ANNUAL REPORT ON THE JUDICIAL ACTIVITIES OF EULEX JUDGES

2010

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Foreword by EULEX Head of Justice

I am pleased to present the 2010 Annual Report of the EULEX Judges Unit. Within the EULEX Justice Component the Judges Unit is the biggest in terms of staff members and the most diversified in terms of functions. EULEX judges deal with a wide range of cases, ranging from civil disputes on civil property rights to criminal proceedings in sensitive cases related to serious crimes.

The report highlights the achievements of the EULEX Judges Unit in their executive capacity during 2010. Besides having a direct impact on the lives on the individual parties, the judgments and judicial decision taken by EULEX judges makes positive contributions to the advancement of the administration of justice in Kosovo. In order for this EULEX contribution to be lasting a continued cooperation and participation with the Kosovo judiciary is needed. In this regard I am pleased to see that a significant number of trials are held by mixed panel consisting of both EULEX and local judges.

I want to express my appreciation for the work that has been conducted by the EULEX Judges Unit, under the leadership of the President of the Assembly of EULEX Judge Maria Giuliana Civinini. The Assembly of EULEX judges has facilitated forums where EULEX judges and local judges meet to discuss legal issues and court management solutions resulting in immediate result and most importantly assisted the Kosovo judiciary system to progress towards becoming reliable and self-sustainable.

Silvio Bonfigli

Head of Justice

EULEX Kosovo

Foreword by the President of the Assembly of EULEX Judges

In the year 2010, the EULEX judiciary found itself at a turning point. The Kosovo judiciary has made steady progress on its path to achieve an independent and impartial judiciary. Therefore, EULEX judges have progressively empowered the local judges in decision-making as equal members in an integrated judicial system, and our mandate for monitoring and mentoring and advising has begun to take precedence over our executive functions, whenever possible. At the same time, the EULEX judiciary has reached consolidation and maturity in the implementation of its executive mandate. Let me elaborate in more detail.

First, the year 2010 laid the foundation for major transformations of the Kosovo judiciary. In July 2010, the Law on Courts reorganizing the judicial system and setting out the rights and responsibilities of the members of the Kosovo judiciary was adopted. Furthermore, in October 2010, the (re-) appointment process of judges and prosecutors undertaken by the Independent Judicial and Prosecutorial Commission was completed. This merit-based process, which has followed rules of procedure, operational methodologies and careful scrutiny in line with European standards, has resulted in over 300 judges and prosecutors being either newly appointed (over 60%) or reappointed by the President of Kosovo to all courts and prosecutorial offices in Kosovo.

The completion of this lengthy and challenging process confirms a willingness of the Kosovo Judicial Council to further and fully engage in reform in this area. It is also accompanied by an increased self-confidence and assertiveness of the Kosovo judiciary and prosecution that in turn is further strengthened by the mostly life-long tenure in accordance with the Kosovo constitution and by the increased salaries for the judges. Together, these developments importantly reinforce the independence of the judiciary at both an institutional and individual level and thus the rule of law.

The momentum of the Kosovo judiciary's increased consciousness of the importance of its role for a rule of law based society and state is maintained by the outstanding visionaries leading the Supreme Court of Kosovo, the Kosovo Judicial Council and the Kosovo Judicial Institute. They are closely followed by a number of very competent and dynamic District Court Presidents who, under the current legislation, are still responsible for case selection and case allocation for each district. Great improvement is to be underlined here: the essential criteria of transparency and objectivity are widely observed. This positive development has allowed for a progressive empowerment of the local judiciary in EULEX competences through an increased use of the mechanism foreseen in the law on EULEX jurisdiction according to which mixed panels can be composed by a majority of Kosovo judges or indeed of Kosovo judges only.

Secondly, the mission priority of the fight against organized crime and corruption is clearly reflected in the

increased number of cases in these closely intertwined areas. While the collection and evaluation of evidence continues to pose difficulties, overshadowed by the challenges of effective witness protection which still falls under EULEX executive mandate, our capacities in this respect have significantly increased, allowing for enhanced action and operability.

Thirdly, against the background of an increased attention that is paid in the region and internationally to the north of Kosovo, EULEX judges deployed to the district court in Mitrovicë/Mitrovica continue to importantly contribute to the respect of human rights and the rule of law in this area. Most significantly, they have been able – despite the continuously difficult circumstances – to tackle the backlog of criminal cases, advancing justice to many who have been held in detention centres for a considerable amount of time.

Last but not least, EULEX judges gained important ground in civil matters. Property rights, indeed, as an area of paramount importance in a post-conflict and post-socialist setting, are increasingly dealt with by EULEX judges. The so-called Drehusha Hunting Club case which has been adjudicated by EULEX Judges both at first and second instance may serve as an example. Apart from the socio-political sensitivity, the case was legally complex as it was related to the constitutional regime of social ownership in the pre-conflict period, and its possible transformation into municipal or state property under the current Kosovo legislation. The Special Chamber of the Supreme Court for KTA-related matters throughout 2010 focused on the socially and economically highly significant case, the so-called Ramiz Sadiku case, with over 1400 complainants requesting to be included in the list of employees entitled to share the 20% of the proceeds of the privatization of the enterprise. The SCSC furthermore concentrated on clarifying important procedural issues such as the admissibility criteria of the claims and preliminary injunctions, which would serve as firm basis for the later stage to issue judgments on the merits of the claims.

None of these positive developments in the successful implementation of EULEX mandate would have been possible without the dedication and commitment of our judges, legal officers and legal advisors. I therefore take the opportunity to address a warm thank you to all of them.

Maria Giuliana Civinini

President of EULEX judges

EULEX Kosovo

List of acronyms

AEJ - Assembly of EULEX Judges

ASC - Appeals pending with the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters

CCK - Criminal Code of Kosovo

CC SFRY - Criminal Code of the Socialist Federal Republic of Yugoslavia

CLK - Criminal Law of the Socialist Autonomous Province of Kosovo

DC - District Court

ECtHR - European Court on Human Rights

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

EULEX - European Union Rule of Law Mission Kosovo

HPCC - Housing and Property Claims Commission

HPD - Housing and Property Directorate

ICR - International Civilian Representative

ICTY - International Criminal Tribunal for the former Yugoslavia

KCCP - Kosovo Code of Criminal Procedure

KJC - Kosovo Judicial Council

KP - Kosovo Police

KPA - Kosovo Property Agency

KPCC - Kosovo Property Claims Commission

KTA - Kosovo Trust Agency

LCP - Law on Criminal Procedure

Law on Jurisdiction - Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo

Law on SPRK - Law on the Special Prosecution Office of Kosovo

MC - Municipal Court

MMA - mentoring, monitoring and advising

OG - Official Gazette

OPK - Office of the President of Kosovo

OSPK - Office of the State Prosecutor of Kosovo

PAEJ - President of the Assembly of EULEX Judges

PAK - Privatization Agency of Kosovo

POE - Publicly Owned Enterprise

PTK - Kosovo Post and Telecommunications Company

RR - Request for Removal from a local court filed with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters

SAPK - Socialist Autonomous Province of Kosovo

SC - Supreme Court

SCA - Appeal against a decision of a local court filed with the Trial Panel Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters

SCC - Regular Claim filed with the Trial Panel of Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters

SCC-R - Request for Review of a decision on a regular claim filed with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters

SCEL - Employee List Case

SCL - Case regarding Liquidation Proceedings filed with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters

SCPL - Request for Protection of Legality filed with the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters

SCSC - Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters

SPRK - Special Prosecution Office of Kosovo

SOE - Socially owned Enterprise

SRSG - Special Representative of the Secretary General of the United Nations

UNMIK - United Nations Interim Administration Mission in Kosovo

Introduction

Executive summary

This report presents the work done by the judges of the European Union Rule of Law Mission in Kosovo (hereinafter EULEX) in fulfilling their executive functions in Kosovo courts during 2010. The report aims at providing an overview exclusively of the executive/judicial functions of the EULEX judges in Kosovo courts. It does not cover any of the work of the EULEX judges in monitoring, mentoring and advising (hereinafter MMA).

EULEX judges exercise judicial functions in Kosovo in accordance with the Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo (hereinafter Law on Jurisdiction).[1] The Law on Jurisdiction provides EULEX judges with primary/exclusive and secondary/subsidiary competences over a range of criminal offences which include terrorism; crimes against humanity; war crimes; organized crime; murder and aggravated murder; economic and financial crimes. According to Article 3, para 1 of the Law on Jurisdiction, EULEX judges have primary/exclusive competence over any criminal case investigated or prosecuted by the Special Prosecution Office of Kosovo (hereinafter SPRK). In exceptional circumstances EULEX judges may also take responsibility and exercise secondary/subsidiary competence over criminal cases investigated or prosecuted by municipal and district prosecution offices.

The Chapter on the Exercise of the powers of the President of the Assembly of the EULEX judges under the Law on Jurisdiction, provides details on the procedure of selection and take over of cases under the secondary/subsidiary competence of EULEX Judges. The procedure and requirements of the take over of sensitive and/or complex cases, either criminal or civil, are foreseen by the Law on jurisdiction. The application of those provisions during the year 2010 led to an evolvement of the procedure, taking into consideration the particular circumstances (e.g. in the north of Kosovo) and the current situation in the courts of Kosovo towards the achievement of the Mission's mandate of sustainability and accountability of the Kosovo judiciary. In this respect the President of the Assembly of EULEX Judges (hereinafter PAEJ) frequently uses the mechanisms provided in the Law on Jurisdiction to increase the involvement of Kosovo judges in cases handled by EULEX judges.

The Chapter on Criminal Cases focuses on selected criminal proceedings that were conducted in 2010 by the EULEX judges. These cases were selected based upon several criteria, such as relevance in regard to the priorities of the EULEX Mission according to its mandate for 2010 and precedential value or instructive significance of the reasoning in respect to the interpretation of material or procedural legal provisions. The respective sub-sections in this Chapter contains descriptions of 4 (four) war crimes cases, 11 (eleven) cases of corruption, organized crime and related criminal offences, 2 (two) criminal proceedings related to domestic violence, 1 (one) ethnically motivated criminal case, 2 (two) cases of criminal proceedings where a significant amount of public and political pressure was exerted on the judiciary and 4 (four) murder cases.

1 Law No. 03/L-053 on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo dated 13 March 2008. The law is available on EULEX website: http://www.eulex-kosovo.eu/training/?id=13

Additionally, EULEX judges exercise jurisdiction in civil cases. According to Article 5, paragraph 1 of the Law on Jurisdiction, EULEX judges have: primary competence on cases within the jurisdiction of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency (hereinafter KTA) related matters (hereinafter SCSC); exclusive competence on cases falling within the jurisdiction of any court of Kosovo concerning appeals against decisions of the Kosovo Property Claims Commission (hereinafter KPCC); and authority to select and take over any new or pending property related civil case. At the Municipal and District court level EULEX judges exercise only secondary/subsidiary competence in the civil law area and do not possess the primary/exclusive competence pertinent to the criminal cases. Therefore, in the civil field the work is done predominantly in the form of MMA and not through the adjudication of cases; accordingly the number of civil cases dealt with by the EULEX judges is significantly smaller than the number of criminal cases. Currently, EULEX civil judges devote approximately 10 % of their time to the executive mandate. The remaining time is dedicated to MMA. In the section on the adjudication of civil cases, the report seeks to summarize civil cases dealt with by the EULEX civil judges in 2010 whose adjudication involved sensitive and complex legal issues. The case summaries provide the factual background of the case; the rational behind its take over by the EULEX judges and the outcome of the proceedings.

Chapter 4 of the report focuses on the jurisdiction of the SCSC. The SCSC was originally established by United Nations Interim Administration Mission in Kosovo (hereinafter UNMIK) Regulation 2002/13[2] in order to provide for a strong, independent and unbiased control mechanism for the privatization process in Kosovo, carried out by the KTA. In early 2009 it was redesigned and largely expanded, to involve EULEX judges. The report thus describes the legal basis of the mandate of the SCSC and provides summaries of relevant cases which fall under the SCSC's jurisdiction.

The conclusion of the Annual report is presented under Chapter VII and assesses the achievements so far, and remaining challenges. In 2010, the UNMIK legacy was completed at the Supreme Court (SC) level. Significant progress was also achieved in this regard at district courts (DC) level. EULEX judges gave priority to the adjudication of cases involving charges of corruption and organized crime. Further work was done to reduce the backlog of criminal cases, especially cases involving prolonged detention on remand. Particular attention was given to the proper adjudication of cases against juveniles.

EULEX Judges Unit – personnel and deployment in Kosovo courts

EULEX judges represent an integral part of the EULEX Justice Component. EULEX judges are either citizens of the European Union Member States or of contributing Third States (Norway, Switzerland, Turkey, Croatia, the USA and Canada), and are acting judges in their national capacity. Due to the particular nature of their functions, EULEX judges exercise executive functions in accordance with the Law on Jurisdiction.

Currently, there are 39 (thirty nine) EULEX judges and 27 (twenty seven) EULEX legal officers deployed in courts Kosovo wide. In addition, there are local legal advisors, administrative/language assistants, and interpreters/translators. The support of the local staff is indispensable for the efficient exercise of the judicial functions of the EULEX judges. The PAEJ is the Head of the Judges Unit.

2 UNMIK Regulation 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, dated 13 June 2002

The distribution of the EULEX judges and legal officers is as follows:

- 5 (five) SC judges, including the PAEJ;
- 16 (sixteen) criminal judges at district court (DC) level;
- 9 (nine) civil judges at DC level;
- 6 (six) first instance judges at the SCSC, and
- 3 (three) appeal judges at the SCSC;
- 15 (fifteen) legal officers at DC level;
- 5 (five) legal officers at the SC level;
- 1 (one) legal officer for Kosovo Property Agency (hereinafter KPA) appeals;
- 6 (six) legal officers at the SCSC.

EULEX judges perform their duties throughout Kosovo. EULEX judges' teams are deployed in all five DCs.

Pristina DC – 6 (six) criminal judges and 2 (two) civil judges supported by 5 (five) legal officers and 3 (three) local legal advisors;

Gjilan/Gnjilane DC – 2 (two) criminal judges and 1 (one) civil judge supported by 3 (three) legal officers, 2 (two) legal advisors and 1 (one) local legal assistant;

Pejë/Peć DC – 3 (three) criminal judges and 2 (two) civil judges supported by 2 (two) legal officers and 2 (two) local legal advisors;

Prizren DC – 1 (one) criminal judge and 2 (two) civil judges supported by 2 (two) legal officers, 2 (two) local legal advisors and 1 (one) local legal assistant;

Mitrovicë/Mitrovica DC – 4 (four) criminal judges and 2 (two) civil judges supported by 3 (three) legal officers, 2 (two) local legal advisors.


JUSTICE FOR CHILDREN
JUVENILE CRIME
and
JUSTICE PRACTICE
IN KOSOVO

Chapter 1:

Procedure of selection and take over of cases under the Law on Jurisdiction

(analysis of decisions and statistical data)

The EULEX judges exercise their judicial functions according to the Law on Jurisdiction. The law regulates *inter alia* the competence of EULEX Judges based on objective and predetermined criteria, the powers of the PAEJ and the prerogatives of the Assembly of EULEX Judges (hereinafter AEJ).[3] These provisions enable the parties to a proceeding to determine the *competent judge* in a given case, i.e. the judge who is assigned to the case, according to the law and its rules on competence. This Law shall be read in conjunction with the Law establishing the Special Prosecution Office of Kosovo (Law on SPRK)[4] that provides for the competences of this office to prosecute and investigate serious crimes.

A distinction is to be made between the primary/exclusive and subsidiary/secondary competence of EULEX judges in criminal cases. A case under primary competence falls automatically under the jurisdiction of EULEX judges in accordance with the provisions of the law, whereas, for a case under secondary competence, a decision on whether the case shall be taken over by EULEX judges has to be issued pursuant to the requirements provided by law.

- The exclusive competence of EULEX judges is foreseen for the cases that fall under the primary competence of the SPRK.[5] These cases listed under Article 9 of the Law on SPRK are considered as serious crimes, e.g. terrorism, genocide, crimes against humanity, war crimes, organized crime etc. In addition, all cases investigated under the secondary competence of the SPRK fall under the primary competence of EULEX judges.

- If a case is not investigated or prosecuted by the SPRK, EULEX judges may exercise their secondary competence. The PAEJ has the authority in limited cases to assign EULEX judges to the respective stage of criminal proceeding (procedure of take over a case).

The jurisdiction of EULEX judges on civil cases, assigned in regular courts is foreseen in Article 5 of the Law on Jurisdiction. The requirements to select a civil case are mentioned in Article 5, para 1, c) of the Law. The take over of a case from the Kosovo judiciary to the profit of the EULEX judges may be considered as an exception to the fundamental principle of the *competent judge* as determined by law. Indeed the adjudication to a EULEX Judge of a case that was already allocated to another Judge or was pending assignment to a Judge, derogates to the fundamental rules on competence. Therefore the conditions of take over are strictly regulated in the Law on Jurisdiction.

I. Grounds for selection and taking over of a case

The adjudication of a case by EULEX judges may be necessary to ensure a fair and equitable proceeding that may not be guaranteed if the Kosovo judiciary would deal with the case.

3 See Articles 2 and fol. for the competences of EULEX Judges; Article 4.10 of the Law on Jurisdiction for the Assembly of EULEX Judges

4 Law No. 03/L-052 on the Special Prosecution Office of the Republic of Kosovo dated 13 March 2008.

5 Article 3 of the Law on Jurisdiction

Grounds for taking over a criminal case

For the take over of a criminal case, two situations are envisaged in the Law on Jurisdiction: if there is a need to ensure the proper administration of justice and if there is suspicion that the case relates to an ethnic-motivated crime.

Need to ensure the proper administration of Justice under Article 3, para 3 of the Law on jurisdiction

Article 3, para 3 enumerates a list of criminal offences that may fall under the secondary competence of EULEX judges "when it is considered necessary to ensure the proper administration of justice". The need to ensure the proper administration of justice is elaborated in Article 3, para 5 of the Law:

- "if there have been threats to the Kosovo judge, to the witnesses or to the parties to the proceeding in connection with the case, and this can reasonably lead to a belief that there would be a serious miscarriage of justice if the case is kept under the exclusive responsibility of Kosovo judges"; or
- "if it is reasonable to believe that the activity of EULEX judges due to the particular complexity or the nature of the case is necessary to avoid a miscarriage of justice".

Suspicion of ethnic-motivated crime under Article 3, para 4 of the Law on jurisdiction

EULEX judges may exercise their secondary competence in cases showing ethnic-motivated elements; in other words "where the victim, premises, or target of the offence appear to be selected because of their real or perceived connection, attachment, affiliation, support, or membership of a real or perceived group identified according to its race, national, ethnic or social origin, association with a national minority or with a political group, language, color, religion, sex, age, mental or physical disability, sexual orientation, or other similar factor."

Grounds for taking over a civil case

The jurisdiction of EULEX judges assigned in regular courts on civil matters is foreseen in Article 5 of the Law on Jurisdiction. Article 5, para 1 item c) foresees limited jurisdiction for EULEX judges in regular civil proceedings for any new or pending property related civil cases, including the execution procedures, falling within the jurisdiction of any court in Kosovo, if:

i) there is a grounded suspicion of attempts to influence the impartiality or independence of the local judiciary; or

ii) there is a grounded suspicion that the local judiciary is not willing or unable to properly deal with the case; or

iii) there is a grounded suspicion of a serious violation of the fairness of the proceeding.

II. Procedure of selection and take over of a case

The selection and take over of a criminal case at the municipal, district or supreme court level is decided before the commencement of the relevant stage of the proceeding (investigation, pre-trial, confirmation, trial, appeal). It is initiated upon a request of the EULEX Prosecutor assigned to the case (or working in the mixed team with local Prosecutors) or of any of the parties to the proceeding or at the written request of the President of the competent court. The principles of transparency, objectivity and efficiency serve as guidance during the procedure of take over.

The Office of the PAEJ issued Standard Operating Procedures (SOPs) in January 2009 detailing the procedure for take over criminal cases (filing of the request etc.). Taking into consideration the sensitiveness of the pre-trial phase in a criminal proceeding, the SOPs were slightly amended in October 2010 to modify the take over procedure at this stage.

Under Article 3, para 6 of the Law, the Kosovo Judge who would otherwise be assigned to the case, the president of the competent court, and the parties to the proceeding in the case have the right to be heard by the PAEJ. Thus the parties can submit a written opinion to the PAEJ on whether to take over a case. However the right to be heard has been interpreted in a broad sense and a hearing is generally held to entitle the parties and the Kosovo judges to present their opinion. The hearing is held by the PAEJ in closed session due to the sensitive nature of a case or the early stage of the proceeding that may prevent any disclosure of confidential information to the public. After the hearing the PAEJ issues a grounded ruling. It is attached in the case file and communicated to the persons invited to the hearing. Against this ruling there is no possibility of appeal.[6] This ruling is valid for the whole criminal proceeding unless a request to hand over the case to Kosovo judges is subsequently filed.

