the most urgent and difficult tasks facing UNMIK and its partners was the re-establishment of the judicial system. The importance of this task was punctuated by ethnic violence and growing criminal activity.

On 28 June, the Special Representative for the Secretary-General (SRSG) issued an emergency decree establishing the Joint Advisory Council on Provisional Judicial Appointments (JAC) to recommend candidates for appointment as judges and prosecutors.³ Following the JAC's recommendations, the SRSG appointed a total of fifty-five judges and prosecutors to serve in an Emergency Judicial System in Kosovo (EJS) for three-month renewable terms. All those appointed had previously served as judges or prosecutors, although most had not done so during the last ten years. With the resignation or departure of all Kosovo Serb judges and prosecutors, only forty-seven remain in the system.

There are currently thirty criminal law judges, five civil law judges and twelve prosecutors. Of the thirty-five judges, there are three Muslim Serbs, one Turk and the remainder are of Albanian ethnicity (including one Catholic Albanian). The five civil law judges include three who are working in the Pristina Municipal Court and two in the Pristina District Court. None of civil judges have begun hearing cases yet and it is expected that civil trials will not commence until Spring 2000.

² See Kosovo/ Kosova: As Seen, As Told, Part II, pp. 10 - 14.

³ UNMIK Emergency Decree No. 1999/1 (28 June 1999) (providing legal basis for the establishment of the Joint Advisory Council for Provisional Judicial Appointments (JAC/PJA)); UMIK Emergency Decree No. 1999/2 (28 June 1999) (appointing members of the JAC/PJA). The JAC was composed of three internationals and four local Kosovo members, of whom one was Kosovo Serb, two were Kosovo Albanian, and one was Kosovo Muslim (Bosniak).

Provisional district courts and prosecutors offices have been set up in Pristina, Prizren, Mitrovica, and Pec.⁴ Mobile Units operating out of the Pristina District Court have covered areas that were not served by a regular district court, including the District of Gnjilane. In September, an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor were established to entertain appeals from the district court rulings.⁵

The JAC was dissolved under UNMIK Regulation 1999/7 (7 September 1999) and ceased its work following its 10 September 1999 meeting. The JAC was replaced by the Advisory Judicial Commission (AJC).⁶ Because of gap between the dissolution of the JAC and the establishment of the new AJC, there was no official body to recommend appointments for a period of approximately six weeks. The new AJC not only recommends the appointment of judges and prosecutors, but also is empowered to recommend their discipline and removal.

The AJC began its work on 27 October 1999. From November - December 1999, the AJC received more than 700 applications and conducted approximately 560 interviews. On 11 and 12 December 1999, the AJC finalised recommendations for 328 judges and prosecutors, and 238 lay-judges and delivered the recommendations to the SRSG on 13 December 1999. The SRSG is expected to make appointments by the end of the year.

Problems Facing the Emergency Judicial System

The Emergency Judicial System was established on an emergency basis with the primary purpose of providing hearings to criminal defendants detained by KFOR. Despite some progress, the judicial system faces a serious crisis and remains unable to respond to the needs of Kosovo.

By 15 December 1999, hundreds of pre-trial detention hearings and thirty-five criminal trials had been completed. For over 200 cases, indictment have been presented and the cases are now ready to go to trial.⁷ However, the only court that has the lay judges to hear criminal cases is the Prizren District Court. Thousands of other criminal cases involving defendants who are not in pre-trial custody are pending (although investigations are not proceeding in many of these cases). In addition to the new cases initiated since June, thousands of criminal and civil cases initiated before the NATO intervention also remain open.

As of 15 December 1999, there are currently 255 detainees being held by KFOR, the UN Civil Administration, and UN CivPol. Approximately one-third of all detainees, or 80 in

⁴ On 30 June 1999, the SRSG appointed judges and prosecutors to the Pristina District Court. The first Mobile Unit began operating on 2 July 1999. The SRSG made appointments to the court in Prizren on 17 July 1999, Mitrovica on 31 August 1999, and Pec on 7 September 1999.

⁵ On 14 September 1999, five judges and two prosecutors were sworn in to the Ad Hoc Court of Final Appeal and the Ad Hoc Office of the Public Prosecutor in Pristina. All seven are Kosovo Albanians.

