

On the occasion of the First Assembly of the EULEX Judges, held in
Pristina on 10 July 2008

The Assembly composed of the following Judges: Maria Giuliana Civinini, President of the Assembly of EULEX Judges; Guy Van Craen, Olavi Snellman, Andrea Cruciani, Angela Kaptein; Michael Zimmermann, Norbert Koster, Christine Lindemann-Proetel, Michael Simmons, Gerrit-Marc Sprenger; Gianfranco Gallo; Emilio Gatti.

Unanimously adopts the DECISION

To approve the MMA Guidelines for MMA by EULEX Judges.

Monitoring, Mentoring and Advising by EULEX Judges

Introduction

As stated in sec. 2.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo, “besides exercising their judicial functions pursuant to the provision of articles 3, 4 and 5 of this law, EULEX judges will monitor, mentor and advise the Kosovo judges, in the respect of the principle of independence of the judiciary and according to the modalities as established by the present law and by the EULEX KOSOVO.” Moreover, sec. 3.9 and 5.6 of the Law on Jurisdiction provide the EU Judges in the performance of their monitoring, mentoring and advisory functions with the authority to access to any stage of the proceedings, to receive free copies of documents and request in written form information in regards of any ongoing or closed criminal case falling under jurisdiction or competence of any court in Kosovo, which shall include the request of information related to the execution of final judgments or court decisions.

The Kosovan law represent then the legal source which assigns to EULEX judges, *inter alia*, monitoring, mentoring and advising (MMA) tasks. The mentioned Law however does not provide a legal definition of these supplementary functions of the EULEX judges. A systematic interpretation of that Law leads to the conclusion that monitoring, mentoring and advising represent three successive stages of a unitary process, which aims at assisting and supporting the Kosovo judiciary to perform the judicial functions in the respect of the European standards and best practices. Indeed, it is not by accident that the Law on jurisdiction starts up with the monitoring function which is the least intrusive activity, then continues with the more structured phase of the mentoring, in cases where monitoring has revealed the need for further action, and ends up with the exercise of formal advising powers, whenever the preceding attempts to guarantee the full respect of

the European standards have failed. Nevertheless, these three supplementary functions that from a logical and theoretical perspective may be broken up into three distinct and gradual steps are very much interrelated and they do reinforce each other as well. Hence it appears that, once the process has started up, the EULEX judges will apply the three functions simultaneously. On the same line of reasoning, it should be pointed out as well that the MMA functions work on a circular basis in the sense that advising does not finalize the all process, which afterwards indeed goes back to the monitoring stage. The idea is that of a virtual chain which connects the all process: monitoring – mentoring – advising - executive functions-monitoring...

At an operational level:

- 1) EULEX Judges will report when needed on the MMA activity to the President of the Assembly;
- 2) The President of the Assembly then, on the basis of the EULEX judges' reports, will submit a proposal of report on the MMA activity to the Assembly of the EULEX judges every six months;
- 3) The approved report on the MMA will finally be sent by the President of the EULEX Judges to the EULEX Programme Manager Office, responsible of the six-monthly report to the Council of the European Union based on the Programme Implementation Document. This reporting system will seek to evaluate the functioning of the Kosovo judiciary while establishing benchmarks and developing future strategies. The final goal is to develop an integrated evaluation system. Indeed, one of the EULEX long term objectives is to develop a clear, fair and democratic evaluation process which ensures anonymous reporting, transparency with respect to the criteria of evaluation and sources of information and quality indicators for the judiciary;
- 4) The President of the EULEX judges will also be responsible to send every six months to the EULEX Programme Manager Office a report on the exercise of the executive power to substitute Kosovan judges with EULEX judges (and vice-versa).

It should also be mentioned that in the first three months transitional period MMA will not be connected to the executive judicial functions. As a result, only after this transitional period, when it is foreseen for EULEX to exercise executive powers, the MMA will be applied to the fullest extent. Indeed, the MMA functions are strictly linked to the exercise of the executive functions.

Indeed, the results of the MMA process can be used by the President of the Assembly of the EULEX judges to adopt grounded decisions for the substitution of Kosovan judges with EULEX judges and vice-versa. In such a way, without interfering with the nationally owned disciplinary proceedings, the President of the Assembly of the EULEX judges can exercise the substitution power which may reflect the (positive or negative) interaction between the MMA process and the cooperation and efforts demonstrated by the local judges as a result of this process.

MONITORING

Monitoring is understood to mean observing, assessing and reporting on the performance of the relevant judicial functions for identifying potential improvements. In particular, monitoring shall consist in observing and scanning the performance of the duties by the national judges in order to identify areas where a further support is needed to meet the international and European standards, guidelines, best practices and benchmarks.

Monitoring does not imply the exercise of individual control or any other form of supervision of the functioning of Kosovo courts. The monitoring will be carried out in a non-discriminatory manner with full respect for the independence of the Kosovo judges based on the principles of reciprocal esteem and equality. Monitoring does not seek to review or criticize the work of the national judges. This technique aims at developing a fair and objective assessment of the efficiency of the judiciary in Kosovo in the application of the relevant principle of justice and international Human Rights standards.