Although holding a hearing for take over a case is the rule, there are particular circumstances in certain instances that do not require a hearing: when the parties have expressed their opinion in writing; when the case is at the early stage of investigation and the President of the Court already expressed his/her opinion; when the request is manifestly inadmissible since it does not fall under EULEX judges' competence. 35 (thirty five) requests to transfer a criminal case were rejected/dismissed without a hearing mainly because of the lack of jurisdiction of EULEX judges or the absence of sufficient grounds.

The take over procedure of civil cases differs depending on whether the case is "new" or "pending".[7] The EULEX Judge assesses if the new case meets the requirements under Article 5, para 1 of the Law and issues a ruling to select and take over the case. In the latter, "pending" case, a hearing is held by the PAEJ, or her delegate,[8] and a final decision is rendered.

6 Article 3, para 6 of Law on Jurisdiction
7 A case is new when registered but not allocated to a Kosovo judge. A case registered and allocated is pending.
8 Article 3, para 14 of the Guidelines for case Selection and Case Allocation for EULEX Judges in civil cases dated 10th July 2008

Composition of the panels assigned on cases taken over

According to the Law, the panels in which EULEX judges exercise their jurisdiction are of mixed composition with a majority of EULEX judges and presided by a EULEX judge.[9] The panel composition is made on a *case by case* basis after a thorough assessment of the case file and of its circumstances.

Nonetheless, Article 3, para 7 of the Law on Jurisdiction enables the PAEJ to deviate from this rule by deciding that for grounded reasons panels in a criminal case can be composed of a majority of Kosovo judges. The PAEJ can also decide the panels to be fully composed of Kosovo judges or not to assign EULEX judges at particular stage of the criminal proceeding. Lately this mechanism has been used more frequently and there were several instances in which mixed panels were composed of a majority of local and not EULEX judges.[10] In order to further facilitate the process of engaging Kosovo judges in mixed panels, the PAEJ issued a decision in July 2010 on the procedure of composition and designation of the panels. It is considered that the gradual involvement of Kosovo judges in panels contributes in strengthening the capacity and legitimacy of the judiciary, and promotes the incorporation of the best European practices into the Kosovo judicial system.

Finally, the AEJ adopted Guidelines for case Selection and Case Allocation for EULEX judges in civil and criminal Cases in District Courts on 10th July 2008 and at the Supreme court level on 23rd October 2008, as foreseen in the Law on jurisdiction.[11] These guidelines include the fundamental principles of the assignment of EULEX judges and the case allocation system. They have been amended in 2010 to take the current situation and workload of the courts into consideration. These Guidelines are public to enable any party to a proceeding to have access to the rules applicable to the allocation of a case to a EULEX Judge.

III. Cases taken over in 2010

A. Criminal cases taken over in 2010

During the year 2010, 53 (fifty three) take over hearings (29 (twenty nine) in Mitrovicë/Mitrovica District court) were held by the PAEJ in the criminal field. 43 (forty three) requests for the take over of criminal cases were accepted following a hearing. The other requests were either rejected or withdrawn by the Prosecutor. One request was postponed due the unsuccessful notification of the parties.

9 See Article 3, para 7 of the Law on jurisdiction

10 The tendency of more active involvement of Kosovo judges in the adjudication of serious crimes is particularly noticeable at the Supreme Court level where in over 56 (fifty six) criminal cases dealt with by the EULEX judges since January 2009, the panels were composed of a majority of local judges while presided by a EULEX judge.

11 Guidelines for Case Allocation for EULEX Judges in Criminal Cases in District Courts dated 10th July 2008; Guidelines for Case Allocation for EULEX Judges in Civil Cases in District Courts dated 10th July 2008; Guidelines for Case Allocation for EULEX Judges in Criminal Cases at the Supreme Court of Kosovo dated 23 October 2008, as amended on 1st June 2010. the Guidelines are available on WULEX website http://www.eulex-kosovo.eu/en/justice/assembly-of-the-eulex-judges.php

Comparison of criminal and civil cases taken over between year 2009 and year 2010

Courts	Prishtinë/ Pristina District court		Mitrovicë/ Mitrovica District court		Pejë/Peć District court		Prizren District court		Gjilan/ Gnjilane District court		Supreme Court of Kosovo	
Years	2009	2010	2009	2010	2009	2010	2009	2010	2009	2010	2009	2010
Criminal cases taken over	14	3	19	25	8	11	4	6	1	0	3	2
Civil cases taken over	6	21	0	0	21	6	0	4	3	2	0	0

1) Prishtinë/Pristina District court: there was an increase of civil cases taken over and a decrease of criminal cases (3 (three) criminal and 21 (twenty one) civil cases) during the year 2010 in comparison with 14 (fourteen) criminal cases and 6 (six) civil cases taken over in 2009. This decrease has come as a result of the increase of the number of criminal cases under the exclusive competence of the EULEX judges and the expansion of the monitoring activities.
2) Mitrovicë/Mitrovica District court: the number of selected criminal cases rose in 2010 (25 (twenty five) cases) in comparison with 19 (nineteen) cases for the year 2009. No civil cases were taken over due to the particular circumstances prevailing in Mitrovicë/Mitrovica region. The adjudication of serious criminal cases by EULEX judges increased since last year due the need of ensuring the administration of justice in northern Kosovo and the absence of Kosovo Albanian and Serb judges sitting in panel in Mitrovicë/Mitrovica District court. Moreover the EULEX team deployed in Mitrovicë/Mitrovica court was re-enforced with addition staff members.
3) Pejë/Peć District court: there was a slight rise of the number of criminal cases taken over in 2010 (11 (eleven) criminal cases) in comparison with year 2009 (8 (eight) criminal cases). The number of civil cases taken over in 2010 (6 (six) cases) has decreased comparing to 21 (twenty one) civil cases taken over in 2009. During year 2010 the EULEX civil judge was involved in the adjudication of criminal cases due to the deficient number of EULEX criminal judges at Pejë/Peć District Court.
4) Prizren District court: the number of civil and criminal cases increased in 2010 (6 (six) criminal and 4 (four) civil cases) whilst only 3 (three) criminal cases were taken over in 2009. The increase of the number of criminal cases in 2010 finds reason in the take over of cases involving members of the Kosovo judiciary of Prishtinë/Pristina region.[12]
5) Gjilan/Gnjilane District court: there were no requests for take over of criminal cases; only 2 (two) civil cases were taken over in 2010, compared to 3 (three) civil cases and 1 (one) criminal case in 2009. The EULEX judges are actively involved in monitoring activities and the EULEX judges of Gjilan/Gnjilane District court also deal with cases at the pre-trial stage at Prishtinë/Pristina region.
6) Supreme Court of Kosovo: 2 (two) criminal cases were taken over during the year 2010, while 3 (three) criminal cases were selected and handled by EULEX judges in 2009.

12 See Article 13, para 2 of the Law on jurisdiction. The criminal cases involving members of the Kosovo judiciary or by employees of the various courts in Kosovo shall be investigated, prosecuted and adjudicated by a prosecution office and by a court that exercise competence and jurisdiction over a different region than the region where the judge, prosecutor or employee normally perform his or her functions. Therefore if the alleged crime occurred in the region of Prishtinë/Priština or Gnjilane/ Gjilan, the competent prosecution office and court is to be identified in either the district or municipal prosecution office and in either the district or municipal court of Prizren.

Most of the criminal cases taken over in 2010 fell under the jurisdiction of Mitrovicë/Mitrovica District court. The majority of these cases (16 (sixteen) cases) involve serious offences. The need to guarantee fair and equitable trial for the accused and ensure proper administration of justice is fundamental when deciding on the take over of a case. These are the principles based on which criminal cases have been assigned to the EULEX judges in the north of Kosovo where the regular functioning of the judicial system is obstructed by the complexity of the political situation and the suspension of the re-integration process of Kosovo judges into Mitrovicë/Mitrovica District court. Under these circumstances a number of cases were adjudicated by the EULEX judges in Mitrovicë/Mitrovica in order to avert a violation of the Defendant's rights due to lengthy criminal proceeding or unjustly prolonged detention. Most of the cases taken over concerned crimes of violent nature such as murder, attempted murder, trafficking in human beings and criminal acts for which the deterrence is of significance such as cases of domestic violence.

For example, in the case B. Z. the Defendant allegedly attempted to take his wife's life in 2008 by hitting her head and face and tying a rope around a neck. The PAEJ issued a take over decision taking into consideration the difficulties in the proper administration of justice in the north of Kosovo and the potential breaches of Defendant's and victim's rights. It was also considered that the case involved a grave domestic violence crime and prolonged detention of the Defendant (since September 2008).

EULEX judges handled the A.D. murder case (shooting with automatic rifle and attempted murder of the victim's relative) based on the grounds that the Defendant had been in detention on remand for the past three years, the case had been pending for a lengthy period (the main trial which started on February 2008 was later on suspended). Avoiding a miscarriage of justice was also a ground to take over this case.
In the Y.K. shooting case, consideration was once again given to the violent aspect of the crime committed and the lengthy period of detention on remand of the Defendant (since October 2007). After the confirmation of the indictment in December 2009, the trial had not been scheduled and this situation may have led to a grave miscarriage of justice.

Another category of cases taken over by the EULEX judges were *corruption cases*,[13] in particular those involving the Kosovo judiciary. Few cases relating to the criminal offence of Issuance of Unlawful decision based on the Article 346 of the Criminal Code of Kosovo (hereinafter CCK)[14] were taken over. In such cases in order to prevent allegations of unfairness of the proceedings and avoid violation of judges' impartiality when the case involved a member of the Kosovo judiciary of one region, it was adjudicated in a court of another region.[15]

In M. S. case, the Defendant acting in the capacity of execution Judge at the municipal court level was accused of having issued an unlawful judicial decision regarding a civil dispute. The case was taken over given that the

13 The Assembly of EULEX Judges adopted a list of criminal offences that may fall under the category of 'corruption cases' during the 12th Assembly on 23rd September 2010. This list enumerates the criminal offences under Chapter XXII: criminal offences against the economy (Articles 235-238; Articles 249-251); Chapter XXIII: criminal offences against property (Article 261); Chapter XXVII: criminal offences against the administration of justice (Articles 309-311); Chapter XXVIII: criminal offences against public order and legal transactions (Article 316; Articles 332-334); Chapter XXIX: criminal offences against official duty (Articles 339-351)

14 Article 346 CCK: "A judge or a lay judge or a minor offence court judge who, with the intent to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person, issues an unlawful decision shall be punished by imprisonment of six months to five years."

15 Article 13, para 2 of the Law on Jurisdiction (quoted above)

criminal offence of Article 346 CCK has a strong impact on the independence of the Kosovo judiciary and on its perception by the citizens. Further it was a complex property-related case.

Another case related to the criminal offence of issuing an unlawful judicial decision which triggered the attention of the EULEX judges was the case of R.B. This case involved allegations of issuing unlawful decision by a Judge of Prishtinë/Pristina Municipal Court. According to the indictment, the Defendant issued an unlawful judicial decision in 2005 harming one party to a civil dispute in an inheritance procedure. In May 2010 the defence counsel filed a request for the take over. Since the adjudication of such case may have a direct impact on the reputation of the Judge and his or her independence and perception of the Kosovo judiciary in the public, the case was selected in July 2010.

B. Civil cases taken over in 2010

During this year 2010, 2 (two) take over hearings were held by the PAEJ. Other hearings were held by her delegate and led to the take over of 32 (thirty two) cases. 18 (eighteen) requests for the take over of civil cases were dismissed or rejected, mainly due to the fact that the requests were not falling under EULEX judges' mandate or were ungrounded.
Total number of civil cases taken over during the year 2010:[16]

1) Prishtinë/Pristina District court: 21 (twenty one) civil cases taken over;
2) Pejë/Peć District court: 6 (six) civil cases taken over;
3) Prizren District court: 4 (four) civil cases taken over;
4) Gjilan/Gnjilane District court: 2 (two) civil cases taken over.

At the District court of Gjilan/Gnjilane EULEX judges took over a case relating to a claim of confirmation of ownership filed by Privatization Agency of Kosovo (hereinafter PAK) against Viti/Vitina Municipality. The case concerns the issue of repartition of competences between the Kosovo regular courts and the SCSC. The Kosovo courts usually consider themselves incompetent to deal with the cases involving Socially Owned Enterprises (hereinafter SOE), under the Special chamber's exclusive competence. Furthermore**,** the Municipality of Viti/Vitina showed unwillingness to enforce judicial decisions issued by the Kosovo judiciary.[17]

In August 2010 the President of Deçan/Dečani Municipal Court requested to the EULEX judges the transfer of a case relating to a claim for compensation of damages (for destruction of property) filed against the Monastery of Deçan/Dečani. As the issue in dispute was property-related and the case involves parties of different ethnicity, the case was taken over by EULEX judges.

18 (eighteen) cases in which the respondent was the Municipality of Gllogovc/Glogovac and the claimants individual shop owners, whose shops were turned down by the municipality after long administrative procedures, have been taken over by EULEX Civil judges from the Gllogovc/Glogovac Municipal Court. EULEX judges considered that the cases were not properly administered and the political pressure exercised by the Municipality on the local judiciary was detrimental to the proper adjudication of the case.[18]

16 No civil cases were taken over in Mitrovicë/Mitrovica District court and in the supreme court of Kosovo in 2010.
17 See cross reference to Chapter 3: Adjudication of civil cases (case studies and statistics), Case C. No. 328/09 Municipality of Viti/Vitina vs PAK, Viti/Vitina Municipal court (Gjilan/Gnjilane region)
18 See cross reference to Chapter 3: Adjudication of civil cases (case studies and statistics), Case C. No. 302/07 and others,


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Chapter 2:
Adjudication of criminal cases
(case studies and statistics)[19]

shop owners vs Municipality of Gllogovc/Glogovac, Gllogovc/Glogovac Municipal court (Prishtinë/Pristina region)

19 The judgments and rulings issued in these cases are available on EULEX website: http://www.eulex-kosovo.eu/en/judgments/index.php

This Chapter presents criminal proceedings adjudicated under the auspices of EULEX judges. As to the legal basis and the procedural details of the case selection and case allocation to EULEX judges, reference is made to Chapter 1: Procedure of selection and take over of cases under the Law on Jurisdiction (analysis of decisions and statistical data). The reasons for selection and take over of these cases are explained at the beginning of the discussion of every case.

The Chapter is structured on the first level in a thematic way. The cases are assigned to sections according to different types of proceedings, which were special focus of the EULEX Justice component during 2010. The proceedings are sorted into sub-categories according to the competent courts, the cases being arranged in chronological order according to the date of the decisions.[20] An exception is the last section, which includes different categories of proceedings. Most of these proceedings were assigned to EULEX judges due to concerns that the Kosovo judiciary was unable to adjudicate them in a fair, independent and impartial way. Here also included are Murder cases of factual or legal complexity that were taken over by EULEX judges in order to support the local judiciary and the cases taken over in order to avoid indefinite delays in the administration of justice. Proceedings against the same Defendants for the same criminal acts tried within the reporting period in different instances are presented as separate cases. However, they are always presented together consecutively, beginning with the proceedings in the lower instance.

In addition to the executive judicial functions of EULEX judges their mandate also includes MMA activities of the local counterparts. Very often no clear distinction between executive function and MMA activities can be made since frequently both take place at the same time in the course of work with mixed panels.

Pursuant to the applicable procedural law in Kosovo, namely Kosovo Code of Criminal Procedure (hereinafter KCCP), in its Article 20, para 1, cases shall be adjudicated in municipal courts, district courts and the Supreme Court of Kosovo.

A case is to be tried at the Municipal court level by an individual Judge or in a trial panel of one Judge and two lay judges if the criminal offence in instance is punishable by a fine or by imprisonment of up to 5 (five) years.[21] The District court is competent to adjudicate cases for which the criminal offence is punishable by imprisonment of at least 5 (five) years or by long-term imprisonment. The District court also has competence to hear the appeals against judgments issued by a Municipal court. The court panel is, in these instances composed of either 3 (three) judges or 5 (five) judges.

The Supreme Court of Kosovo as the highest instance in criminal proceedings is competent to decide on 1) an appeal against a decision of a district court rendered at first instance, 2) an appeal against a judgment rendered at second instance and 3) an extraordinary legal remedy. Chapter XXXIX of the procedural code lists the extraordinary legal remedies: reopening of criminal proceedings, Extraordinary Mitigation of Punishment, Request for Protection of Legality.[22]

20 Proceedings tried at the Municipal Courts are included into the sub-section according to the area of the respective District Courts.

21 For the cases handled by EULEX Judges, the trial panels are composed of professional judges without any involvement of lay judges. See also Case Pkl-Kzz 119/09 Mehmet Morina, judgment of the Supreme court of Kosovo, 20 January 2010, Request for protection of legality, pages 3 and 4

22 See Articles 451 and fol. of the KCCP on the Request for protection of legality: such request may be filed by the Public Prosecutor for Kosovo, the Defendant or his or her defence counsel on the grounds of 1) a violation of the criminal law; 2) a

Some statistics on criminal trials in 2009 and 2010

Number of criminal cases in main trial stage at the district court level

Courts	2009	2010
DC Gjilan/Gnjilane	1	4
DC Mitrovicë/Mitrovica	21	34
DC Pejë/Peć	9	17
DC Prishtinë/Priština	23	30
DC Prizren	12	8
Total	66	93

Number of judgments issued in criminal cases at the municipal, district and Supreme Court level per court

Courts	2009	2010
Supreme court	27	24
DC Gjilan/Gnjilane	1	1
DC Mitrovicë/Mitrovica	4	27
DC Pejë/Peć	7	12
DC Prishtinë/Priština	10	15
DC Prizren	6	8
Total	56	87

Number of judgments issued in criminal cases at the municipal, district and Supreme Court level according to the criminal offence

Criminal offence	2009	2010
War crimes	10	4
Terrorism	2	0
Corruption	1	15
Other (Murder, Theft, Rape, Bodily Injury, THB)	39	68
Total	56	87

I. War crime cases

Case P no. 285/10 Vukmir Cvertković, District court of Pejë/Peć

Type of proceedings:	First instance judgment
Date:	9 November 2010
Criminal Offences:	War Crime against Civilian Population in violation of Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter CC SFRY)
Result:	Conviction

These proceedings concern a case of war crime against the civilian population committed during the armed conflict in Kosovo in March 1999 in the region of Pejë/Peć.

substantial violation of the provisions of criminal procedure provided for in Article 403, para 1 of the present Code; or 3) another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision. The Supreme Court may modify or annul the first or second instance judgment or reject the request.

The Defendant was charged with, acting jointly with members of the Serbian Police and wearing himself a uniform, had expelled one Kosovo Albanian family from its house and set on fire at least two houses belonging to Kosovo Albanians in Kline/Klina at the end of March 1999.

Upon an international wanted notice, the Defendant, after being extradited from Norway, was arrested in Kosovo on 13 July 2010. The indictment filed by the SPRK in September 2010 was confirmed the same month. It was mainly based upon statements of witnesses who reported the Defendant to the police war crime investigation unit when he returned to Kline/Klina in 2005 and became a Kosovo Police (hereinafter KP) police officer. The main trial started on 26 October 2010 whereby few witnesses were heard and a site inspection in Kline/Klina was conducted. The court in addition perused the case materials, i.e. pictures of the burnt houses and the site inspection, police reports and the Defendant's statement. The Defendant whilst admitting that he was wearing a police uniform as reserve policeman at the critical time, denied the accusation against him.

On 9 November 2010, the trial panel composed of two EULEX judges and one Kosovo Judge found that the Defendant wearing a uniform from the Serbian forces and equipped with an AK-47 automatic gun pointed it at one victim and ordered the victim and his family to leave to Albania. It also found that the Defendant together with other Serbian forces' members, took part to an organized and military operation consisting in expelling Kosovo Albanian population from Kline/Klina by setting on fire at least two houses.

The court determined the factual situation taking into consideration the credibility of the witnesses, the time that elapsed (10 years) between the event and their testimony before the court, and also considered the time between the various witnesses' statements and their testimony in court and finally assessed that these statements were consistent and credible. The court took into consideration as aggravating circumstances, the fact that the Defendant committed two criminal offences of war crimes, i.e. he set fire on two houses and he expelled one family from its house. By doing so, he caused serious danger to the neighboring area. The trial panel found the Defendant guilty of having committed War Crimes against Civilian Population (contrary to Article 22 and 142 of the CC SFRY). He was sentenced to 7 (seven) years imprisonment.