⁶ The Advisory Judicial Commission is composed of three international and eight local members. Seven of the local members are Kosovo Albanians, one is a Kosovo Serb.

⁷ There are fifty-one indictments in Prizren, eighty-two in Pristina, thirty-nine in Pec, and thirty-two in Mitrovica.

total, will have spent nearly six months in detention, as of December 1999, January 2000, and February 2000. Only 20 out of the 80 individuals have already been indicted. Without indictments, the remainder are entitled to release in the coming months.⁸ Of those in detention, thirty-two individuals are suspected of violations of international humanitarian law or for crimes relating to the armed conflict.

In order to have a functioning judiciary -- a prerequisite to the establishment of a stable society based on the rule of law -- several serious problems must be immediately overcome. The most urgent problems include: 1) applicable law; 2) insufficient number of lay judges; 3) insufficient number of judges and prosecutors; 4) security concerns; 5) lack of multi-ethnic participation in the judicial system; 6) material needs of the courts; and 7) salaries of judges, prosecutors, and others working in the judicial system.

1) Applicable Law

One of the most serious obstacles to the functioning of the judicial system was the rejection of UNMIK's determination on the applicable law in Kosovo. UNMIK's first regulation established, among other things, that the laws applicable in Kosovo before 24 March 1999 (the start of the NATO intervention) will continue to be in force.⁹ Importantly, the regulation provided that the laws should only be applied to the extent that they are consistent with internationally recognised human rights standards, UN Security Council Resolution 1244, and other UNMIK Regulations. Under this regulation, the federal laws of the FRY and the regional laws of Serbia apply, in so far as they do not discriminate or otherwise violate human rights standards.

Despite Regulation 1, judges and prosecutors applied the provisions of the Kosovo Criminal Code, which was annulled in 1989-90. All trials held thus far have been conducted under the FRY Criminal Procedure Code, Kosovo Criminal Code and the FRY Criminal Code.¹⁰ While the substance of the Kosovo Criminal Code and the Serbian Criminal Code might be similar in most respects, the application of the wrong law to a criminal defendant raised serious concerns. Moreover, the law enforcement officials and citizens were left not knowing what body of law would apply to them.

On 12 December 1999, the SRSG passed Regulation 1999/24 and Regulation 1999/25. These regulations repealed Section 3 of UNMIK Regulation No. 1999/1 and provided that in criminal proceedings, the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and the date of the present regulation. This regulation will enable the application of the

⁸ Under Article 197 of the FRY Code of Criminal Procedure, if a suspect is held for a crime punishable by more than five years' imprisonment and has not been indicted within six months, he must be released. The maximum detention period of individuals held for less serious crimes is three months. At least twelve individuals whose maximum detention period is three months remain in custody and have not yet been indicted.

⁹ UNMIK Regulation 1999/1, Para. 2 & 3 (25 July 1999).

¹⁰ Most Kosovo Albanian legal professionals approached recognise that the federal laws of FRY apply now, as they did before 1990; the point of disagreement is whether the Serbian or Kosovo regional law should apply.

Kosovo Criminal Code and other Kosovo regional laws to future cases but will raise other serious difficulties.¹¹

2) Insufficient Number of Lay Judges Appointed

Lay judges are needed for criminal trials in Kosovo's district courts. Depending on the case, a trial panel in the district court is composed of two lay judges and one professional judge, or three lay judges and two professional judges.¹²

In August 1999, the SRSG appointed seven lay judges to serve on the Prizren District Court. However, with the dissolution of the JAC in early September and the commencement of the work of the AJC in late October, the appointment of lay judges was delayed for months. The failure to appoint sufficient lay judges has prevented all provisional district courts, except the Prizren Court, from proceeding with criminal trials.

As noted above, on 13 December 1999, the AJC delivered recommendations to the SRSG for 238 lay judges. The immediate appointment of lay judges will be critical for ensuring that the growing backlog of criminal cases will go to trial as expeditiously as possible.