Case Pkl.-Kzz 117/2009, Selim Krasniqi, Supreme Court

Type of proceedings:	Request for Protection of Legality
Date:	12 October 2010
Criminal Offences:	Convicted for War Crime of Inhumane Treatment and Immense Suffering or Violation of the Bodily Health of Civilian Detainees thus applying measures of intimidation and terror in violation of Article 142 of the CC SFRY as read with Articles 22, 26 and 30 of the CC SFRY
Result:	Rejected as unfounded

The proceedings concern a case of serious crimes against the civilian population. The Defendant filed a request for protection of legality filed on behalf of the Defendant against both, the first instance judgment of the Prizren District Court, dated 10 August 2006[23] and the second instance judgment of the Supreme Court of Kosovo, dated 10 April 2009.[24] The Defendant (together with 2 co-accused) was in the second instance

23 Prizren District Court, Case P. No. 85/2005, 10 August 2006
24 Supreme Court of Kosovo, Case Ap.-Kž. No. 371/2008, 10 April 2009

convicted for the criminal act of having committed War Crimes against the Civilian Population and sentenced to a term of imprisonment of 6 (six) years.

In the decision the court concluded that the judgments were not based on inadmissible evidence, as alleged by the defense. In relation to the interpretation of Article 153, para 1 KCCP the court stated that the provision required strict interpretation according to its wording and concluded that the KCCP did not contain any provisions indicating the inadmissibility of a witness statement just because the witness has not received proper legal instruction as provided by the law (Article 164, para 2 of the KCCP). In regard to the claim that the enacting clause of the final judgment was incomprehensible or inconsistent with the grounds for the judgment, the court ruled that no such fault existed in any judgment of the previous instances. It clarified that since according to Article 451, para 2 KCCP "A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation […]", such a request can not lead to the obligation of the Supreme Court to re-evaluate evidence and facts. Consequently the request for protection of legality was rejected as unfounded.

Case Pkl-Kzz 27/2010 Gani Gashi, Supreme Court

Type of proceedings:	Request for Protection of Legality
Date:	6 August 2010
Criminal Offences:	Convicted for War Crime of killing, Attempted killing and violation of bodily integrity or health in violation of Article 142 of the CC SFRY
Result:	Rejected as unfounded

The case relates to serious criminal offences committed during the conflict in Kosovo. It was the fist war crime trial to be held by EULEX judges. The Defence counsel filed a request for protection of legality against the first instance judgment of the District Court of Prishtinë/Priština and the second instance judgment of the Supreme Court of Kosovo.

The Defendant was charged with in July 1998, in his capacity as soldier of the Kosovo Liberation Army (KLA) in charge of guarding a checkpoint near Komoran/Komorane in central Kosovo, willfully murdered and attempted to murder two civilians and violated the bodily integrity and health of two others. The victims were all members of a single family.

On 3 March 2009, the first instance court found the Defendant guilty of war crimes against the civilian population, in violation of Article 142 CC SFRY as read in conjunction with Geneva Conventions of 1949 and article 4 of Additional Protocol II to the Geneva Conventions. It sentenced him to an aggregate sentence of 17 (seventeen) years of imprisonment. On 8 December 2009 the Supreme Court partially granted the appeal and modified the judgment rendered by the first instance by reducing the punishment imposed to 15 (fifteen) years, crediting the time spent in detention and modifying certain formal aspects of the judgment.

On 6 August 2010 a five-judge panel of the Supreme Court rejected the request. It found that the enacting clauses of both the first and second instance judgments are fully comprehensible, consistent and founded and there is no discrepancy between the enacting clause and the reasoning.

In respect to the alleged inconsistency regarding several factual issues, *inter alia* that the exact time of the commission of the victim's murder has not been defined; that the judgment indicates that the victim was shot in the back and all evidence shows that he was shot in this neck; and the third victim was injured by a small peace of glass of the back window and not by the bullet shot by the Defendant. As for the last ground, the court found that the Defendant is criminally liable for each and every one of the consequences arising out of his shot, including the injuries caused by the glass of the rear window that the Defendant broke when he shot.

The Supreme Court found that all these grounds have been already raised by the defense counsel in the appeal and most of them have already been answered by the second instance in a very clear and understandable way. It concluded that these alleged inconsistencies have been rightfully assessed by the first and second instance courts. As raised by the Defence counsel, the court found a discrepancy in the Albanian and English versions of the judgment, the Albanian version mentioning the "shtënave" is plural form of shooting whilst the English reads "this shooting" and concluded that the English version of the judgment prevails in the instance.

The request was thus rejected as unfounded.

Case Ap-Kz 108/2010 Idriz Gashi, Supreme Court[25]

Type of proceedings:	Judgment against first instance
Date:	25 November 2010
Criminal Offences:	War Crime against the civilian population in violation of Article 142 of the CC SFRY
Result:	Rejected as unfounded

The proceedings in this case commenced in 2007 under the auspices of UNMIK and related to grave criminal offences against the civilian population.

The Defendant was charged with on 12 August 1998, in the vicinity of the Village Vranoc/Vranovac in Pejë/Peć Municipality a female, travelling towards Pejë/Peć, was stopped at Baran/Barane village and brought in front of KLA members for questioning; after the interrogation the victim was escorted by the Defendant and another KLA member away to a wooden area known as "Lugu I Isufit". In the vicinity of the village of Vranoc, Pejë/Peć Municipality, where the Defendant shot her dead because the victim was perceived as a Serb collaborator.

On 22 June 2007, in the first instance the court composed of UNMIK and Kosovo judges found the Defendant guilty of war crimes against the civilian population and sentenced him to 15 (fifteen) years imprisonment. The case was later on transferred to EULEX. On 2 June 2009 the five-judge panel of the Supreme Court partially granted the Defendant's appeal. It found that the first instance court committed a substantial violation of the procedural rules by accepting the testimony of one witness without following the legal formalities set forth for a so called cooperative witness. As a result, it returned the case back to the court of first instance for a retrial.

25 See Annual Report on the judicial activities of EULEX Judges 2009, pages 12-13

The retrial commenced in October 2009 at the District court of Pejë/Peć. The prosecution was represented by the SPRK. On 19 November 2009 the District Court of Pejë/Peć announced its verdict finding the Defendant guilty of War crimes against civilian population and sentencing him to 14 (fourteen) years of imprisonment.

On 25 November 2010, after having held an open session, the Supreme Court issued its judgment rejecting the appeal as unfounded and affirmed the first instance judgment. It found that the appealed judgment did not contain any violation of the provisions of criminal procedure. It further concluded that the factual situation was correctly determined by the retrial panel and that the first instance court had established the guilt of the Defendant beyond reasonable doubt.

In respect to the Defendant's ground relating to the admissibility of the cooperative witness' statements by the first instance court, the appeal court concluded that taking into account the findings of the Supreme court during the first appeal procedure, while the retrial panel ruled on the inadmissibility of two of the witness' statements, the other statements were not declared inadmissible and hence can be used for evidential purposes. It further concluded that the enacting clause constitutes a fundamental part of the judgment and the one of the first instance judgment contains all the necessary data as required by a combination of Articles 396, para 4 and Article 391, para 1 of the KCCP. It also rejected the ground that the District court has wrongly assessed the factual situation. It satisfied itself that all the requirements for the killing of the victim to be qualified as a war crime against the civilian population were met in the instance.

The Supreme Court further found that the first instance judgment is largely devoted to the assessment of the evidence, including the credibility of the conflicting evidence, notably some witness statements (of which certain parts were considered as not reliable). It concluded that the assessment of the evidence was carried out in a careful, transparent and convicting manner in accordance with the procedural requirements. As for the sentencing the court endorsed the first instance court reasoning that the CC SFRY provisions were more favorable to the Defendant and thus to be applied to the sentencing.

II. Corruption, organized and related criminal offences

Case Pkl-Kzz 114/2009 Leme Xhema, Supreme Court

Type of proceedings:	Request for Protection of Legality
Date:	12 April 2010
Criminal Offences:	Convicted for Entering into Harmful Contract, Article 109, para 1 and 2 Criminal Law of the Socialist Autonomous Province of Kosovo (hereinafter CLK)
Result:	Rejected as unfounded

The proceedings concern a case of economic crime that caused large financial damage to one of the largest publicly owned companies in Kosovo. The judgment at hand deals with the Defendant's request for protection of legality against both, the first and second instance judgments. Legally the decision discusses the question of requirements for the enacting clause of judgments.

According to the charges, the Defendant in February 2003 in her position as General Manager of the publicly owned enterprise Kosovo Post and Telecommunications Company (PTK) initiated and authorized a payment of 300,000 Euro to the Kosovo Company Norway Invest allegedly as payment for services rendered to PTK in the course of the installation of digital network called TETRA. She did so without approval from the KTA and knowing that there was no contractual or other obligation for PTK to pay this sum and that the receiving company could not have actually rendered the services described in the invoice.

The indictment against Leme Xhema and a co-accused was first filed on 2 November 2006 and confirmed on 14 June 2007. Initially the case was under the competence of UNMIK. The first instance verdict of the Prishtinë/Priština District Court was announced on 9 May 2008. Leme Xhema was found guilty of the criminal offence of Abusing Official Position and Authority in co-perpetration and of Entering into Harmful Contract. She was sentenced to an aggregate punishment of 4 (four) years imprisonment.

The case was transferred to EULEX on 2 January 2009. The Supreme Court on 22 June 2009 partially granted the appeal and modified the first instance verdict, convicting her only for the criminal offence of Entering into Harmful Contract since this criminal act absorbs and includes the characteristics of Abusing Official Position and Authority. The court sentenced her to 3 (three) years of imprisonment.

The court had to assess if the enacting clause was missing essential elements. The verdict states that the enacting clause is an integral part of the judgment and has to be read together with the statement on grounds. Based on the principle of judicial economy, an act has to be interpreted in a way, in which it has meaning in order to avoid unnecessary repetition and redundancy of judicial proceedings. It clarifies that the reasons for a particular decision do not have to be given in the enacting clause but rather in the statement on grounds. In essence, the court found, that the facts in the enacting clause have to be read in conjunction with the statement on grounds. It considered that the enacting clauses of both judgments of the previous instances fulfill the legal requirements.

The court also discussed the problem of legality of evidence and the allegation of the Defendant that her request for additional evidence was not taken into consideration. It concluded that all necessary facts had already been proven that additional evidence was therefore not required. Consequently the court rejected the request for protection of legality as unfounded.

Case Pkl-Kzz 103/2009 Bedri Krasniqi (1), Xhevat Danqa (2), Agim Hasani (3), Supreme court

Type of proceedings:	Request for Protection of Legality
Date:	22 April 2010
Criminal Offences:	Defendants (1) and (2) convicted of Abusing Official Position or Authority in co-perpetration, Articles 339, para 2 and 23 CCK; Defendant (3) convicted of Falsifying Official Documents, Article 348, para 1 CCK
Result:	Partly granted, judgment against Defendants (1) and (2) annulled and sent back to Prizren Municipal Court, judgment against Defendant (3) upheld

The case is presented because it relates to a miscarriage of justice and involves as Defendants a Judge and a public prosecutor. The judgment decides on two Requests for Protection of Legality against first and second instance judgments of Prizren Municipal Court, submitted on behalf of the Defendants (1) and (2).

The Defendants are a Judge, a public prosecutor and a court messenger convicted for in September 2007 jointly having manipulated a criminal indictment in a way to exclude two initially accused persons from prosecution and in order to deny the injured parties the right to pursue criminal charges against the two accused as subsidiary prosecutors.

The first instance court had sentenced the Defendants to 3 (three) to 6 (six) months' imprisonment. The second instance court affirmed the sentences. EULEX judges took over the case only at the current stage at the Supreme Court after a request from the defense counsel of Defendant (1).

The court found that there was no evidence that Defendant (1) specifically intended to obtain an unlawful material benefit for himself or another person or that he intended to cause damage to another person, as required by Article 339, para 1 CCK. It remarks that neither the first nor second instance court had discussed the *mens rea* of the Defendants (1) and (2). In respect to Defendant (3) the court found no essential violations of criminal procedure or violations of the criminal law. Hence, the court in regard to Defendant (1) annulled the judgments of the first and second instance and sent the case back for retrial to the Prizren Municipal Court. Pursuant to Article 455, para 2 KCCP, although he had not filed a request for protection of legality, the court extended the annulment to the co-Defendant (2) since the same reasons exist in his favor. It upheld the decisions against the Defendant (3).[26]

The retrial in this case commenced on 13th December 2010. On 15th December 2010, the court pursuant to Article 390, para 3 of the KCCP, acquitted the Defendants (1) and (2) for the criminal offence of Abusing official position or authority under Article 339, para 2 as read with Article 23 of the CCK. It concluded that there was not evidence to support a grounded suspicion that the Defendants (1) and (2) specifically intended to obtain unlawful material benefit for them or another person or that they intended to cause damage to another person as required in Article 339 CCK.

It further pointed out that it was unfeasible for one indictment dated the same day to be legally valid in two versions and that the Prosecutor could not amend the legal content of the previous indictment by removing part of it and filing it with the same date and reference number directly to the Judge. The Municipal court thus found Defendant (2) guilty for the criminal offence of Falsifying official documents under Article 348, para 2 of the CCK and sentenced him to sentenced him to a suspended sentence imposing a term of imprisonment of 3 (three) months.

26 On 15 December 2010 the retrial took place before a EULEX judge of MC Prizren. The court acquitted both Defendants from the charges of Abusing Official Position or Authority and convicted Defendant 2 for Falsifying Official Documents (Article 348, para 2 CCK). It pronounced a suspended sentence of 3 months imprisonment with a verification period of 1 year.

Case P. No. 504/2007 "Kasabank Case" Jahja Lluka (1), Milazim Abazi (2) and Hashim Sejdiu (3), Prishtinë/Priština District Court

Type of proceedings:	First instance
Date:	12 February 2010
Criminal Offences:	Defendant (1): Charged with 2 counts of False Statement or Report, UNMIK Regulation 2004/2,[1] Section 10.5, para (a) and (b) and Unlawful Acceptance of Contribution, UNMIK Regulation 2004/2, Section 10.8 Defendants (2) and (3): Both charged with Failure to Report Transactions in co-perpetration, UNMIK Regulation 2004/2, Section 10.6, para (b) in conjunction with Article 23 CCK
Result:	Defendant (1): Found guilty of all 3 counts; Defendants (2) and (3) were acquitted of all charges

The present proceedings are related to the criminal case against Ramush Haradinaj before the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) and received high media coverage.

After the indictment against Ramush Haradinaj was filed by the ICTY prosecutor in The Hague, in 2005 a fund for his defence had been established in Kosovo by Jahja Lluka and other founders with an account at the banks Kasabank and Banka Ekonomike. The fund was registered as a Non-Governmental Organization and this status was approved by the Ministry of Public Services. Defendant (1) was charged with the criminal offences of False Statement or Report and Unlawful Acceptance of Contribution. Defendant (2) as a General Director and Defendant (3) as Retail Manager of the company Kasabank were charged with Failure to Report Transactions in co-perpetration. The criminal provisions the Defendants were charged with aim at the prevention of money laundering by penalizing actions or omissions which could conceal suspicious operations related to money laundering as breaching financial and banking regulations in force. The evidentiary test that the court had to perform was about the compliance with the rules and duties of the reporting and declarations illustrated by the legal norms.

After the confirmation of the indictment, the case was transferred to EULEX in February 2009. The offence fell within the scope of the primary competence of the EULEX judges under Article 3, para 2 of the Law on Jurisdiction. The main trial commenced on 10 December 2009 and the verdict was announced on 12 February 2010. On the first day of trial, the court rejected the Defence motion to order the severance of the criminal proceedings against Defendants (2) and (3) in order to allow the completeness and speediness of the proceedings.

At the end of the evidentiary proceedings the court found that there was a full proof that Defendant (1) acting as co-founder and authorized representative of the Fund in providing information or making reports, certifications or declarations in connection with the deposits of currency into the Fund's account, knowingly made false statements or willfully omitted to disclose material information. The court in addition found that Defendant (1) accepted on the behalf of the Fund, a contribution in currency in excess of 1,000 Euros in one single day thus violating with Section 4.1 of UNMIK Regulation 2004/2. Evidence was provided by the massive documentation seized by the investigators in the bank and by statements of several witnesses. However Milazim Abazi and Hashim Sejdiu were acquitted from all charges because the court could not establish their intention to hide suspicious transactions.

Case P. No. 403/2007 Shefka Shasivari (1), Suzana Haxhimusovic Bahtijari (2) and Riza Kuka (3), Prishtinë/Priština District Court

Type of proceedings:	First instance
Date:	23 June 2010
Criminal Offences:	Defendant (1): Charged with criminal offence of Abusing Official Position in co-perpetration contrary to Articles 339 and 23 CCK and Fraud in Office in Co-perpetration contrary to Articles 341 and 23 CCK Defendant (2): Charged with criminal offences of Abusing Official Position in Co-perpetration contrary to articles 339 and 23 CCK and Fraud in Office, in Co-perpetration contrary to Articles 341 and 23 CCK Defendant (3): Charged with the criminal offence of Assistance in Abusing Official Position contrary to articles Article 339 and 25 CCK
Result:	Conviction

The present case has been selected for the report because it is related to a priority within the mandate of EULEX – the fight against corruption. Crimes committed by persons that were supposed to pursue the public interest deserve special attention by the international community.

Shefka Shasivari was charged with between 2003 and 2004 with the assistance of Riza Kuka, in her capacity as official person and with the intent to obtain an unlawful material benefit for themselves, having caused damage to other person or business organization, both abusing their official positions in the Office of the President of Kosovo (OPK). Exceeding the limits of their authorizations and without executing their official duties as required by the Law on Public Procurement, Shasivari with the assistance of Kuka fraudulently manipulated the purchase of 90 tires for the vehicles of the OPK in violation of government procurement laws and rules. They operated against the public interest and caused OPK to expend grossly inflated sums of money, far in excess of the true cost of the tires with the use of the false documentation to justify the inflated price.

Shefka Shasivari was found guilty and sentenced to an aggregate suspended sentence of 2 (two) years imprisonment. The court found that Suzana Bahtijari in her capacity as an official person had forged an official document titled “Purchase Order” of the Ministry of Economy and Finance by entering false information. With her signature she certified that the summer tires of the brand Bridgestone were received and delivered to the competent department in accordance with terms listed in the “Purchase Order”, when in reality they were not even transported from Slovenia to Kosovo. She was found guilty of the criminal offence of Falsifying Official Documents and sentenced to a suspended term of imprisonment of 4 (four) months. Riza Kuka was found guilty of the charge and sentenced to a suspended term of imprisonment of 6 (six) months. The court obliged Defendants (1) and (3) to compensate the damage caused at the amount of 28,400 Euro within 2 (two) years, starting from the date when the judgment becomes final.

Case P. No. 462/2009 Ove Johansen, Prishtinë/Priština District Court[27]

Type of proceedings:	First instance
Date:	9 July 2010
Criminal Offences:	Charged with criminal offence of Abusing Official Position in co-perpetration, Articles 339, paras 1 and 3, 23 CCK
Result:	Conviction

The Defendant was charged of committing the offence of Abusing Official Position in co-perpetration with Leme Xhema and other co-perpetrators. The reason for presenting the case corresponds to the one mentioned for the respective case above.

The court found that although the Defendant himself was not an official person in the sense of Article 339 CCK he had made a substantial contribution to the commission of the crime by Leme Xhema. Such contribution, pursuant to Article 23 CCK, provided that the requirement of the *mens rea* is fulfilled, makes the co-perpetrator liable as if he had committed the criminal act himself, irrespective if the Defendant was vested with official powers or not. The Defendant acting as *de facto* representative of the company "Norway Invest" in Kosovo had a willful and active role in stimulating, organizing and receiving the unlawful payment of 300,000 Euro from Leme Xhema to the company "Norway Invest R&O AS".

Consequently the Defendant was found guilty. In calculating the punishment the court took into consideration as aggravating circumstances the high amount of damage caused and the fact that the Defendant had been convicted before in Norway for a criminal offence of unfaithful accountancy. As mitigating circumstances were recognized the fact that the accused had not been vested with official powers and that there was no proof that he had personally enriched himself. It had only been concluded that the criminal conduct led to enrichment of the Kosovo Company Norway Invest. The court in the same context took also note of the difficulties of doing business in Kosovo at that time.

The court pronounced as punishment a suspended term of imprisonment of 2 (two) years. The punishment shall be executed if within the period of 2 (two) years, starting from when the judgment becomes final, the Defendant does not compensate the damage caused to PTK at the amount of 300,000 Euro.

Case P. No. 71/2007 Nexhat Daci (1) and Ahmet Alishani (2), Prishtinë/Priština District Court

Type of proceedings:	First instance
Date:	10 November 2010
Criminal Offences:	Both: Multiple counts of Embezzlement, Article 219, paras 1, 2 CLK and Misappropriation in Office, Article 340 CLK
Result:	Both**:** Partial conviction

The case is presented in this report since one of the accused is a prominent political person who at the time of the commission of the criminal offence held an important public function.

The Defendant was charged with in February and May 2005 when he was the President of the Assembly of

27 Cross reference: see above Case Pkl-Kzz 114/2009 Leme Xhema, Supreme Court

Kosovo and consequently he was qualified as official person, appropriated the sum of 590 Euro from the budget assigned to the Assembly of Kosovo for the purchase of two pairs of spectacles for himself and 950 Euro for personal dental works with the intent to obtain an unlawful material benefit. The court found that it had been established that Daci used that money, entrusted to him in consideration of his position within the Assembly of Kosovo to purchase the spectacles and to pay for dental treatment, thus committing the criminal offence of Misappropriation in Office.

On 10 November 2010, the first instance court found the Defendant guilty of two counts of the criminal offence of Misappropriation in Office. The court dismissed the claims of the Defendants that a) it was not within his official competence to authorize payments from the budget but this was a function of the Secretary's Office of the Assembly of Kosovo; and b) both purchases were related to his official functions. The court concluded that the term "entrustment", as used in Article 340 CCK has to be interpreted widely. It is sufficient that the Defendant, based on his official position, was – at least *de facto* – in a position of management with the power to decide on the use of the goods/finds in question. The court found that there was ample evidence that the Defendant was in a factual position enabling him to decide on expenditures from the budget of the Assembly of Kosovo. As to the claim b), the court established that the Defendant had personally ordered the spectacles from the optician and the dental services in his own name and without mentioning the Assembly of Kosovo as contracting party or any public tendering procedure. Therefore the District Court concluded that those purchases were of exclusively personal nature, with no relationship to the official activities of the Defendant.

Ahmet Alishani was found guilty of one count of Misappropriation in Office. He provided assistance to Nexhat Daci in the commission of the above mentioned offence by liaising with the dentist, instructing him on how to prepare the invoices and on how to receive the payment from the budget of the Assembly for the dental work performed in the interest of Nexhat Daci.

With regard to the other charges the trial panel concluded that the prosecution could not provide sufficient evidence to demonstrate that the Defendants had committed the criminal offences of Embezzlement. Defendant (1) was sentenced to an aggregate suspended term of imprisonment of 1 (one) year and 6 (six) months. In addition, pursuant to Article 56, para 2 CCK, he was prohibited from exercising public administration or public service functions for 2 (two) years after the punishment has been served. Defendant (2) was sentenced to a suspended term of imprisonment of 6 (six) months. The prosecution as well as both Defendants appealed the judgment. The appeals are currently pending at the Supreme Court of Kosovo.

Case P. No. 36/2010 Abedin Muzlijaj, Klinë/Klina Municipal Court (Pejë/Peć region)

Type of proceedings:	First instance
Date:	25 March 2010
Criminal Offences:	Charged with Abuse of Official Position or Authority and Fraud, Articles 339, para 2 and 261, para 1 CCK
Result:	Partial conviction

The case is presented here because it falls within the primary competence of EULEX judges and concerns the core mandate of the mission, fight against corruption.

The Defendant worked as Investigative Police Officer in Pejë/Peć Regional Headquarters. He was charged with in this official function in charge of a murder investigation in March 2008 having asked 10,000 Euro from the family of the victim, allegedly in order to pay informers who would reveal the perpetrator of the crime. He received a sum of 4,500 Euro and 700 Swiss Francs in three installments.

The Defendant was charged with Abuse of Official Position or Authority and Fraud, under Article 339 para 2 and Article 261 para 1 CCK. In the main trial before the Klinë/Klina Municipal Court it was undisputed that the Defendant had asked the sum of money alleged in the indictment from the family of the murder victim. However, the Defendant claimed that he simply had asked for a loan without any connection to his function as investigative officer. The court found that the version of the Defendant was contradicted by coherent and credible witness statements. It found it convincing that in the context of Kosovo the family of the murder victim found it acceptable to be asked for money to support the police investigation. The court gave weight to the fact that the Defendant only during his examination in the main trial, after all evidence against him had been presented, had offered his exculpatory claim. Neither during the pre-trial phase nor during the cross-examination of the witnesses had the defense challenged the crucial statements. The court considered the late presentation of the exculpatory version as a tactical maneuver aimed at avoiding a confrontation with the key witnesses. The court concluded that the Defendant had committed the criminal offence of Abuse of Official Position or Authority when accepting the payment in exchange for revealing the perpetrator of the crime.

The court found that the criminal offense of Abuse of Official Position or Authority was committed when Abedin Muzlijaj had asked for money in exchange for finding the perpetrator of the killing and had received the first installment of 3,000 Euro. All further payments were received only in execution of this initial agreement. Even though the Defendant misleads the injured party when receiving another installment after he had submitted his criminal report to the Office of the Prosecutor, this did not constitute an additional offense, namely Fraud but still was part of the initial offense mentioned above. Therefore it found him not guilty of Fraud.

The Defendant was convicted for Abuse of Official Position or Authority under Article 339 para 2 CCK and sentenced to 1 (one) year and 6 (six) months imprisonment with the punishment to be suspended on the condition that the accused compensates the damage caused to the injured party.

Case Ap-Kz No. 93/2010 Abedin Muzlijaj, Pejë/Peć District Court

Type of proceedings:	Appeal against first instance judgment
Date:	7 September 2010
Criminal Offences:	Convicted for Abuse of Official Position or Authority (see above)
Result:	Partial confirmation of previous judgment

The current proceedings concern the appeal decision in the case described above. The judgment contains valuable discussion on the legal qualification of the qualified alternative of the criminal offense of Abuse of Official Position or Authority pursuant to Article 339, para 2 CCK.

Upon appeals filed by the SPRK and the defense the Pejë/Peć District Court had to decide in second instance. The court considered that the first instance had sufficiently established the facts of the case and saw no necessity to take additional evidence. The court rejected the claim of the Defendant that the act in question had wrongly been determined because there was no intention to cause damage. It elaborated that no intent to cause damage in excess of 2,500 Euro is needed in order to commit the offense of Article 339, para 2. It is sufficient when the damage (exceeding 2,500 euro) is caused as a direct result of the commission of the criminal conduct described in Article 339, para 1 CCK.

In regard to the criminal act of Fraud the panel followed the argument of the court of first instance that the graver offense absorbs the less serious one and consequently rejected the prosecution's appeal in that respect as unfounded. It modified the previous judgment in regard to the penal sanction. The decision not to go beyond 1 (one) year and 6 (six) month was based on the new fact that the Defendant in the meanwhile had paid back the unlawfully received sum to the injured party. The court imposed the imprisonment term of 1 (one) year and 6 (six) months without suspension based on Article 34, para 2 CCK in order to deter other potential offenders. Both appeals filed by the defense counsels on behalf of the Defendant were rejected as unfounded.

Case P. No. 385/2010 Agim Zeka, Municipal court of Prizren (Prizren region)

Type of proceedings:	First instance
Date:	25 March 2010
Criminal Offences:	Charged with Giving Bribes as an intermediary, Article 344, para 1 CCK
Result:	Conviction

The proceedings relate to a case of giving bribes to a Judge and as such are part of the EULEX core mandate.

Initially the main trial before the Prizren Municipal Court was opened jointly against Elez Hoxha,[28] a Judge who was charged with receiving bribes and the Defendant. At the commencement of the main trial, on 23 March 2010, the Defendant Agim Zeka pleaded guilty. The court then issued a ruling ordering the severance of the proceedings against both mentioned Defendants.

The court, being satisfied that the requirements for a guilty plea pursuant to Article 315, para 1 KCCP were met, found that the Defendant had in the years between 2005 and 2007 as intermediary conferred upon the presiding Judge of the Prishtinë/Priština District Court in case against two persons charged with murder the sum of at least 53,000 Euro and a Volkswagen Caddy motor vehicle as a bribe in order to influence a favorable outcome of the mentioned trial for the two accused persons. The Defendant denied that he had benefitted financially from acting as intermediary for another person and the court found no evidence to contradict this claim. The Defendant was convicted and sentenced to a term of 12 (twelve) months imprisonment and a fine of 2,000 Euro. The sentence reflected the Defendant's early guilty plea.

On 30 July 2010 the Prizren District court rejected the appeals of the Defence counsel and the Prosecution office, as ungrounded.[29]

28 Cross reference next case

29 See District court of Prizren, Case KP No. 160/10, Agim Zeka, 30 July 2010 available on http://www.eulex-kosovo.eu/en/

Case P. No. 351/2010 Elez Hoxha, Municipal court of Prizren (Prizren region)

Type of proceedings:	First instance
Date:	14 July 2010
Criminal Offences:	Charged with Accepting Bribes, Article 343, para 1 CCK
Result:	Conviction

The proceedings relate to the criminal offense described above. They concern a Judge of Prishtinë/Priština District Court who was charged with receiving bribes, against whom the proceedings were separated.

The Defendant was charged with during the years 2005 until 2007, while a Judge at the District Court Prishtinë/Priština and therefore an official person within the meaning of Article 343 CCK, accepted money in the sum of 53,000 Euros and a Volkswagen Caddy motor vehicle, all with the intention that he would perform within the scope of his official authority an official or other act which he should not have performed or to fail to perform an official or other act which he should have performed - specifically the acquittal of or the imposition of a disproportionately lenient sentence against 2 (two) persons charged with murder.

The Defendant denied all charges and claimed that the allegations resulted from an elaborate scheme to secure a retrial of the 2 (two) persons he convicted for murder and an attempt to inflict revenge against him for their conviction. The court heard several witnesses. The judgment is also based on documentary evidence, among it insurance, customs and registration documents for the motor vehicle in question as well as audio and video recordings produced by the family of the 2 (two) persons the Defendant had convicted for murder.

With regard to those recordings, upon motion submitted by the defense, the Municipal court had to decide on the admissibility of the evidence. It elaborated that the evidence would only be inadmissible if the taking of the audio and video recordings mentioned above were punishable according to the CCK. The relevant provisions to be considered were the criminal offences according to Articles 170[30] and 171[31] CCK. However, neither of the criminal provisions applied since the recorded conversations took place between the witness and the Defendant and the recordings were not taken in the personal premises of the Defendant and therefore constituted no violation of the Defendant's privacy. Consequently the court found the evidence admissible. The recordings were also judged as genuine and the quality sufficient to reliably identify the Defendant while receiving payments and discussing his potential to influence the judicial proceedings in question.
Consequently, based on the evidence the court found the Defendant guilty as charged. It sentenced him to imprisonment of 4 (four) years and an accessory punishment of a fine of 10,000 EUR.

When announcing the verdict the court stated:[32]

> Justice and equal treatment before the law are fundamental principles at the heart of any democratic society. We repose in those who hold judicial office the trust and confidence of the people to protect individual rights and freedoms. Judges are often all that stand between a free, fair and democratic society and tyranny. When judges are corrupt the scales of justice are

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30 Unauthorized Wiretapping and Recording

31 Unauthorized Photographing and Other Recording

32 Municipal court of Prizren, Case P. No. 351/2010, Elez Hoxha, judgment page 36

tipped in favor of the guilty. Innocent voices go unheard; the guilty act with impunity and the very fabric of society disintegrates.

Upon the Defendant's appeal the District court of Prizren issued a judgment on 22 October 2010. The court rejected the appeal as unfounded.[33]

Case P. No. 917/2010 Ekrem Agushi, Municipal Court of Prizren (Prizren region)

Type of proceedings:	First instance
Date:	7 October 2010
Criminal Offences:	Charged with Issuing Unlawful Judicial Decisions, Article 346 CCK
Result:	Acquitted

The current proceedings concern another case against a Kosovo Judge charged with manipulating a judicial decision.

The Defendant was charged with on 4 June 2008 acting as presiding Judge at the Prishtinë/Priština District Court upon receiving an appeal in an inheritance case having issued an unlawful judicial decision with the intent to obtain an unlawful benefit or cause damage to another person. The prosecution in particular averred that he as reporting Judge during the deliberation had knowingly failed to inform the other panel members that a final ruling allegedly issued earlier by the Prishtinë/Priština Municipal Court had been stamped with a seal reading "Republic of Serbia, Autonomous Province of Kosovo and Metohija", and therefore was clearly recognizable as issued by an unauthorized institution, a so-called "parallel" court. In affect the panel with the reasoning that the issue had been *res judicata* approved the appeal and annulled the first instance decision.

The Defendant claimed that he had failed to notice the content of the stamp and was convinced that the decision had been issued by a legitimate branch of the Prishtinë/Priština Municipal Court. He stated that he did not know the parties to the inheritance proceedings and that he had had neither intended to obtain a benefit for himself or somebody else nor to cause damage to anybody. He also mentioned that the decision on inheritance is not final and the parties to the civil proceeding can still file a request before a higher instance. The court concluded that it had not been established that Ekrem Agushi had acted with the intent to obtain an unlawful material benefit for himself or another person or cause damage to another person, as required in Article 346 CCK and acquitted the Defendant.

On 5 November 2010 the Prosecution office filed an appeal against the first instance judgment. The District court rejected the appeal as ungrounded on 7 December 2010 and thereby confirmed the Municipal court judgment.[34]

33 See District court of Prizren, case KP. No. 227/10, Elez Hoxha, 22 October 2010 available on http://www.eulex-kosovo.eu/en/judgments/CM-District-Court-of-Prizren.php

34 See District court of Prizren, case Ap. No. 156/10, Ekrem Agushi, 7 December 2010 available on http://www.eulex-kosovo.eu/en/judgments/CM-District-Court-of-Prizren.php

III. Domestic violence cases

Case P. No. 215/2007 Enver Hasani, Mitrovicë/Mitrovica District Court

Type of proceedings:	First instance
Date:	16 February 2010
Criminal Offences:	Charged with Aggravated Murder, Article 147 item 9 CCK and Unauthorized Ownership, Control, Possession or Use of Weapons, Article 328, para 2 CCK
Result:	Conviction

The trial concerns a serious case of domestic violence where the wife was killed by the husband. It is also a showcase to illustrate the problems faced in the administration of justice in the courts of north of Kosovo. After first having being dealt with by Kosovo judges, due to the displacement of judicial staff from the Mitrovicë/Mitrovica courthouse the proceedings were interrupted in March 2008 during the main trial. After being taken over by EULEX it restarted only in January 2010.

On 31 May 2007 at around 11:30 hours the victim Raba Hasani was shot dead in her house in the village of Klladernicë/Kladernica (Municipality of Skenderaj/Srbica). The indictment, dated 10 September 2007, charged the accused who is the husband of the late victim with the criminal offences of Aggravated Murder and Unauthorized Ownership, Control, Possession or Use of Weapons. The indictment was confirmed in November 2007. The main trial commenced on 12 February 2008; the verdict was pronounced on 16 February 2010.

The court concluded that on 31 May 2007 in their house the Defendant, after an argument centered on the question if his wife needed his permission to leave the house and out of jealousy, shot his wife at least 3 times from close distance with a carbine rifle M 48, hitting her in the chest and abdomen area. The victim died at the scene as result of the injuries. The accused had admitted shooting his wife but claimed that he did so in a state of mental distress caused by a grave insult by the victim. The court consequently had to consider the legal qualification of the criminal act. It denied applicability of the legal provision for Murder Committed in a State of Mental Distress (Article 148 CCK) and concluded the Defendant committed Aggravated Murder (Article 147, item 9 CCK). The court found that there was no indication that victim had attacked, maltreated or gravely insulted the Defendant and so brought him, through no fault of his own, into a state of severe shock.

On the contrary, the Defendant's actions were qualified as mentally aware and controlled, since he had to load and cock the rifle after each shot. The court had also ordered a psychiatric expertise of the Defendant and so excluded the possibility that his criminal liability was limited or excluded (Article 12 CCK).

When determining the punishment the court considered as aggravating circumstances in particular the long-term abuse to which the Defendant had subjected his wife, the fact that she was the mother of 7 (seven) children and the manner in which the criminal act was committed. As mitigating circumstances the

court counted in particular that he partly admitted the criminal offences – he had pled guilty to Murder and Unlawful Possession of Weapons. The court convicted the Defendant for both charges and sentenced him to an aggregate sentence of 15 (fifteen) years imprisonment.

Case Ap-Kz No. 192/2010 Enver Hasani, Supreme Court

Type of proceedings:	Appeal against first instance judgment
Date:	5 October 2010
Criminal Offences:	Convicted as charged (see above)
Result:	Appeal rejected as ungrounded

The proceedings concern the appeal on behalf of the Defendant against the first instance judgment of the Mitrovicë/Mitrovica District Court in the case discussed above.

The judgment of the Supreme Court contains interesting discussions of the question of burden of proof and the principle *in dubio pro reo* in regard to the privileging provision of Article 148 CCK[35] as well as on the qualification of "base motives" in the sense of Article 147, item 9 CCK.

The court held that the benefit for the Defendant of the application of Article 148 CCK can not be denied for the mere reason that the accused did not provide any evidence for the alleged insult by the late victim prior to the killing. Such requirement to present evidence would conflict with the principles *in dubio pro reo* and *presumption of innocence* and would therefore constitute a violation of most basic individual rights enshrined in the European Convention of Human Rights (hereinafter ECHR). Hence the narration given by the accused cannot be dismissed for the only reason that he failed to submit any evidence. His description of the event is plausible and no evidence can be found by which this part of his statement could be disproved.

This, however, does not change the legal qualification. Not even the narration provided by the accused himself allows the application of Article 148 of the CCK. It is not necessary to establish whether the words of the victim constituted a "grave insult" and whether the accused was brought in a state of mental distress by these words, because the application of Article 148 of the CCK requires that all this happened "through no fault of his or her own", i.e. of the accused. To this regard the correctly established facts in the first instance judgment leave no space for doubts that the victim reacted on wrong accusations, personal offenses and even physical maltreatment inflicted on her by the accused prior to the event itself. Consequently it were in any case his own faults which made the victim on the critical day react in the way described by the accused.

The court of first instance correctly applied item 9 of Article 147 of the CCK. The accused deprived his wife of her life for base motives. Base motives are all those motives which are not worthy of a human being and which do not coincide with the adopted moral views of the society; they are at the lowest point of the scale of values according to moral judgment[36]. It might be arguable whether jealousy in itself can be seen as a

35 The provision foresees a milder punishment if the murder was committed in a state of mental distress after the perpetrator being brought, through no fault of his or her own, into a state of severe shock caused by an attack, maltreatment or grave insult by the murdered person.

36 See Commentary on the criminal laws of SR of Serbia, SAP Kosovo and SAP Vojvodina, 1981, "Savremena Administracija" Belgrade, Commentary on Criminal Code of Serbia, Article 47 No. 7 item d, Srzentic, Nikola – Stajic, dr. Aleksandar – Kraus dr. Bozidar – Lazarevic, dr. Ljubisa – Djordjevic, Dr. Miroslav.

base motive[37]. In the case in question, however, the accused did not only act out of jealousy. He also killed his wife because she "dared" attempting to leave the house without his permission. His reaction on this attempt – shooting her – demonstrates his belief that he was entitled to decide about her right to exist. This ruthlessly selfish concept of being the sovereign over her existence shows utmost disrespect for the natural right of another human being to live and is as such a base motive. The court rejected the Defendant's appeal as ungrounded and affirmed the first instance judgment.

IV. Cases assigned to EULEX judges to avoid miscarriage of justice

A. Cases concerning apparently ethnically motivated acts

Case Ap-Kz No. 24/2010 Predrag Djordjević, Supreme Court

Type of proceedings:	Appeal against first instance judgment
Date:	4 May 2010
Criminal Offences:	Charged with Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance and Attempted Aggravated Murder, Articles 115, para 3 and 1 and Article 147, read in conjunction with Article 20 CCK
Result:	Appeal of Defendant rejected; appeal of injured party (1) dismissed as belated; appeal injured party (2) granted; first instance judgment partially modified

The judgment concerns a case where the Defendant, a Serb from the town Užice in Serbia, in the early morning hours of 14 June 2008 climbed on a mosque in the centre of South Mitrovicë/Mitrovica and placed a flag with Serbian Orthodox Christian symbols on the Islamic religious building. Later, armed with a knife and a pistol, he entered the fenced yard of the Kosovo Police station Mitrovicë/Mitrovica South and from close distance shot at a Kosovo Police Officer, severely injuring him.

In the first instance trial before the Mitrovicë/Mitrovica District Court the Defendant had been convicted for both mentioned criminal offences and sentenced to an aggregate term of 6 (six) years and 3 (three) months imprisonment. Initially he had also been charged with the criminal act of Terrorism under Article 110, paras 1 and 2 as read with Article 109, para 1 items 2, 7 and 10 CCK. However, the prosecutor later withdrew this charge and consequently it was rejected by the court of first instance. Appeals were filed by the defense and two police officers claiming injured party status.