3) Insufficient Number of Judges and Prosecutors

In addition to the lack of lay judges, the thirty-five judges¹³ and twelve prosecutors currently in the judicial system are not sufficient to handle even just the criminal case load. According to a Council of Europe report, 756 judges and prosecutors worked in the Kosovo judiciary before the conflict.¹⁴ The OSCE had estimated that between 360 and 400 judges and prosecutors would be needed for a system with a Supreme Court, a Constitutional Court, two district courts, and thirteen municipal courts.¹⁵

The dissolution of the JAC, the gap in the establishment of the AJC and the failure to implement interim measures such as the immediate provisional appointments for judges and prosecutors has meant that no additional appointments have been made September 1999. The insufficient number of judges and prosecutors contributes to the inability of the court system to deal with current cases.

As noted above, on 13 December 1999, the AJC delivered recommendations to the SRSG for 328 judges and prosecutors. The quick appointment of judges and prosecutors will greatly help to resolve the current crisis in the criminal justice system.

¹¹ OSCE legal monitors will report on these issues as they arise in the criminal justice system.

¹² See FRY Law on Criminal Procedure, Article 23.

¹³ Out of the thirty-five judges, only thirty are actually working since five judges were appointed for to handle civil cases and civil trials have not yet commenced.

¹⁴ Report of Council of Europe Experts on a Transitory Judicial System for Kosovo, at 2 (1999).

¹⁵ OSCE Paper on Judicial Institution Building, at 5 (May 1999).

4) Security Concerns

Judges and prosecutors have been harassed, threatened, and even attacked.¹⁶ In November, the President of the Court in Mitrovica had his car stoned. Also in November, the Chief Prosecutor in Pec was threatened that if three detainees were not released, he would be "executed in front of the UÇK headquarters."

Additional security arrangements -- in the courts, in travel to and from the courts, and in appropriate cases at the residence of those at risk -- are needed to avoid risks of undue pressure and inappropriate influence upon judges and prosecutors.

5) Lack of Multi-Ethnic Participation in the Judicial System

In July, one Kosovo Serb judge left Kosovo and did not return. In September, one Kosovo Serb prosecutor resigned, and one Kosovo Serb judge left after being attacked outside his apartment. On 4 October, the four remaining Kosovo Serb judges and prosecutors resigned from their positions, complaining of a lack of security, the application of the wrong law by their Kosovo Albanian counterparts (who persist in applying the Kosovo Criminal Code), discrimination against Serbs in the administration of justice, and a lack of sufficient payment. Thus there are currently no Kosovo Serb judges or prosecutors who have continued to work in the Emergency Judicial System.

The lack of any Kosovo Serbs in the judiciary reduces the credibility of the court system and can lead to at least an appearance of bias. Kosovo Serb legal professionals should, therefore, be urged to resume their participation in the judicial system. Appropriate steps should be taken to address their concerns about participating, for example by providing adequate security measures.

6) Material Needs of the Courts

OSCE legal monitors have noted the material needs of the courts as another factor contributing to the crisis in the judiciary.¹⁷ Basic office supplies, furniture, and equipment are needed.¹⁸ In Bondsteel, one judge informed the monitors that the conditions under which they worked (usually fifteen to twenty-five persons in a "court-tent") were unacceptable.

The OSCE has directed 80,000 USD -- from a larger United States human rights grant -- for immediate support to the Emergency Judicial System. The money is being used to provide computers, copy machines, typewriters, stationery, and some repairs for the courts and prosecutors offices in Pristina, Pec, Prizren, and Mitrovica. Resources have also been used for a court to be established in Gnjilane.

¹⁶ An informal OSCE survey, however, revealed that most judges and prosecutors do not report a higher degree of insecurity because of their position as judge or prosecutor.

¹⁷ See "Observations and Recommendations of the OSCE Legal System Monitoring Section: Report No. 1 Material Needs of the Emergency Judicial System" (1999).

¹⁸ Id.

The UN Civil Administration Pillar has also taken steps to provide further material assistance to the courts in the near future. In November and December 1999, the OSCE Rule of Law Division handed over most of the materials to the court and prosecutors offices in Pristina, Mitrovica, Pec, Prizren and Gnjilane. All have received one computer, one monitor, one laser printer and one back-up power supply unit, as well as all the stationery. The OSCE has also provided computer training sessions. The OSCE will continue to distribute the rest of the materials -- photocopy machines, manual typewriters, filing cabinets and electric heaters – to the courts and prosecutors offices in Kosovo as soon as the procurement procedure is finalised.