The judgment elaborates on the question of voluntary abandonment of attempt and on the requirements for an extraordinary mitigation of punishment pursuant to Articles 66, para 2 and 67 CCK.

Since the defense in the appeals claimed that the accused had no premeditation for Aggravated Murder, the court had to consider the legal problem of voluntary abandonment of attempt (Article 22 CCK). It found that the fact that the accused had a second bullet in his pistol which he did not attempt to fire was not sufficient

37 Supreme Court of Serbia in its ruling Kz-2105/57 qualified jealousy not as base motive; also Supreme Court of Croatia in its ruling Kz-2333/56 stated that jealousy does not represent a base motive.

to successfully challenge his intent to deprive the victim of his life. First, the Defendant's behavior lacked the element of voluntariness since the police officer almost immediately returned fire and in doing so deterred the accused. Also, with firing a shot from very close distance at a part of the body which contains vital organs and internal arteries puts the life of the victim at a very high risk which by no means can be controlled by the perpetrator. Therefore the attempt was completed with the consequence that he had to take active measures to prevent the occurrence of the consequences (i.e. the possible death of the victim) in order to benefit from the provision of voluntary abandonment. However, no such action - as for example the calling of medical help – was undertaken.

The court clarified that in regard to the criminal offence Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance the injured police officer had no right to appeal as the criminal act was not directed against him or his legally protected rights.

In respect to the punishment the court held that there were not sufficient reasons to apply an extraordinary mitigation of punishment pursuant to Article 66, para 2 and Article 67 CCK. The fact that the criminal offence was just an attempt resulted in mitigation of punishment pursuant to Article 65, para 2 of the CCK and can not be used another time to justify the extraordinary mitigation of punishment according to Article 66 of the CCK. As for the other mitigating circumstances, as mentioned by the first instance, i.e. his unbalanced mental state and the lack of previous criminal records, the Supreme Court of Kosovo held that not even the combination of all three factors would be so extraordinary to justify the application of Article 66, para 2 CCK.

Consequently the court recalculated the punishment, resulting in an aggregate sentence of 12 (twelve) years and 3 (three) months imprisonment.

B. Cases involving political and public pressure on the judiciary

Case Pkl-Kzz No. 31/2010 Jeton Kiqina, Supreme court

Type of proceedings:	Request for Protection of Legality
Date:	1 November 2010
Criminal Offences:	Defendant was convicted for 5 (five) intentional Aggravated Murders and 1 (one) Attempted Aggravated Murder, Article 30, para 1, para 2 items 1 and para 3 CLK in conjunction with Articles 19 and 22 CC SFRY
Result:	Rejected as unfounded

The case is presented here because it concerns the 2001 revenge killing of a former police officer during the Milošević regime together with his wife, his son and his two daughters. The killing was apparently well planned and executed by a large group of persons. The proceedings relating to the current Defendant are only one out of several pending cases with numerous Defendants related to the mentioned killing. The cases received a large amount of public attention. Several public manifestations and demonstrations were organized by supporters of the Defendants with the demand to free the "freedom fighters" and the aim to display the proceedings as an attempt to discredit the KLA and its former members as well as the intent to exert pressure on the judiciary.

The Defendant was charged with and found guilty of the criminal offences Murder of 5 (five) persons in co-perpetration (Article 30, para 2 items 1, 3, 4, 5 CLK in conjunction with Articles 22 and 24 CC SFRY) and 1 (one) Attempted Murder in co-perpetration (Article 30, para 2 items 1, 3, 4, 5 CLK in conjunction with Articles 19, 22 and 24 CC SFRY). The defense counsel of the accused had filed a request for protection of legality against the final judgment of the Supreme Court of Kosovo dated 3 December 2009.
The Supreme Court had to address the claim of the defense that the first instance court had decided in an improper panel composition. It ruled that although the KCCP, in its Article 24 KCCP prescribed a five-member panel the UNMIK Regulation 2000/6[38] Section 2.1 as *lex specialis* takes precedence. In regard to the replacement of one of the panel members in the last hearing of the first instance trial the court concluded that the defense after having duly been informed had raised no objections to the changed composition and had agreed to reading out of the previous testimonies. The court also dismissed claims by the defense that the enacting clauses of both previous judgments were incomprehensible and that they were based on inadmissible evidence. A claim by the defense that the judgments in the reasoning did not contain decisive facts with regard to the causal link between actions and consequences and to the *mens rea* of the Defendant was rejected as inadmissible for falling outside the scope of review at the stage of a request for protection of legality. At this stage the court may review only if a violation of the law occurred but not anymore the correct determination of facts during the previous proceedings.

Consequently the Supreme Court rejected the request for protection of legality as unfounded and affirmed the previous judgments, sentencing the Defendant to an aggregate punishment of 16 (sixteen) years of imprisonment.

Case P. No. 281/2007 Albin Kurti, Prishtinë/Priština District Court

Type of proceedings:	First instance
Date:	14 June 2010
Criminal Offences:	Count 1: Participation in a Crowd Committing a Criminal Offence, Article 320, para 2 CCK (Charge later withdrawn by Public Prosecutor) Count 2: Participating in a Group Obstructing Official Persons in Performing Official Duties, Article 318, paras 1 and 2 CCK Count 3: Call to Resistance, Article 319, para 1 CCK (Charge later withdrawn by Public Prosecutor)
Result:	Partial conviction

The case is presented as example for lack of resistance of the Kosovo judiciary to withstand public and political pressure. Due to this the main trial was delayed for almost 6 (six) months. The case was constantly focused of a massive amount of public interest.

On 10 February 2007, a protesting crowd organized by the movement "Vetëvendosje" (Self-Determination) broke through barriers and a cordon put up by Kosovo and UNMIK Police in front of the Government Building in Prishtinë/Priština. In the course of events, two protestors died after they were hit by rubber bullets, which allegedly had been fired into the crowd by Romanian Police forces. In 2007, an indictment was filed against the Defendant Albin Kurti, who is the leader of the "Vetëvendosje" movement.

38 UNMIK Regulation on the Appointment and Removal From Office of International Judges and International Prosecutors, dated 15 February 2000, as amended by UNMIK Regulations 2000/34 and 2001/2.

UNMIK started a main trial against the Defendant, but stopped all procedures in February 2008 since no defense lawyer could be found that wanted to defend Albin Kurti. In December 2008, the case was transferred from UNMIK to EULEX.

On 19 January 2010 a EULEX Judge was appointed as Presiding Judge together with another EULEX Judge and one Kosovo Judge as panel members in the criminal case against Albin Kurti. On 21 January 2010, the Presiding Judge issued an order resuming the main trial, concurrently appointing an *ex officio* Defense Counsel. On 9 February 2010, after 6 (six) unsuccessful attempts, the Court Officer finally served summons to Albin Kurti.

On 15 February 2010, the main trial against Albin Kurti started, but the Defendant failed to appear and the Defense Counsel rejected the *ex officio* appointment, thus asking the court to relieve him from the duty to represent Albin Kurti. The trial panel rejected the lawyer's motion and adjourned the main trial to 22 February 2010.

On 22 February the main trial continued and the panel, in unchanged composition, after acknowledging the absence of the Defendant, issued an arrest order, adjourning the session to 12:30 p.m. of the same day. Before the continuation of the main trial, the Kosovo Judge unexpectedly left the court for medical reasons and the Presiding Judge, after resumption of the main trial, adjourned the session to 23 February 2010. On the same day, the Presiding Judge was informed that due to illness the Kosovo Judge might not be able to be present at the main trial as planned. Therefore, the Presiding Judge sent a letter to the DC President asking him to urgently appoint a replacement.

On 23 February, just short before the scheduled begin of the hearing, two Kosovo judges rejected the order from the President of the District Court to replace the missing panel member. Due to the fact that it had turned out as impossible to successfully compose the needed court panel, at 10:30 hrs the hearing was postponed to 2 March 2010. On the next day another Kosovo Judge rejected an appointment as substitute for the missing panel member. In a following meeting with the EULEX Presiding Judge the President confirmed the unwillingness of any District Court judge to participate as judge in the trial. Later he pointed out that the reasons for the refusals all corresponded to the concern of the local judges to expose themselves in such a sensitive trial. This led to another adjournment of the hearing to 13 April 2010.

On 08 April 2010, the Assembly of Kosovo held a session to discuss the events of 10 February 2007 that led to the deaths of two protestors, during which the demand was raised to stop the criminal proceedings against Albin Kurti. The Assembly abstained from issuing a decision on the matter.

On 12 April the Kosovo Judge that had initially been appointed as panel member returned from sick leave. A new defense counsel for the Defendant was appointed and, in order to grant him time to prepare for the trial, the hearing was re-scheduled for the 16 April 2010. On the scheduled day the defense counsel declared that he would not continue the defense since he had been attacked by "Vetevendosje" activists by throwing eggs in the court building and his family had received threats in the last days. The trial was again postponed for 19 April and a new arrest warrant was issued for the Defendant.

Consequently the President of the Kosovo Bar Association was appointed as additional ex-officio defense counsel. However, neither any of the defense counsels, nor the Defendant were present on the 19 April with the Kosovo Police claiming inability to arrest the Defendant.

On 26 April 2010 Kosovo Police made an effort to arrest the Defendant, who was known to attend a funeral in Prishtinë/Priština. The attempt failed and 3 Kosovo Police Officers were injured when hit by the car of the Defendant. Another scheduled hearing on 28 April failed also due to the absence of the Defendant. The failure to ensure the presence of the Defendant who apparently was not even attempting to hide started to raise doubts on the seriousness of the Kosovo Police efforts to arrest Albin Kurti.

Eventually, the Defendant was arrested on surprise and the main trial was held on 14 June 2010. During the session, the Defendant declared that he would not accept this "EULEX Court", which he considered just a continuation of UNMIK. The prosecution, which was represented by a local prosecutor from the SPRK, withdrew the first and the third charges. The Defendant was finally convicted for Participating in a Group Obstructing Official Persons in Performing Official Duties and sentenced to 9 (nine) months imprisonment but was released immediately in consideration of the time already spent in detention.

C. Murder cases

Case Ap-Kz No. 190/2009 Shkumbin Mehmeti, Supreme court

Type of proceedings:	Appeal against first instance judgment
Date:	27 January 2010
Criminal Offences:	Convicted for 2 (two) counts of Aggravated Murder, 2 (two) counts of Attempted Aggravated Murder in co-perpetration and 3 (three) counts of Unauthorized Ownership, Control, Possession or Use of Weapons, Article 30, para 2 item 2 CLK in conjunction with Articles 19, 22 CC SFRY; Section 8.6 of the UNMIK Regulation No. 2001/7[2] in conjunction with Article 22 of the CC SFRY and Art. 328, para 2 CCK
Result:	Appeals partially granted; first instance judgment modified

The case concerned a serious crime involving an UNMIK Police car ambush and the death of an international and a Kosovo police officer in the immediate aftermath of the March 2004 riots. The decision also contains an assessment of fair trial standards.

The Defendant was charged with, a few days after the March 2004 riots, together with three other persons, he attacked an UNMIK police vehicle with 4 (four) members of a mixed Kosovo/international police team, and opened fire from automatic weapons. Two police officers were killed, and the other two passengers were wounded. The assailants hijacked two cars in order to flee the crime scene.

The Pristinë/Priština District Court in the first instance had found the Defendant guilty of all charges and had imposed an aggregate punishment of 30 (thirty) years of imprisonment. The conviction is based primarily on the supporting evidence provided by the content of telephone calls intercepted from Mehmeti's mobile telephone.

The Supreme Court affirmed that the first instance court had established with the correct factual and legal reasoning the criminal liability of the accused within the scope of the indictment, and that the lack of direct evidence did not *ipso facto* imply that the case had to be decided *in dubio pro reo*, but that the court was legally authorized to assess and decide whether there was enough secondary and supporting (factual) evidence which proved beyond reasonable doubt that the accused was guilty. The Supreme Court however modified the first instance judgment as it considered a 12 (twelve) years imprisonment sentence previously imposed against Shkumbin Mehmeti for another criminal offence by a final judgment as included in the single aggregated punishment of 30 (thirty) years of imprisonment.

The Supreme Court furthermore stated that the courtroom facilities at the Dubrava prison were the first instance trial was held offered the legal conditions of Article 43 KCCP and the guarantees for a fair and public trial foreseen by the ECHR as, *inter alia*, the contact between the defense council and the accused was guaranteed, the accused was able to effectively exercise his right to defense, the "change of venue" to this courtroom had been regularly and legally reasoned and had been announced in advance, and the composition of the trial panel was legal.

Case Api-Kzi No. 1/2010 Shkumbin Mehmeti, Supreme court

Type of proceedings:	Appeal against second instance judgment
Date:	26 November 2010
Criminal Offences:	Convicted for 2 (two) counts of Aggravated Murder, 2 (two) counts of Attempted Aggravated Murder, Article 30, para 2 item 6) CLK, in relation with Article 19 and 22 CC SFRY and 3 (three) counts of Unlawful Possession of Weapons pursuant to Sections 8.2. and 8.6. of UNMIK Regulation 2001/7
Result:	Appeals rejected, judgments affirmed

The case[39] concerned a serious crime (murder and attempted murder) in the immediate aftermath of the March 2004 riots. It required an analysis of the legislation in Kosovo as well as of the proceedings with respect to the fair trial standards as guaranteed by the ECHR.

The Supreme Court as the court of second instance had partially modified the judgment of the first instance, holding that the single aggregate punishment imposed on Shkumbin Mehmeti was 30 (thirty) years of imprisonment for the two counts of Aggravated Murder and Attempted Aggravated Murder. It had confirmed the judgment of the first instance court with respect to the factual and legal reasoning establishing the criminal liability of Mehmeti based on the evidence provided by the interception of telephone conversations.

The Supreme Court as the court of third instance confirmed the fulfillment of fair trial standards by the trial at first instance by specifying that the Special Representative of the Secretary General of the United Nations (hereinafter SRSG) as the highest authority for the administration of justice in Kosovo at that time had been the proper authority for approving the proceedings to be held in the Dubravë/Dubrava Prison.

It furthermore held that the legislation in Kosovo regarding telephone interception as well as the actual telephone interceptions carried out during the investigation in the case at hand were in compliance with

39 Cross reference Case Ap-Kz No. 190/2009 Shkumbin Mehmeti, Supreme court

the jurisprudence of the European Court for Human Rights (ECtHR), and thus perfectly valid evidence in these proceedings. By referring to the consistent jurisprudence of the ECtHR regarding the interception of communications for the purpose of police investigations, the Supreme Court pointed out that the both the KCCP and the relevant UNMIK Regulations were in line with the requirements of the relevant case law as this legislation regulated in detail, *inter alia*, the preconditions for ordering a measure, the procedure for requesting the order, the nature, content, modification and extension of orders and the admissibility of evidence obtained by these measures. The court also underlined that the first instance panel had taken special care not to violate the right to privacy of the Defendant in the case at hand.

Case Ap-Kz No. 128/2010 F. B., Supreme Court

Type of proceedings:	Appeal against first instance judgment
Date:	3 August 2010
Criminal Offences:	Charged with Murder, Article 146 CCK
Result:	Conviction, criminal offence re-qualified

The case is presented in the report due to the valuable legal and factual argumentations in the decision in respect to the burden of proof, the principle *in dubio pro reo* and the legal qualification of the criminal act.

The Defendant was charged with, on 24 May 2007 in her house the female Defendant shot a neighbor 3 (three) times with a hunting rifle, causing his death.

In the first main trial the court of first instance had considered that the Defendant had acted in necessary self-defense (Article 8 CCK) and acquitted the Defendant from the murder charge, convicting her only for Unauthorized Ownership, Control, Possession or Use of Weapons. Upon appeal the Supreme Court had partly quashed the first instance verdict and sent the case back to the first instance for retrial. After the case was taken over by EULEX the District Court of Pejë/Peć found the Defendant guilty of Murder and sentenced her to 10 (ten) years imprisonment.

The Defendant did not deny having shot the victim. However, she claimed that in addition to the fact that he had raped her several times before and threatened to do so again, he was about to attack her with a knife when she shot him. A knife had been found next to the victim but since no fingerprints could be identified on it, it was not possible to determine if the victim had used it to threaten or attack the Defendant. The claim of previous rapes was countered by family members of the late victim by the allegation that he and the accused had had a consensual love affair.

The Supreme Court in its reasoning first discussed shortcomings of the enacting clause of the first instance judgment. It found that the content fell short of the legal requirements and lacked the description of facts, such as circumstances of the commission of the criminal offence and premeditation. However, since the court found the evidence produced in the first instance was sufficient to establish correctly the factual state of affairs it did not have to annul the previous judgment and order another re-trial but rather could act according to Article 426, para 1 KCCP, i.e. modify the judgment of the court of first instance by assessing differently the already determined material facts. In deciding so the court gave particular weight to the fact that the case already had been tried at first instance 2 (two) times.

The court had to evaluate whether the description of the events by the Defendant was plausible and reasonable (even without evidence to proof it) and, if yes, whether there was evidence, which allowed the conclusion beyond reasonable doubt that the version submitted by the Defendant was not true. Otherwise the burden of proof would be shifted on to the Defendant who would have to proof his or her innocence. The court found that the narration presented by the accused regarding the events, which happened prior to the killing was detailed and plausible while the witness statements regarding an alleged love affair between the accused and the late victim were not credible. Consequently, in application of the principle *in dubio pro reo* the court followed the claim of the accused that 2 (two) episodes of sexual violence and threats from the late victim against her had taken place.

The court concurred with the first instance that the Defendant could not claim necessary self-defense. It stated that even granting that the victim might have entered the premises of the accused without permission, the accused had taken the hunting rifle from the bedroom, loaded it and then went to the victim although her husband and her mother-in-law were present nearby. This was not a situation in which an imminent attack of the victim against the accused could have been established.

The panel further on found that the act of the accused showed the elements of Murder Committed in a State of Mental Distress pursuant to Article 148 CCK. The victim had forced her 2 (two) times to sexual intercourse against her will; he had taken a picture of her naked body, threatening her to publish it on the internet in case she reported him. Moreover, the victim had threatened her that he would do the same to her daughter. On the critical day all of this amounted to a state of mental distress at the latest when the victim did not comply with her order to leave her house. The court found signs of such an exceptional mental state in the Defendant's behavior during and after the commission of the crime.

The court consequently partially granted the appeal on behalf of the Defendant and in modifying the first instance judgment found the accused guilty of Murder Committed in a State of Mental Distress. She was sentenced – under inclusion of the already final sentence for Unauthorized Ownership, Control, Possession or Use of Weapons – to an aggregate term of 4 (four) years imprisonment. The appeal of the injured party was rejected as unfounded.[40]

40 Two panel members in their partly dissenting opinions disagreed with the conclusion that the enacting clause contained major shortcomings. Both opinions argue that the enacting clause is clear and understandable and contained at least the essential legally required elements. Above that, with the reasoning given in the judgment the only decision possible for the Supreme Court would have been annulment of the first instance verdict and sending the case back for re-trial. Consequently the judges consider the reasoning of the judgment in question as inconsistent. In addition, one panel member did not concur either with the legal qualification of the criminal act as Murder Committed in a State of Mental Distress. The respective dissenting opinion elaborates that a mere claim of "mental distress" was not sufficient and that the defense was under obligation to provide evidence for the mitigating circumstances as per Article 148 CCK. Such a burden of proof cannot be considered as in contradiction to Article 6 of the ECHR.

Case P. No. 32/2009 Radivoje Virijević, Mitrovicë/Mitrovica District Court[41]

Type of proceedings:	First instance
Date:	22 April 2010
Criminal Offences:	Charged with Aggravated Murder and Unauthorized Ownership, Control, Possession or Use of Weapons
Result:	Conviction, criminal offense re-qualified

The case is included as it is exemplary for the numerous "ordinary" cases of Murder especially the EULEX judges at the court in Mitrovicë/Mitrovica have to handle due to the partial dysfunction of the local courts.

The Defendant was charged with on 20 June 2008 in a village in the municipality of Zvečan/Zveqan having shot with an assault rifle of the model AK-47 at the late victim while driving in his vehicle and killed him.

The court established that the wife of the accused had had an extramarital affair with the late victim for 8 years, from 2000 until 6 June 2008. After the end of the relationship the late victim had started sending text messages to the accused wife's mobile phones coercing her to come back to him, threatening her with death and insulting her husband – the accused. After the Defendant noticed that his wife was upset by the messages she informed him about the previous affair and he took her mobile phone from her. Between the 6 June 2008 and the day of the killing the late victim had sent 71 text messages to the accused wife's mobile phone, many of them including threats to her life. The accused within that period of time asked the late victim twice to stop sending threatening messages (once via two cousins who talked to the victim and once via the victim's superior, the local police commander). Both times the persons approached the victim but without success and the threat messages continued.

On the evening of the killing the family of the Defendant had their daughter and her husband visiting. When they left, at about 22.30 hours, the daughter showed the accused that she had on the same day as well received a message from the late victim for her mother, threatening to kill her. According to the Defendant's testimony he then "completely lost his mind". He left his house, took the rifle from his shed and walked over to the neighboring home of the late victim. When he saw him approaching his home in his vehicle the Defendant opened fire with the automatic rifle until the magazine was empty.

The Defendant had admitted that he had killed the late victim. All those facts were established based on clear, consistent and corroborating statements by several witnesses and the two accused. The court therefore deemed them credible.

As additional evidence a psychologist was heard as an expert witness on the mental state of the Defendant at the time the offence was committed. Based on her testimony the court found that the criminal offence had to be qualified as Murder Committed in a State of Mental Distress pursuant to Article 148 CCK. The Defendant had suffered severe stress when learning about his wife's eight-year affair with the late victim – a neighbor and close friend whom he had helped over the years because the late victim's family had been displaced from central Kosovo. However, he had decided to forgive his wife. After that his stress was accumulated and

41 The co-accused was a juvenile person. Information concerning this accused is not included due to the need to protect the personal data.

gradually increased by the messages the late victim continued to send, insulting him and threatening the life of his wife. All his attempts to alleviate the situation peacefully had failed. On the critical day, after receiving new and increased insults from the late victim and after learning that his daughter had received threatening messages too the accumulated stress resulted in a state of sever shock which affected the Defendant's conscience and reason. In this state he committed the killing.

Consequently the court convicted the Defendant for Murder Committed in a state of Mental Distress and Unauthorized Ownership, Control, Possession or Use of Weapons and sentenced him to an aggregate sentence of 7 (seven) years imprisonment. In determining the punishment the court, among other facts, took into consideration that the accused had admitted the killing and pleaded guilty on the charge of Unauthorized Ownership, Control, Possession or Use of Weapons.


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Kosovo


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Chapter 3:
Adjudication of civil cases
Adjudication of civil cases

This Chapter focuses on the activities performed by EULEX civil judges in the regular courts of Kosovo within their secondary executive competence. The selected cases are classified in a thematic way. A section is devoted to KPA Appeals Panel of the Supreme Court of Kosovo.

According to the Law on the Jurisdiction in its Article 5 a EULEX civil Judge can thus only take over a new or pending property-related civil case,[42] including at the execution phase, if the decision has been taken by the President of the Assembly of the EULEX judges and one or several of the following requirements are met: 1) There is a grounded suspicion of attempts to influence the impartiality or independence of the local judiciary; or 2) There is a grounded suspicion that the local judiciary is not willing or unable to properly deal with the case; or 3) There is a grounded suspicion of a serious violation of the fairness of the proceeding.

Cases are selected by EULEX civil judges in the respective regions according to the modalities established in the Guidelines for case selection and allocation approved by the Assembly of the EULEX Judges. This enables an objective and transparent procedure which complies with the principle of independence and impartiality of the judiciary.

A majority of the civil cases dealt with by EULEX Civil judges during 2010, were connected with contested property disputes originating from the conflict in 1999. There is often an inter-ethnic aspect on these cases as returning internally displaced persons often found their property illegally occupied or sold in a fraudulent manner. Adding to the complexity is the fact that many of the current owners bought their property unaware of the fact that the transaction had been completed without the consent of the rightful owner. Against this background there is a risk that these cases might fuel social and inter-ethnic tension. This has contributed in some cases to an unwillingness/reluctance from the Kosovo judiciary to act, resulting in a huge backlog of cases pending final judgment. This is especially apparent in small communities hit hard by the conflict. However, it should also be highlighted that the insufficient number of Kosovo civil judges also contributes to the back log of decisions and lengthy proceedings in civil cases.

Several factors relating to the legislative framework or the practices in Kosovo courts may hamper for the proper administration of justice in civil matters: difficulties relating to the applicable law; complexity of the cases originating from pre and/or post-conflict situations; excessive use of procedural mechanisms such as retrial procedure and stay of the execution procedure; practical issue of notification of parties to a proceeding living outside of Kosovo.

According to the applicable procedural law in Kosovo, a single Judge decides on matters relating to a civil dispute in first instance at the Municipal court level. The cases in second instance are adjudicated by a three-judge panel of the District court. A request for revision can be filed before the Supreme Court of Kosovo. Once a decision is issued in a given case, the case is sent to the competent Municipal court to be executed.[43]

42 The 9th Assembly of the EULEX Judges held on 11 March 2010 adopted a recommendation to construe the term 'property related civil cases" under Article 5.1.c) of the Law on Jurisdiction as following:
Immovable property and 'mixed' cases, when a right *in rem* (involving or determining the status of a property), occupancy right and other rights of use of socially or state owned property are contested, including compensation claims based on the violation or loss of one of the aforementioned rights or on the illegal hindrance to acquire such a right. The full version of the Recommendation (Annex 1 of the 9th Assembly of EULEX Judges, 11 March 2010) can be found on EULEX website http://www.eulex-kosovo.eu/en/justice/assembly-of-the-eulex-judges.php

43 See inter alia Article 15 of the Law No. 03/L-006 on contested procedure dated 30 June 2008; for the execution of a decision, see inter alia Article 9 of the Law No. 03/L-008 on executive procedure dated 2 June 2008

I. Kosovo Property Agency

Appeals panel of the Supreme Court of Kosovo

UNMIK Regulation 2006/10 laid the foundation for the creation of a Supreme Court Appellate Panel for conflict-related property claims cases.[44] The appellate Panel was supposed to be comprised of both international and local judges but was later suspended[45] and the KPA Appeals Panel was established with the mandate to decide appeals against Kosovo Property Claims Commission (hereinafter KPCC) decisions responsible for the adjudication of claims received by the KPA. Two EULEX civil judges were deployed in November 2008, but the panel was not fully operational as it lacked its third Kosovo panel member. On 22 October 2010, a Kosovo Judge was appointed enabling the panel to perform the assigned executive function. Following this appointment 8 (eight) cases will be immediately processed and decided. Since 2009 twelve appeals have been forwarded from the KPA to the KPA Appeals Panel. In a majority of these cases the panel had to issue court orders to verify whether the claims were notified in accordance with the law and/or to find out why appellants did not meet the deadlines provided for by law.

During 2010, whilst awaiting the appointment of the Kosovo Judge, the EULEX KPA Appeals Panel judges established the administrative framework needed to make the panel operational. Instructions on how to store files were agreed upon as well as the procedures to be used when the panel receives appeals. With the assistance of the Chief Registrar of the AEJ a filing system was established, comprising all cases. Moreover the EULEX KPA Appeals Panel Judges compiled and continuously update a list of property-related legislation covering the period 1945 to present.

II. Property-related cases

In the following section, a selection of cases[46] dealt with by EULEX Civil Judges Kosovo wide in 2010, is presented with background, outcome and the rational behind the EULEX take over. All presented cases illustrate sensitive and complex legal issues and the decisions taken by EULEX civil Judges contribute to the establishment of relevant jurisprudence, which in turn improves the Kosovo judicial system.

Special circumstances in Mitrovicë/Mitrovica

EULEX civil Judges, assigned to the District Court in Mitrovicë/Mitrovica, acted as criminal judges adjudicating the most urgent cases involving Defendants in detention. During 2010 whilst EULEX judges in Mitrovicë/Mitrovica received approximately 50 complaints/requests in relation to civil matters, a majority of which

44 UNMIK Regulation no. 2006/10 on the resolution of claims relating to private immovable property, including agricultural and commercial property dated 4 March 2006. This Regulation established the KPA in charge of receiving and assisting the courts in resolving the conflict-related claims resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999 (ownership claims on private immovable property, claims involving property use rights in respect of private immovable property, where the claimant is not now able to exercise such rights).

45 The Appellate Panel was suspended in October 2006 by UNMIK Regulation 2006/50 on the resolution of claims relating to private immovable property, including agricultural and commercial property and later amended by Law No. 03/L-079 on amending UNMIK Regulation 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property on June 2008.

46 The judgments issued by EULEX civil judges are available on EULEX website: http://www.eulex-kosovo.eu/en/judgments/index.php

concerns disputes over property, the situation in northern Kosovo prevent the EULEX judges to adjudicate civil cases. These complaints refer to cases pending decisions as the courts in the north are non functional.

A. Eviction cases

Case E. No. 393/08 "Drenusha" Hunting Association vs. Municipality of Viti/Vitina, Viti/Vitina Municipal Court (Gjilan/Gnjilane region)[47]

Object: order of eviction and vacation of the premises
Type of procedure: execution

The first case involving the "Drenusha" Hunting Association and the debtor Municipality of Viti/Vitina involves two evictions. The case is to be read in relation with other cases involving the Municipality of Viti/Vitina that were assessed as sensitive due to the involvement of the Municipality, a powerful public institution. The intervention of the EULEX civil judges was therefore assessed as necessary due to the unwillingness of the Kosovo judiciary to proceed with the implementation of the court orders.

On 3 November 2008, a Kosovo Judge at the municipal court of Viti/Vitina ordered the Municipality to vacate the disputed property within 20 (twenty) days. This order was however not respected hence the illegal occupation continued. EULEX judges took over the case in order to guarantee that the decisions taken by Kosovo judges would be executed.

The first eviction was scheduled and executed during the summer of 2009. However the Municipality re-occupied the building shortly after. On 19 March 2010, EULEX civil judges issued an order to re-evict the municipality from the premises. The eviction was scheduled on the 6–7 April with Kosovo Police tasked to assist in removing all equipment and staff. In order to avoid large crowds during the operation EULEX judges scheduled the eviction on a Saturday and Sunday. It soon became clear that the Mayor had ordered the schools to be open and all Municipality staff to be present at the premises in order to "clean up the environment". During the night of 5 - 6 April 2010, masked individuals kidnapped the guards, entered the premises and planted explosives inside the building. The explosion partially destroyed the building but the eviction was executed in the ruins of the building.

B. Ownership cases

Case C. No. 66/09 Municipality of Viti/Vitina vs "Drenusha" Hunting Association", Viti/Vitina Municipal Court (Gjilan/Gnjilane region)

Object: Property claim
Type of procedure: Contested procedure

47 See cross reference: Case C.nr. 66/09 Municipality of Viti/Vitina vs "Drenusha" Hunting Association", Viti/Vitina Municipal Court (Gjilan/Gnjilane region

The case concerns claims of disputed property filed by the Municipality of Viti/Vitina, against the "Drenusha" Hunting Association. It was assessed as especially interesting due to the fact that the property was initially registered in the name of a SOE but claimed as belonging to the Municipality after the conflict in 1999 based on a municipal decision.

The last session of the main trial was held on 26 February 2010. On 19 March 2010 a EULEX civil Judge at the Municipal Court of Viti/Vitina, rejected the property claim filed by the Municipality. The case was appealed at the District Court of Gjilan/Gnjilane but a panel of one Kosovo and two EULEX Civil judges confirmed the judgment of the first instance court.[48]

Case C. No. 328/09 Municipality of Viti/Vitina vs PAK, Viti/Vitina Municipal court (Gjilan/Gnjilane region)

Object: Property claim
Type of procedure: Contested procedure

The last case involving the Municipality of Viti/Vitina is not connected to the cases described above. EULEX civil judges considered the case sensitive as there was grounded suspicion that the Kosovo judiciary was unwilling to deal with it due to the involvement of the Municipality and therefore took over the cases as it reached the appeal level.

In this case the PAK filed a request at the municipal court to determine the ownership right between the PAK and the Municipality of Viti/Vitina. The Municipal Court declared itself not competent to adjudicate the claim and stated that the case was within the competence of the SCSC. [49] This decision was annulled by EULEX civil judges[50] and the case was sent to the first instance court for re-trial.[51] The case was finalized in September after two re-trial sessions by a Kosovo Judge and represents a good example of cooperation between EULEX and Kosovo judges.

Case C. No. 973/08, Pejë/Peć Municipal Court (Pejë/Peć region)

Object: Confirmation of ownership
Type of procedure: Contested procedure

In the case in instance, the claimant, of Serb ethnicity, filed a request for confirmation of ownership and subsequently also a claim for compensation of damages.

The claimant stated that the new owner of a privatized SOE refused her access to her property located in the yard of the enterprise. The EULEX civil Judge, serving in the Pejë/Peć Municipal Court deemed the court not competent to deal with the case thus sent it to the SCSC for further processing. By doing so the EULEX judge realized that Kosovo courts generally do not act in accordance with the provisions of the Law on contested

48 Case AC.nr.170/10, Gjilan/Gnjilane District Court
49 See inter alia Section 4 and Section 5 of UNMIK Regulation 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters.
50 Case AC. No. 351/09, Gjilan/Gnjilane District Court
51 Case C. No. 104/2010, Viti/Vitina Municipal Court

procedure.[52] It was evident that the Kosovo courts closed cases and instructed the parties to file a new claim to the SCSC. This practice emanated from a decision to refuse case files from courts deemed not competent, taken by the SC in 2004.

Following meetings with the President of the SCSC it was confirmed that the provisions in the law were not followed. Subsequently EULEX Judges Unit conducted close monitoring, mentoring and advising with all judges in the five Municipal Courts in Pejë/Peć in order to rectify the misleading practice.

Case AC. No. 623/09, Prizren District Court

Object: Obstruction of property ownership
Type of procedure: contested procedure

The case referred to a pre-war claim of ownership of a real estate where a Serb claimed to have been the rightful owner since 1993 but had left during the conflict in 1999. This pending case put the limelight on the interesting legal issue, whether a regular civil court in Kosovo has jurisdiction to decide on a claim relating to the unlawful occupation of property. The competence of the Housing and Property Claims Commission (HPCC)[53] and Kosovo courts on matters of ownership or possession of such real estates was thus raised.

A claim was filed in 2002 stating that a Kosovo Albanian had illegally occupied the property and commenced construction. In 2005, the HPCC issued a decision ordering that the property should be returned to the claimant, who was the rightful owner.

In October 2009 the Prizren Municipal Court rejected the claim, declaring it inadmissible as regular courts were not competent to deal with such cases. The Municipal Court thus considered that the claim fell under the exclusive competence of the HPCC. On 19 February 2010, a panel with majority of EULEX judges at the Prizren District Court concluded that matters concerning possession of property fall under the exclusive competence of the HPCC, thus affirming the first instance court decision. However this specific claim concerned the obstruction of property ownership, and not the issue of possession. It was therefore concluded that the case could be dealt with by the regular courts of Kosovo. In its decision the District Court revoked the Municipal Court decision and sent the case back to the first instance court for re-trial.

Case Ac. No. 88/2010, Prizren District Court

Object: verification of ownership on immovable property
Type of procedure: contested procedure

52 Article 23 of the Law on contested procedure states that if the court finds itself incompetent it has to send the case to the competent court within three days. The claim is dropped only in case the court finds that a different state body has jurisdiction over the claim.

53 UNMIK Regulations 1999/23 dated 15 November 1999 established the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) to adjudicate claims by natural persons whose ownership, possession or occupancy rights to residential real property have been revoked subsequent to 23 March 1989 on the basis of legislation which is discriminatory; claims by natural persons who entered into informal transactions of residential real property on the basis of the free will of the parties subsequent to 23 March 1989; claims by natural persons who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferred; see inter alia UNMIK Regulation 2000/60 dated 31 October 2000 on residential property claims and The Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission.

The following case also refers to a claim for verification of ownership at the Prizren District Court. It commenced in 2001 and, as will be described below, was sent back to the Municipal Court for re-trial two times. In April 2010, EULEX civil judges at the District Court took over the case as it had been pending final decision for over nine years and substantial procedural breaches had been monitored indicating that the Kosovo Judiciary seemed unwilling to deal with it. This case also highlights the issue of quasi systematic remittal of cases common in Kosovo, adding to the huge back log of civil cases.

In 2001 the claimant, a Kosovo Albanian, stated that a piece of his land was illegally occupied by the respondent and requested that the Municipal Court should verify the ownership. In December 2001, the Municipal court decided that the claimant was the rightful owner of the property hence ordering the respondents, also Kosovo Albanian, to hand it over. This decision was appealed and the Municipal Court decision was revoked by the Prizren District Court in December 2004. The case was sent back for re-trial and in October 2004 the Municipal court confirmed their decision stating that the claimant was the rightful owner. Yet again after appeal in June 2006 the District Court revoked the Municipal Court decision and sent it back for reconsideration a second time. In January 2010 the Municipal Court issued their third decision confirming the ownership to the claimant, stating that the respondents should hand over the occupied property, alternatively pay compensation for the illegally occupied property.

In November 2010 a Prizren District Court panel composed of a majority of EULEX judges issued a final judgment rejecting the respondents' appeal of February 2010 and confirmed the judgment issued by Municipal court of Suharekë/Suva Reka as it was considered that the first instance court properly established and correctly applied substantive law.

C. Contracts

Case C. No. 194/06, Istog/Istok Municipal Court (Pejë/Peć region)

Object: Annulment of a purchase contract
Type of procedure: contested procedure

The following case concerns the annulment of a transaction contract for a property in the Municipality of Istog/Istok. The case was assessed as sensitive and consequently taken over by EULEX civil judges as the dispute involved parties of different ethnic origin and had been pending for years. The case also presents an interesting judicial problem common in Kosovo.

The respondents, Kosovo Albanians, claimed to be the rightful owners of a property referring to judgments issued by the president of the municipal court of Istog/Istok. During this proceeding the claimant, Kosovo Serb, was absent hence never informed. This highlights a common practice seen in courts in Kosovo after the conflict in 1999 and until 2008, as some Kosovo Albanians unlawfully received document of ownership through the process of filing a claim against Serbs. In these filed claims it was stated that a transaction had occurred but a contract had never been signed as the law, discriminatory in nature, forbade it. The

court, unable to summon the Serb party, due to unknown address, consequently appointed a temporary representative. This representative would in turn seldom object to the claim thus in practice declaring the Kosovo Albanian owner of the property. In reality this mechanism enabled many Kosovo Albanians to obtain property illegally but also forced many to pay twice for property already bought in good faith.

In the referred case the claim was withdrawn and the dispute settled as the Serb claimant received money for the disputed property. The respondents therefore paid for the property twice (first to the wrongful owner with a fake power of attorney and secondly to the real owner).

Case C. No. 253/07, Pejë/Peć Municipal Court (Pejë/Peć region)

Object: Annulment of a purchase contract
Type of procedure: contested procedure

In the following case two Serbs filed a claim for annulment of a transaction contract against two Kosovo Albanians. This is one of the several cases adjudicated by EULEX judges concerning fraudulent transaction of a piece of land.

The transaction contract of the property had allegedly been signed and verified in 2004 between the mother of the claimants and the respondents. It was however established during the trial that the mother had deceased in 1983 and the EULEX civil Judge therefore annulled the transaction. In these cases the factual situation is often complex as the number of the parties involved in combination with interest of third parties make the case difficult to adjudicate. The interesting legal issue in this case was if the claimants intentionally had sold the property to the respondents or if it was illegally transferred without their knowledge by the use of falsified documents; in fact this legal question gave the EULEX civil judges the opportunity to clarify the principle of the protection of the third parties.

D. Possession cases

Case C. No. 126/07, Istog/Istok Municipal Court (Pejë/Peć region)

Object: Restitution of possession and compensation of damages
Type of procedure: contested procedure

In 2009 EULEX civil judges took over a case with an inter-ethnic background, pending decision at the Istog/Istok Municipal Court concerning a claim for restitution of property and compensation of damages. This case highlights the close connection between EULEX civil judges Executive and MMA mandate.

A claimant of Serb ethnicity stated that the respondent, Kosovo Albanian, had occupied his property, destroyed the original house and built a new one on the location. During the proceeding it became clear that the respondent had left Kosovo and lived on an unknown address. It also became evident that a third party, Kosovo Albanian as well, lived on the property. Following the Law on contested procedure the EULEX

civil Judge appointed a legal representative to represent the respondent and sent this decision to the Official Gazette (OG) for publishing. However, according to the Law on the OG the newspaper was not obliged to publish court acts.[54] Finding this legislation gap, EULEX civil judges in Pejë/Peć initiated the procedure to amend the Law on the OG. This procedure took almost a year and the amended law was promulgated and published in August 2010 resulting in that Kosovo Courts could announce their actions in the newspaper, thereby guaranteeing publicity and accessibility. On 15 September 2010 the Municipal Court announced the legal representative, in the case referred to above, enabling the EULEX civil Judge to proceed with the case.

E. Cases involving political pressure of party to the proceeding or threat received by the Kosovo judiciary

Case C. No. 302/07 and others, shop owners vs Municipality of Gllogovc/Glogovac, Gllogovc/Glogovac Municipal court (Prishtinë/Pristina region)

Object: compensation for damages
Type of procedure: contested procedure

Of the total of 21 (twenty-one) cases taken over by EULEX civil judges in the region of Prishtinë/Pristina, eighteen were filed by individual shop owners against the Municipality of Gllogovc/Gllogovac.[55] The rational behind the take over of these cases was that the cases had not been properly administered, as well as the fact that the Municipality seemed to have exercised political pressure on the Kosovo judiciary.