Substantial additional material support will be urgently needed as municipal courts and minor offences courts are re-established.

7) Salaries of Judges, Prosecutors, and Others Working in the Judicial System.

Another major concern is the payment of judges, lay judges, prosecutors, state provided legal counsel, and court staff. In August, the UNMIK Interim Civil Administration provided judges and prosecutors a stipend of 500DM. This was followed by monthly stipends of 300DM. Other court staff received monthly stipends of 200DM and 100DM.¹⁹ Those working in the emergency judicial system complain about the level of the stipends,²⁰ and the levels appear to many outside the system as inordinately low. The salary levels may be explained by factors such as constraints on the Kosovo budget, the need for future sustainability, and compatibility with the remuneration of other civil servants in Kosovo.²¹ Salaries for judges and others must also take into account Kosovo's taxing and other revenue generating ability.

Nevertheless, an appropriate balance must be found to reward dedicated judges, lay judges, prosecutors, defence counsel, and staff working in the system on a level sufficient to attract top qualified professionals and to help guard against corruption.²²

RECOMMENDATIONS

It is evident that there are a multitude of tasks facing the interim civil administration of Kosovo and the serious limitations in the Kosovo budget. Nevertheless, the problems identified by the OSCE Legal System Monitoring Section must be immediately addressed by the international community and local Kosovo partners in order to establish a functioning judicial system capable of addressing the urgent needs in criminal and civil law cases. If these steps are not taken, organised crime and other negative forces in Kosovo will become entrenched. The OSCE Legal System Monitoring Section therefore recommends:

¹⁹ Only stipends have been paid thus far. Regular salary levels will not be implemented until the year 2000.

²⁰ Judges, prosecutors and court staff in Pristina went on a two-day strike over this issue in October when the 300DM stipend was first offered.

²¹ The stipends are said to be fairly consistent with the salaries paid before the NATO intervention.

²² Low salaries in the Republic of Albania are said to contribute to corruption.

- ***Achieving consensus on the issue of applicable law.*** UNMIK Regulations 1999/24 and 1999/25 addresses the controversy over applicable law by providing that the criminal provisions in force between "22 March 1989 and the date of the present regulation" may be used. Efforts must be made to present and explain this regulation to the legal community, to ensure that it will enjoy the support of all legal professionals. A thorough look should also be taken at criminal cases concluded between 10 June 1999 and 12 December 1999, the date of the passage of Regulations 1999/ 24 and 25.
- ***Appointing more lay judge, judges and prosecutors.*** With the submission of the recommendations for appointment on 13 December 1999, the OSCE monitors are hopeful that appointments of lay judges, judges, and prosecutors will be made before the end of the year.
- ***Increasing security for judges, prosecutors, and others working in the judicial system.*** Judges and prosecutors in Kosovo have been subjected to physical intimidation and other forms of coercion. Threats against Serb candidates for judicial appointment have also created significant obstacles to the creation of a multi-ethnic judicial system. Security for judges, prosecutors, and other civil servants working in the judicial system should be increased to ensure that these individuals may perform their duties with independence and impartiality and in an environment free from coercion.
- ***Incorporating the participation of international judges or prosecutors.*** In the early stages of establishing a new judicial system in Kosovo, international judges and prosecutors can assist with disseminating and promoting the application of international human rights standards. The participation of international judges and prosecutors may be particularly helpful in national tribunals for violations of international humanitarian law.
- ***Encouraging multi-ethnic participation in the judicial system.*** Establishing a judicial system that reflects a diverse and multi-ethnic character is important in enhancing the impartiality of the judiciary and ensuring the non-discriminatory enforcement of the law.
- Providing increased material assistance. Additional efforts should be made to ensure that existing and future courts will have the basic materials necessary so that they may perform their functions effectively and efficiently.
- ***Establishing the salaries of judges, prosecutors, and others working in the judicial system.*** The payment of judges, prosecutors, and other civil servants working in the judicial system should be set at levels commensurate with their basic living standards as well as with their specialised skills. In particular, the salaries of judges and prosecutors should be set well above the current stipend levels to ensure that the judicial system is able to recruit the highest quality professionals and to guard civil servants from the pressures of corruption.

7 November 1999