In 2001 approximately 60 (sixty) shop owners called for the attention of the SRSG and the Ombudsperson in order to prevent the Municipality of Gllogovc/Glogovac to execute the decision to tear down their shops. On 7 May 2001 the SRSG issued an Executive Direction and suspended the decision made by the Municipality. Despite strong attention from the SRSG and the Ombudsperson and the fact that these cases were pending a final court decision the municipality executed its decision and tore down the shops in March 2005. The procedures for compensation of damages were still pending in 2009, when the 18 (eighteen) parties submitted their complaints to EULEX. After a review of case files as well as after the hearing of parties involved, it was assessed that the Kosovo court was not able to finalize the proceedings.

Cases C. No. 193/02 and C. No. 82/09, Lipjan/Lipljan Municipal Court and C. No. 2355/07, Prishtinë/Pristina Municipal Court (Prishtinë/Pristina region)

Object: annulment of contract/verification of ownership
Type of procedure: contested procedure

During 2010 EULEX civil judges took over 3 (three) civil cases in the region of Prishtine/Pristina, in which the Kosovo judges had been exposed to threats and other obstructions from the parties. Two of these three cases were filed at the Lipjan/Lipljan Municipal Court and the third at the Prishtinë/Pristina Municipal Court.

54 Kosovo judges used to send the announcements for publishing in daily newspapers
55 C.nr.302/07, C.nr.163/08, C.nr.120/08, C.nr.122/08, C.nr.116/08, C.nr.301/07, C.nr.166/08, C.nr.164/08, C.nr.160/08, C.nr.121/08, C.nr.306/07, C.nr.119/08, C.nr.117/08 and C.nr.61/05.

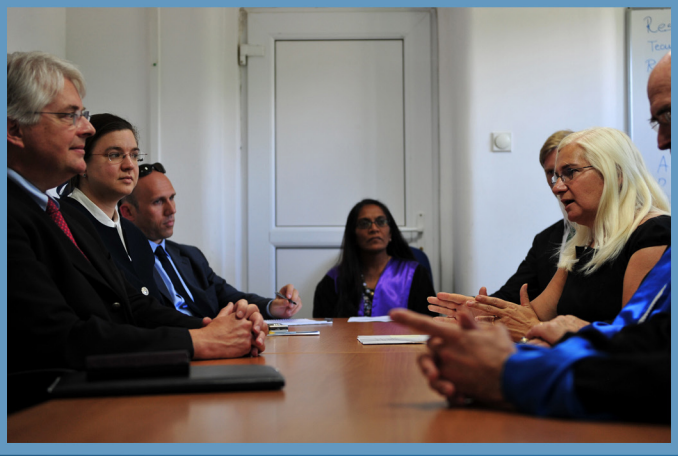
The first case[56] filed in Lipjan/Lipljan concerned a claim for annulment of a contract. In 2002 the claimant stated that he had the priority right to buy a parcel, bought by the respondent located just next to his own property. During the hearings at the Municipal Court the claimant and some of his relatives threatened the Kosovo Judge, the defense counsel and the respondent. These threats hindered the proceedings to be concluded and the case was therefore pending decision. In 2010 EULEX civil judges received a request for take over from both the respondent and the Municipal Court. The claimant strongly opposed this and showed EULEX judges the same threatening attitude.

The second case[57] concerned the verification of ownership of an attractive parcel owned by 3 (three) individuals. Allegedly one of the co-owners had set up and ran a business on the piece of land, a business that the other two also claimed co-ownership of. The case however got stuck as one of the parties started threatening the Kosovo Judge in charge of the case. The Kosovo Judge hence requested EULEX civil judges to take over the case. It was determined that the overall atmosphere surrounding this case would not allow a proper adjudication. After that the take over was concluded a EULEX civil Judge partially granted the motion of the claimants and issued temporary security measure against the respondent. The first hearing in the case is scheduled for January 2011.

The third case[58] concerned the annulment of a transaction contract for an attractive real estate in the centre of Prishtinë/Pristina. In the filed claim it was stated that the respondent, Kosovo Albanian, had bought the property in a fraudulent way from a family member of the claimant, of Serb ethnicity not authorized to sell. The case was assessed as sensitive and consequently taken over by EULEX civil judges as the dispute involved parties of different ethnic origin, one of the parties had connection with influential political groups and the Municipal court judges had resigned from the case after receiving threats from the respondent. The Judge considered that the power of attorney on which the transaction contract was concluded was not a valid one. The contract lacked of consent of one of the contracting parties and no binding agreement was concluded regarding some parts of the disputed property. In December 2010 the EULEX civil Judge hence issued a judgment by which the contested transaction contract was partially annulled. The cadastral office of the Municipality of Prishtinë/Pristina was ordered to alter its books in accordance with the judgment.

56 Case C. No. 193/02, Lipjan/Lipljan Municipal Court
57 Case C. No. 82/09, Lipjan/Lipljan Municipal Court
58 Case C. No. 2355/07, Prishtinë/Pristina Municipal Court


EULEX



Chapter 4:

Adjudication of cases at the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency matters

(case studies and statistics)

I. Special Chamber of the Supreme Court: legal basis, jurisdiction and challenges

The legal basis for the establishment of the SCSC in its present form is UNMIK Regulation 2008/4[59] amending UNMIK Regulation 2002/13, and UNMIK Administrative Direction 2008/6.[60] The law foresees mixed panels in two instances, namely first instance and appeal, with a majority of EULEX Judges on each panel.

The difficulties pertaining to the proper adjudication of often interethnic-related cases, that involve parties outside of Kosovo, require a sustained international assistance in this segment of the administration of justice in Kosovo. Many conflict-related cases concerning property issues fall under the scope of the SCSC's jurisdiction. The privatization process in Kosovo should serve as a firm basis for the true economic independence; hence its importance shall not be underestimated. Because of the amount of money involved in the privatization there is always a higher risk of corruption, which factor shall be always taken into account while examining the individual cases.

The SCSC has made vast progress in implementing European Standards and Best European Practices. The first items on the agenda were the development and implementation of an operational system for the composition of panels of judges in first and second instance, and for a predetermined and objective system of case allocation among judges in a revolving manner, ensuring transparency, the right to a lawful Judge, and a fair balance of workload.

Section 3.1 UNMIK Regulation 2008/4 provides that '[t]he Special Chamber shall be composed of up to twenty (20) judges, thirteen (13) of whom shall be international judges and seven (7) shall be habitual residents of Kosovo […]'. It also provides that one or more groups of two international judges and one Kosovo Judge, each to serve on one of five panels of three judges shall be established by the President of the SCSC for the conduct of trials and adjudication of claims and counter claims in the first instance

Since the entry into force of these provisions, the SCSC has not been fully staffed to enable the composition of the 5 (five) specialized Trial Panels as foreseen by Section 3.2 UNMIK Regulation 2008/4. Therefore the SCSC judges unanimously agreed in January 2009 to establish one Trial Panel, acting through different groups of judges in different compositions, always presided by a EULEX Judge.

Further the Presidium composed of the President and the Presiding judges, foreseen in Section 10 UNMIK Administrative Direction 2008/6 and Section 3 UNMIK Regulation 2008/4, could not be constituted either. Under Section 10.3 UNMIK Administrative Direction 2008/6 in case a Presidium is not able to reach a decision in time the President shall take such decision and present it to the Presidium for approval. To counterbalance the powers resting with the President of the SCSC due to the absence of the Presidium, all decisions which would rest with the Presidium were taken with the consent of the majority of the SCSC judges. Only cases of

59 UNMIK Regulation No. 2008/4 amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, dated 5 February 2008.

60 UNMIK Administrative Direction No. 2008/6 amending and replacing UNMIK Administrative Direction No. 2006/17, implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, dated 11 June 2008.

recusal or substitution of judges were so far decided by the President alone, as additionally provided for in the mentioned rules for case allocation.

This was formalized in the Rules for the Establishment of a Trial Panel and an Appellate Panel of the SCSC, for Case Allocation and Additional Rules of Procedure, which also introduced a rotation system of case allocation.[61] The SCSC further amended on a regular basis, procedural rules on *inter alia* the organization and workflow within the SCSC, the management of case files, rules on the proceedings before the SCSC, the preparation and conduct of deliberations and hearings etc.

In late December 2010 a meeting was initiated where once again, amongst others the question of 5 (five) specialized panels as foreseen by the law and the Presidium were raised. In January 2011 a working group was set up to provide the judges of the SCSC with all possible alternatives on these issues. The assessment report is yet to be discussed by the judges in view of the fact that new international and Kosovo judges will be appointed shortly.

Cases under the jurisdiction of SCSC

The primary jurisdiction over claims and counterclaims of SCSC is defined in Section 4 UNMIK Regulation 2008/4. The SCSC has competence over, *inter alia*, all claims brought against an enterprise or corporation currently or formerly under the administrative authority of KTA. Therefore the jurisdiction of SCSC comprises as a fact all kind of civil cases in which KTA is involved or for example a SOE as a Respondent. Therefore, the most important categories of cases are related to ownership disputes (mainly regarding immovable property), to disputes concerning the privatization and privatization-related contracts and to the employee lists of privatized or liquidated enterprises.

Employee List Cases

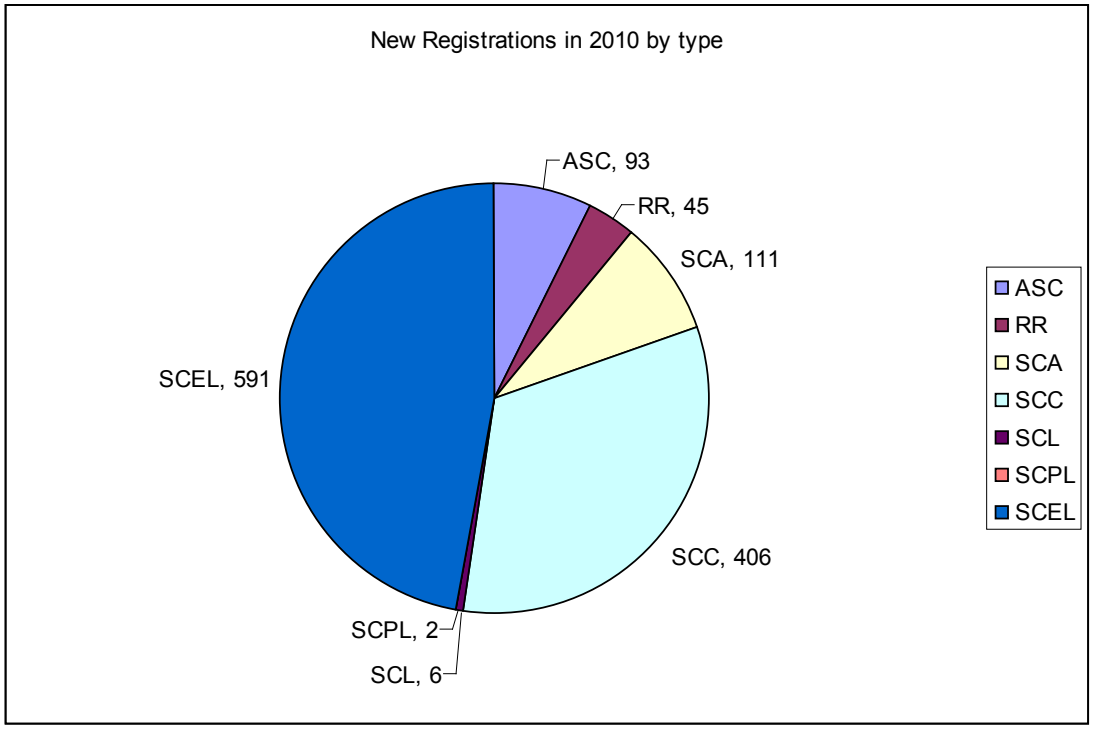
They relate to the entitlement of workers of an enterprise to participate in the proceeds of its privatization or liquidation. According to UNMIK Regulation 2008/4 Section 4.1 (e) the SCSC has jurisdiction over 'claims involving an official list of eligible employees of an enterprise issued by the agency and the eligibility of employees under section 10 of Regulation No. 2003/13, as amended […]', the so called "Employee List Cases".
The most prominent case concerns the SOE "Ramiz Sadiku". Hearings were held during 33 days between March and May 2010 (additional hearing on 21 October 2010) during which all the complainants (approximately 1400) were summonsed to present their case before the court.

Statistics 2010

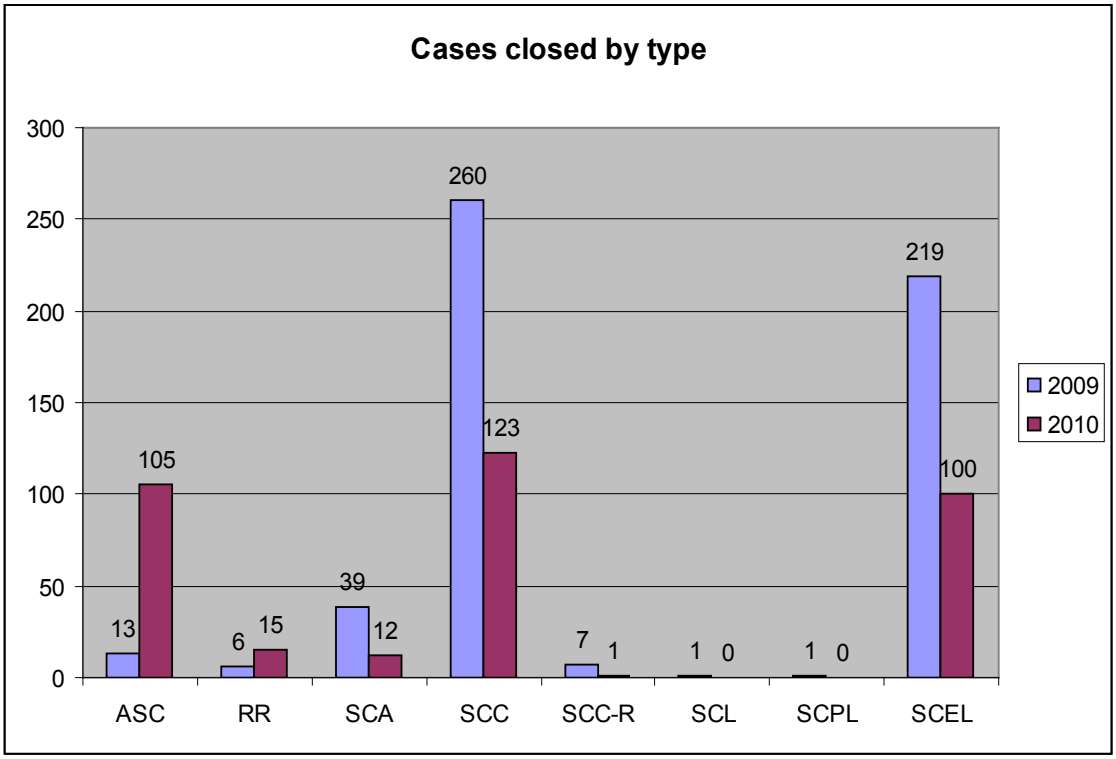
In February 2009, 597 cases were taken over from the "old" SCSC (so called UNMIK Legacy Cases) to date 371 of the UNMIK Legacy Cases have been decided. In 2010 the SCSC has registered 663 new cases in both

61 The Rules have been adopted by the EULEX Judges during the 4th Assembly of EULEX Judges on 2 March 2009.

instances. In addition 591 complaints against employee list cases have been registered. This is in addition to the 659 cases and 2684 complaints that were already pending before the SCSC as of 01 January 2010.



During this year, 356 cases have been closed (employee list cases are counted by individual complainants) and 109 hearings (compared to 11 hearings held in 2009) have been held at the Special Chamber.



In the reporting period 589 procedural decisions (compared to 667 issued in 2009) have been taken and 3930 orders (compared to 964 issued in 2009) have been issued. Currently a total of 1136 cases are pending before the SCSC.

Year of Registration	Active Cases
2003	1
2004	9
2005	16
2006	44
2007	71
2008	130
2009	277
2010	615

During the reporting period the SCSC has registered 41 new Employee List Cases with a total of 428 individual complaints in addition to the 26 cases with a total of 2684 complaints already pending before the SCSC as of 01 January 2009. 4 Employee List Cases with a total of 100 individual complainants have been resolved.

591 complaints were received in 2010, while the SC registered 2785 complaints in 2009. The number of new cases registered during the reporting period (41 cases) significantly increased in comparison with the number of 25 in 2009.

Challenges

Several challenges faced by the SCSC shall be mentioned: complexity of the legal framework; lack of a full complement of EULEX and Kosovo judges; insufficient staff[62] and logistical resources (e.g. poor infrastructure, need for additional administrative staff and huge backlog of translation);[63] service of documents to non-recognizing states.[64] In the past, the SCSC was confronted with numerous protests due to the delays in issuing judgments. In addition due to the unsettled succession between the KTA and PAK the SCSC is often facing situations where both agencies claim the right of administration and representation of the socially owned interest in front of the Court.

62 The Special Chamber has faced difficulties in recruiting EULEX and Kosovo judges that would fulfill the minimum requirements. After a long standstill 3 Kosovo Judges (2 for the Trial Panel and 1 for the Appellate Panel) were appointed in July 2010 (out of 7 announced vacancies).

63 There is a growing backlog of translations of 6036 pages at the end of the reporting period. In 2010, 4036 pages of documents have been translated. Cases for which case files are waiting for translation, are still pending before the Chamber and this poses a serious impediment for the access to justice.

64 The service of documents to non-recognizing states, in particular to Serbia remains a problem. According to the Administrative Instruction on the Procedure of International Legal Assistance in Criminal and Civil Matters of 30 September 2009 issued by the Ministry of Justice, the latter is solely responsible for international judicial cooperation also with countries that have not recognized Kosovo, and Serbia. However documents of the SCSC submitted for service through the Ministry of Justice have not been served on the parties in Serbia proper and this matter raises concerns with respect to the parties' right to access to justice.

II. Selected Cases65

On January 2010, 691 cases were pending before the SCSC in both instances (3345 if complaints in employee list cases are counted individually). On 31 December 2010 1163 cases were pending before the SCSC (4274 if complaints in employee list cases are counted individually). In 2010, the fist instance panel has concluded 251 cases with final decisions, 16 of which were judgments. The Appellate Panel has concluded 105 cases with final decisions 28 of which were final judgments/decisions on the merits.

In its decisions the SCSC addressed numerous important legal issues, only some of which shall be highlighted in this report by the following representative selection which focuses mainly on Appellate Panel Decisions (ASC) because it is the task of any Supreme Court to ensure the uniform application of the law by deciding on appeals in accordance with the law. Legal questions decided by the Appellate Panel of the SCSC are therefore of great importance and contribute to the institution of core principles.
In addition since the applicable regulations and administrative direction contain rather complicated procedural provisions, the Special Chamber's panels issued many decisions on inadmissibility and other procedural matters.

Case ASC-09-0108, representation of a SOE before the SCSC and advice how to appeal

In this case, the second instance panel decided on the question whether the PAK, is legally entitled to represent SOE before the SCSC. Further on, the Appellate Panel had to clarify other aspects of the procedural role of the PAK and the referral of cases to the regular courts as well as on minor procedural questions concerning the procedure of appeal.

The PAK was called into the suit, and the case was referred to the Municipal Court Prishtinë/Priština by the first instance decision dated 24 November 2009. Further, it was confirmed that the appeal from the decision of the Municipal Court Prishtinë/Priština will be handled by the Special Chamber. the Trial Panel stated that it was necessary to exercise jurisdiction over the PAK in order to fully adjudicate the claim and that the Municipal Court Prishtinë/Priština as the court the case was referred to was competent to decide the case impartially and in line with the relevant provisions of Section 4.2 UNMIK Regulation 2008/4, Section 15 UNMIK Administrative Direction 2008/6 and Sections 206 and 207 of the Law on Contested Procedure.

Upon the appeal of the claimant, the second instance panel found that the activities of the KTA, including the representation of SOEs before the Special Chamber, ceased in June 2008 and were then factually taken over by the PAK. Taking into consideration this factual situation and that there is an imminent need for SOEs being duly represented, and considering that as a basic principle legal systems following the rule of law do not allow for legal vacuums, the representation of SOEs by the PAK for the time being will be accepted.

65 Most of the decisions of the SCSC are available on http://www.eulex-kosovo.eu/en/judgments/CV-Special-Chamber-KTA.php

Case SCC – 07 – 0311, validity of certain clauses in the sales documents prepared by the Agency, prior knowledge of legal deficiencies

This case relates to a claim for possession of land subject to illegal occupation and compensation. The First Instance Panel assessed the validity of certain clauses in the sales documents prepared by the Agency and the consequences of the existence of legal deficiencies when both parties were aware of them prior to concluding the contract. This decision can be of general importance because illegal occupation of socially owned property is a widespread phenomenon in Kosovo which is likely to be problematic during the privatization process of a SOE.

The first instance panel rejected the claim as ungrounded on the grounds that the applicable law to be verified in order to decide upon the claim is Articles 508-515 of the Law on contracts and torts.[66] The Claimant is in the position of the buyer who claims his entitlement for compensation. The compensation is the money that the lessee asked from the Claimant for not delivering to the company the promised possession of the land. The loss caused by the encumbrance on the object bought is the usurpation of the land by the third parties (who claimed before their rights against the seller).

The KTA defends itself pointing out a clause of the contract and stating that it was not obliged to transfer the land free from occupation. The panel rejected this argument since the essence of the contract of sale is that the seller is obliged to deliver the good meaning transferring the possession and not "merely" the right. The buyer, in principle, has the right to enjoy the quiet possession of the good.

The Court learned from the collected evidence that the Respondent, KTA, had knowledge about the disturbance of quiet possession. Article 513, para 2 from the Law on contracts and torts declares null and void the clause on excluding liability for legal deficiencies that the seller was aware of or that could not have remained unknown to him at the date of entering into contract.

But in the condition that both parties knew about the deficiency of the good, the liability will run from seller to buyer.[67] As for the other claim, given there was no evidence that the seller knew about it, therefore the clause of the contract operates. Taking into consideration all of these reasoning, the court finds out that the seller has no obligation in defending the claimant from the occupation - hence no obligation in handing over the land - and in compensating for the alleged loss.

Case ASC-09-0072, general questions concerning the admissibility of a claim

The case concerns one of the general questions concerning the admissibility of a claim. The Trial Panel rejected the claim as inadmissible, arguing that the Claimant did not provide the court with the address of the Respondent, did not provide a proper power of attorney and failed to provide facts and legal arguments as well as a list of evidence. Furthermore it argued the Claimant did not prove that he notified the Agency properly on his intention to lodge a claim.

66 Law on contract and torts, OG SFRY no. 29/1978, as amended OG no 39/1985, 45/1989, 57/1989
67 Article 508, para 1, last sentence of the Law on contracts and torts

In the second instance decision the Appellate Panel found that the Claimant timely provided an address of the Respondent. The Appellate Panel furthermore decided that the power of Attorney, as foreseen in Section 24.6 in connection with Sections 25, 28.3 (f) and 28.4 Administrative Direction 2008/6, is among the admissibility criteria for a claim and the disputed power of attorney was not limited to the representation of the Appellant before the Municipal Court Prishtinë/Priština.

Section 28.2 (f) lists among the admissibility criteria for a claim (all) "… the requirements of Sections 25 and 27 …", at first sight giving the impression that all the elements listed therein may lead to the dismissal of the claim as inadmissible, if not provided upon order (see Section 28.4 Administrative Direction 2008/6). A closer reflection, however, reveals that the scope of this provision has to be reduced on teleological grounds. If (sufficient) facts and/or legal arguments are not presented, or the claimed facts do not lead to the conclusion as drawn by the Claimant, the claim can only be subject to rejection as ungrounded, if not clarified upon request. The same goes for the list of evidence: On principle, only contested facts need to be proven by the Claimant. If the Respondent does not contest the facts as claimed in a conclusive claim, there is no need to take evidence. In the case at stake, the Respondent had not been involved yet.

According to Section 29.1 UNMIK Regulation 2002/12 (in conjunction with Section 28.2 [e] Administrative Direction 2008/6), written notice of the intention to file action against a SOE has to be given to the Agency prior to the submission of the claim (the Trial Panel's reference to the 60 days notice as foreseen in Section 30.2 UNMIK Regulation 2002/12 is incorrect, as this provision only applies to claims against the Agency). Even though the admissibility criteria have to be examined *ex officio*, at that early stage of the proceedings (without the Respondent having been involved yet) the mere contention by the Claimant that a proper notice was given, is – on principle – sufficient, following the same pattern as described above. If a Claimant maintains that a proper notification was filed, the Trial Panel cannot dismiss the claim as inadmissible out of this reason. Unless the claim is inadmissible on other grounds, it has to give the Respondent the opportunity to take a stand on the notification, alongside the merits of the claim."

Therefore, the first instance decision had to be set aside.

Case SCC–10–0082, admissibility of a claim, no jurisdiction over municipalities

This case relates to the recognition of possession right over a cadastral parcel and restitution of real estate located on it *vis-à-vis* a Municipality. The question in this case was of whether a claim brought by a natural person against a Municipality does not fall under the jurisdiction of the SCSC. The First Instance Panel rejected the claim as inadmissible, arguing that, under Section 28.2 of UNMIK Administrative Direction 2008/6, a claim shall only be admissible if it is brought against a party who may be a respondent in proceedings before the Special Chamber pursuant to section 5.2 Special Chamber Regulation. Further Section 4.1 of UNMIK Regulation 2008/4 states that the Special Chamber shall have primary jurisdiction for claims or counterclaims in relation to the following: […] c) Claims, including creditor or ownership claims, brought against an Enterprise or Corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the Agency;…

The Special Chamber hence does not have jurisdiction over claims involving the Municipalities and rejected the claim as inadmissible pursuant to Section 28.3 of UNMIK Administrative Direction 2008/6.

Case ASC-09-0075, consequences of a moratorium decision

This case relates to the suspension of proceedings by the trial panel in the instance on the grounds that the moratorium decision would prohibit the continuation of the trial at the moment. In this case the Appellate Panel had to decide whether the Respondent is – still – under a moratorium decision, what the consequences are, and in general on specific consequences of the moratorium.

The Appellate Panel confirmed the first instance decision, by dismissing instead of suspending the claim. In line with general principles of civil procedural law, the "suspension" or "stay" of proceedings *per definitionem* can only be directed if specific circumstances arise in the course of the proceedings, which did not occur prior to their initiation. In particular, the suspension of proceedings has to be ordered only in a situation when a party is put under reorganisation during the proceedings, while the named provision does not cover claims filed when a moratorium decision is already in place (compare ASC-10-0014), and has been announced properly. As long as the moratorium is in place, no claims aiming at the pursuit of demands against the enterprise being subject to the moratorium can be filed, when regarding a subject matter that is based on facts having entered into existence before the moratorium (therefore securing the equality of creditors). These claims are to be dismissed as inadmissible. Consequently, the attacked decision had to be amended as to the dismissal of the claim.

This result does not contradict Section 51.2 UNMIK REG 2005/48, dealing with claims filed in the SCSC after the date of the moratorium, and exempting them from the notification requirement as set out in Sections 29.1 and 30.2 UNMIK REG 2002/12: This provision does not take a stand on the admissibility of certain categories of claims itself, at all, and does by no means allow for the conclusion that claims filed after the moratorium are generally admissible, but only imposes a general rule on claims whose admissibility is to be determined by other provisions (in particular by Sections 30 et seq. UNMIK REG 2005/48 regarding claims in the course of reorganization procedures, or Section 39.7 UNMIK REG 2001/6 for claims challenging decisions of the liquidation committee during the liquidation procedures).

Case ASC-10-0036, admissibility criteria, notice to the Agency

This case concerns the question of the admissibility criteria (notice to the Agency under Sections 29.1 and 30.2 UNMIK Regulation 2002/12, and the relation between these provisions and Section 6.2 UNMIK Regulation 2008/4). It also had to decide in which cases the Agency can be considered as a representative of the SOE and in which cases it should be concerned a party instead.

With regard to the scope of the applicability of Section 30.2 the Appellate Panel found that while the notification as foreseen in Section 29.1 UNMIK Regulation 2002/12, shall only safeguard the Agency's authority to represent any SOE before the SCSC, by informing the Agency prior to/at the beginning of proceedings at

the SCSC (see Section 29.3 UNMIK Regulation 2002/12), the 60 (sixty) days notice as detailed in Section 30.2 UNMIK Regulation 2002/12 has to be seen against the background that the Agency, whose decisions are (to be) challenged shall be granted some time (60 days) to reconsider these decisions and/or to settle any dispute in advance, instead of being sued at the SCSC (compare ASC-10-0024).

According to the mere wording of Section 30.2 UNMIK Regulation 2002/12, the requirement of a written notice at least 60 days prior to the actual filing of the claim is not explicitly restricted to specific categories of claims. Section 4 UNMIK Regulation 2008/4 governing the primary jurisdiction of the SCSC, in its lit (a) and (b) lays out these (only) categories of claims against the Agency to be brought before the SCSC: While lit (b) covers claims against the Agency for certain financial losses, lit (a) deals with challenges to decisions or other actions of the Agency undertaken pursuant to UNMIK Regulation 2002/12. The latter provision read in connection with Section 30.2 UNMIK Regulation 2002/12 reveals that only when challenging decisions or actions of the Agency (directly) the 60 days notice can be justified: Only in these cases the Agency shall be in a position to look its decisions over again within a certain time period, and to revoke them if appropriate, without being subject to the risk of facing legal actions. In all other cases there is no reason for granting the Agency a favorable treatment over the cases covered by Section 29.1 UNMIK Regulation 2002/12, as it may engage in negotiations on behalf of an SOE any time, even when proceedings before the SCSC are already pending.

Consequently, Section 6.2 of UNMIK Regulation 2008/4 containing specific provisions for claims challenging decisions or actions of the Agency, directly refers to Section 30.2 UNMIK Regulation 2002/12, underlining that the latter provision applies to the claims as dealt with by Section 6 UNMIK Regulation 2008/4 only. As a consequence, the scope of Section 30.2 UNMIK Regulation 2002/12 has to be understood as to apply to claims as covered by Section 4.1 (a) UNMIK Regulation 2008/4 only (claims to challenge the Agency's decisions or other actions).

This was not the case in the instance: The Appellant clearly distinguished between the two Respondents, and explicitly stated his will to take action against the KTA, but without challenging decisions or other actions of the KTA. Therefore, Section 30.2 UNMIK Regulation 2002/12 stating the 60 days notice requirement does not apply. Instead, this case is covered by Section 29.1 UNMIK Regulation 2002/12.

With regard to the specific case, in which the claim after 15 month was rejected as inadmissible, the Appellate Panel found that the notice to the Agency about the intention to file a claim is among the admissibility criteria as set forth in Section 28.3 UNMIK Administrative Direction 2008/6. The mere contention by the Claimant that a proper notice was given, is – on principle – sufficient, as it is up to the Respondent's discretion not to contest the facts as stated by the Claimant, including the question of the notification. On this occasion, it has to be reiterated that if a Claimant maintains that a proper notification has been filed, the Trial Panel cannot dismiss the claim as inadmissible, based on the lack of proof of such a notification. Unless the claim is inadmissible on other grounds, it has to give the Respondent the opportunity to take a stand on the claimed notification, alongside the merits of the case. It rests with the Respondent then to contest the facts as maintained in the claim, including the alleged (timeliness of the) notification. Only if the Respondent contests the notification, the Claimant will be required to proof the notification.

In the case at hand, the Respondent has not had the opportunity to contest the notification yet. Though, the Claimant (Appellant) submitted a copy of the notification dated 07 November 2008 but, clearly showing that it was not filed on time. Under these circumstances no further necessity arose here to involve the Respondent; after the Appellant's submission it was already clear that not all admissibility criteria were met at the date of the filing of the claim.

However, it has to be taken into account here that the KTA was aware of the claim and did not opt to settle the dispute with the Appellant. Bearing in mind that the notification's aim is to inform the Agency about potential claims, and to provide them with the opportunity to take the matter up on behalf of the SOE involved, the ratio legis of the notification in the meantime has been met. In addition, it has to be considered that the duty of a claimant to notify the Agency in advance adds extra burden to him as to the access to justice; the provision must therefore be interpreted in a restrictive way. In this situation, the Appellate Panel considers the untimely notification to be without (further) relevance as to the adjudication of the claim.

Case ASC-09-0059, validity of an expropriation before 1999

The case deals with the highly disputed question of challenging acts of expropriation which have taken place before 1999. In this decision the Appellate Panel decided on the jurisdiction of the SCSC over these claims and found that it is within the SCSC's jurisdiction to scrutinize the validity of any act of expropriation which is contested within a law suit against a Socially Owned or Publicly Owned Enterprise. The second instance panel considered that UNMIK Regulation 2008/4 grant the SCSC jurisdiction over all claims brought against a POE or SOE, regardless of their legal nature.[68]

The SCSC when deciding on the claim of a claimant may also assess what is the legal validity of an earlier decision of the administrative authority, as well as the validity of decisions or judgments of courts, which may have legal significance in the matter, thus defining the extent of the legal force of the former decision. Restraining from exercising jurisdiction over cases like the one at hand would leave those who were subject to acts of expropriation before 1999 without any proper legal remedy. It can be assumed that acts of expropriation might have been connected with discrimination before 1999. This has to be scrutinized on a case by case basis and it also has to be scrutinized, if those whose property was subject to expropriation by then had proper means – within the framework of the then applicable law – to raise their objections against the expropriation. For the time being, the applicable law in Kosovo does not foresee a proper legal remedy to challenge those expropriations outside of the regular courts, including the SCSC.
The decision of the Trial Panel was set aside and the case sent back for retrial.

Case ASC-09-0035, requirements for the issuance of a preliminary injunction

This case concerns the request for a preliminary injunction to avoid changes in the ownership of the first Respondent (a SOE).

68 According to Section 4, para c) of UNMIK Regulation 2008/4 the Trial Panel of the SCSC shall have primary jurisdiction for claims and counterclaims, including creditor or ownership claims brought against an enterprise or corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such enterprise or corporation is or was subject to the administrative authority of the Agency.

The second instance had to decide on the question if the requirements to issue a preliminary injunction are met and whether the involvement of the PAK as an independent party was necessary and if not, what are the legal consequences of PAK's further procedural actions. The court found that in order to grant a preliminary injunction a party shall give credible evidence that immediate and irreparable loss or damage would result if the request is not granted. These criteria are set in a way that if any of the above is missing the request shall be denied. Since in the case at hand the damage already occurred there is no way that an injunction can be granted.

It was also decided that although the 2nd Respondent (PAK) had no *legitimatio passiva* concerning the claim in the main proceedings, it was entitled to lodge an appeal, as it has suffered gravamen from the challenged decision. There is no valid legal reasoning to call the PAK as an additional Respondent into any law suit if the claim concerns only the legal relations of a SOE with another natural or legal person, since the PAK due to its mandate "only acts as a representative, thus on behalf of the SOEs in court proceedings, which does not at all affect the active legitimacy and/or the legal integrity of the SOEs. The panel rejected the claim to issue a preliminary injunction is rejected as ungrounded and found the decision of the Trial Panel to call the PAK as 2nd *Respondent* into the suit without legal effect.

Case ASC-09-0091, jurisdiction of the SCSC over claims regarding the correctness of the share of the proceeds granted to an individual employee

The question raised in the instance was of whether the SCSC has jurisdiction over the proper distribution of the 20% of the proceeds of the privatization of a SOE to the employees already acknowledged as eligible to a share of the proceeds.

The Trial Panel negated this question. The Appellate Panel found that when the case was pending at the Trial Panel the new UNMIK Regulation 2008/4 entered into force. Its Section 4.1 stipulates that the Trial Panels of the SCSC shall have primary jurisdiction for claims or counterclaims in relation to claims involving an official list of eligible employees of an enterprise issued by the Agency and the eligibility of employees under Section 10 of UNMIK Regulation 2003/13, as amended. Furthermore, Section 67 of UNMIK Administrative Direction 2008/6 contains among other matters detailed instructions how to file a complaint. According to Section 67.6 of UNMIK Administrative Direction 2008/6 a complaint shall contain among other issues "the detailed legal and factual grounds for seeking inclusion in or challenging the list of eligible employees as established by the Agency or the distribution of funds from the escrow account provided for in Section 10 of UNMIK Regulation 2003/13.

Distribution of the right share of the proceeds from the privatization of a SOE to an individual employee according to Section 10 of UNMIK Regulation 2003/13 is an essential part of the privatization procedure. It cannot be concluded from the law that regarding this important part of the privatization procedure the employees should have no legal remedy against the decisions of the Agency. The Agency has to be subject to a control mechanism including a legal remedy in front of a court when calculating the right share of the proceeds to be distributed to an individual employee. Thus the mentioned provisions are to be interpreted in the way that also complaints dealing with the question of the correctness of the share of the proceeds granted to an individual employee are under the jurisdiction of the SCSC.

Case SCEL – 09-0005, burden of proof when discrimination is alleged

The case relates to the issue of the burden of proof when discrimination is alleged in a dispute concerning the eligibly of former employees of a SOE for a share of 20% of the privatization proceeds.

The First Instance Panel found that the Complainants […] maintained that they have been dismissed from work in the period 1991-1999 based on their Albanian ethnicity by the Interim Measures Management imposed on the SOE. Therefore they have filed their complaint to the SCSC pursuant to Section 10.6 of UNMIK Regulation 2003/13 as amended. section 10.6 (b) of UNMIK Regulation 2003/13 states: "Any complaint filed with the Special Chamber on the grounds of discrimination as reason for being excluded from the list of eligible employees has to be accompanied by documentary evidence of the alleged discrimination." However, article 8.1 of the Anti-Discrimination Law 2004/3 reverses the burden of proof as follows: "When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

The Anti Discrimination Law no. 2004/3 dated 30 July 2004 that was adopted after UNMIK Regulation 2003/13 was applicable in the instance.[69] The SCSC's Appellate Panel has answered some basic questions to lay the ground for a sustainable and predictable adjudication of cases that fall within the jurisdiction of the SCSC. While facing many problems of legal, political and administrative nature, since the involvement of EULEX in early 2009 the SCSC has made substantial progress in bringing the setup of the court to European Standards and Best European Practices. The SCSC is adjudicating cases on a regular basis and will also be able to tackle the current and future caseload, especially also the employee list cases.

Conclusion: achievements and challenges ahead

This report reveals that 2010 was a challenging and rewarding year for the EULEX judges Unit. There are a number of achievements to be highlighted. The processing of the criminal cases taken over from UNMIK was finalized at the Supreme Court. The EULEX judges in Mitrovicë/Mitrovica region took over and completed a number of complex criminal cases, many of which defendants have been in prolonged detention on remand since the normal activities of the Court were halted in March 2008. By the end of 2010, 27 (twenty seven) judgments have been issued in the Mitrovicë/Mitrovica DC.

EULEX judges continued to support and encourage Kosovo judges in dealing with the backlog of approximately 22,000 'stayed cases' - compensation claims filed against North Atlantic Treaty Organization (NATO) Kosovo Forces (KFOR), UNMIK and local municipalities in 2004-2005 following the NATO intervention in 1999 and the March 2004 riots. As a result of the EULEX judges' continuous MMA the work on the 'stayed cases' has now started in all Kosovo courts and more than 1,500 cases have been completed.

69 Article 11 Anti-Discrimination Law 2004/3: "11.1 When this law comes into effect it supersedes all previous applicable laws of this scope. 11.2. The provisions of the legislation introduced or into force for the protection of the principle of equal treatment are still valid and should be applied if they are more favorable than provisions in this Law".

In 2011, EULEX judges will continue to support the Kosovo judiciary in achieving the effective application of European best practices and internationally recognized standards meaning: impartiality and independence of the judiciary, reduction of instances of judicial misconduct; improving the application of human rights and fundamental freedoms in the adjudication of civil and criminal cases.

In 2011, EULEX judges will perform their executive functions in Mitrovicë/Mitrovica region, with a particular focus on serious crime cases involving lengthy detention on remand. In exercising their judicial functions in Kosovo courts EULEX judges will continue to give priority to the adjudication of cases involving corruption and organized crime, including high profile cases.

In 2010 EULEX judges began with elaborating a transition strategy to ensure the gradual transfer of executive functions to Kosovo judiciary. Steps were undertaken to amend the procedure on designating mixed panels in order to ensure the more active engagement of the Kosovo judges based on Article 3 paragraph 7 of the Law on Jurisdiction. In the execution of their functions in 2011 the EULEX judges will continue to collaborate with their local colleagues. The mechanism of Article 3, paragraph 7 of the Law on Jurisdiction will be further used to enhance the involvement of Kosovo judges in the adjudication of cases, thus facilitating the gradual handover of competences to the Kosovo judiciary.

(Footnotes)

1 UNMIK Regulation on Deterrence of Money Laundering and Related Criminal Offences, dated 5 February 2004, as amended by UNMIK Regulation 2006/53, dated 8 November 2006.

2 UNMIK regulation on the Authorization of Possession of Weapons in Kosovo, dated 21 February 2001.