In executing this objective EULEX judges will seek to share experience and collaborate with other national and international counterparts which have worked in the field of court monitoring such as the KJC, OSCE, USAID, UN and the Ombudsperson.

It is also important that local colleagues are given an active role in the monitoring process. They should be encouraged to express their opinion on flaws and deficiencies at their court and in the judiciary in general, and on their ideas how the situation could be improved.

Moreover, monitoring process should not be seen as being an opportunity for further appeal process for litigants dissatisfied with the outcome of their cases.

It should also be clear that monitoring is not aimed to investigate misconduct of national judges with disciplinary or criminal relevance. In the unlikely event that such misconduct should be observed during the monitoring, the EULEX judges will take no action but to inform competent national disciplinary or prosecutorial authorities.

EULEX judges will conduct the monitoring on the basis of clear and commonly shared applicable international and European standards, guidelines, best practices and benchmarks. As for this aspect, the 2003 Manual on Human Rights in the Administration of Justice, published by OHCHR, could represent a useful tool as it is based on the main sources related to the human rights in the justice sector with the relevant international jurisprudence (for instance, 1950 ECHR; 1966 ICCPR; 1985 Basic Principles on the Independence of the Judiciary).

A first list of the sectors of the Kosovan judicial system which will be monitored by the EULEX judges can be found in details in the Program Implementation Document, though we shall consider the difference between the finality of the Program Management Monitor and Report (to check the achievement of the goals of the Mission) and the

finality of the monitoring (and reporting) of EULEX judges (to detect the monitoring and advising needs and check the improvement of the quality of the judiciary).

Some of the areas which may require special attention in the monitoring process could be:

- Case allocation system;
- Backlog reduction system;
- Workload distribution;
- Witness protection program;
- Access to the court,
- Absence of corruption or discrimination;
- Respect of the reasonable time to take decisions;
- Execution/enforcement of judicial (criminal) decisions, prison-sentences, and fines;
- Recidivism, namely how a judge/panel can find out that a suspect/accused has been previously sentenced to imprisonment or another sanction (fine or alternative);
- Ongoing investigations against the same suspect/accused in a different district.
- What is the mechanism (if any) by which a judge at the Municipal Court/District Court can have knowledge of the decisions of the Supreme Court on his cases and/or on cases in general.

Nevertheless, before being more specific about the several area's subject for monitor activities an analysis and synthesis of the great amount of monitor-reports issued by the different national and international organizations, including NGO can be useful.

A working group of EULEX Judges shall be established for studying and making a synthesis of the reports of OSCE, UNDP, USAID-Center of State Courts, Human Rights Watch, Amnesty International, Ombuds and Inspection Institutions, Fact finding report of E.U., Council of Europe and others. The synthesis will provide EULEX Judges (and our local counterparts) with a clear overview on the ongoing monitoring activity (methods, sources of the information, legal base, results, consequential measures) aimed on the Kosovan judiciary, avoiding us to come up with a similar report as those of other monitor-organizations.

The WG will propose (within the end of August) some recommendations as to the area's where EULEX mentoring should focus on.

This activity of determining the "interesting subjects" to monitor and the means we need shall be realized in consultation with the Kosovan Judges. A meeting with the President of the Supreme Courts, the Presidents of the Districts Courts and a representative of the judges will be scheduled for the beginning of September. The KJC and the KJI will be involved in this process.

In principle, the monitoring shall be conducted by the EULEX judges in the same district court where they exercise executive functions. In particular circumstances, the President of the Assembly of EULEX judges may decide to appoint one or more EULEX judges of a district court to monitor one or more cases in a different district court.

It being understood that the monitoring of the quality of the activity of the Courts and of the desired standards of the quality of adjudications needs a systemic evaluation program (that remain a goal for the Mission and that requires the detailed choice of the relevant aspect of the judiciary activity and the choice of the quality criteria), a plurality of sources can be used:

- Statistics on pleas of disqualification
- Statistics on requests for substitution of the Kosovan judge with an EULEX judge
- Statistics of complaints
- Court level statistics
- Statistics on hearing cancellation (advance cancellations and cancellations in the hearing)
- Statistics on number of hearing for case
- Statistics on processing times
- Statistics on appeal rates
- Statistics of overturn rates
- Self evaluation by the Kosovan judges
- Media survey
- EULEX judges evaluation on the process (open and transparent proceeding, guarantee of the right of defense, independence and impartiality, good organization of the proceeding, effectiveness, activeness, publicity, flexibility), on the decision (lawful, transparent, systematic motivation, understandability), on the treatment of the party and the public, on the competence of the judges (active participation in the training activities and in the periodical meeting with the European colleagues, information, specialization), on the management

To that end and in accordance with the Law on Jurisdiction and with the Arrangement between the President of the Assembly, the President of the Supreme Court and the Presidents of the District Courts in date 5 June 2008, “the EULEX judges will have the authority to have access, together with the assisting EULEX personnel (i.e. legal officers, interpreters, etc.) to any stage of any ongoing or closed civil or criminal proceeding, to receive free copies of documents and of files and to request in writing information concerning any ongoing or closed civil or criminal case falling under the jurisdiction of any court of Kosovo, irrespective of their assignment to the case”.

The access of EULEX judges to information, documents, files and sessions of ongoing or closed civil and criminal cases will always occur in consultation with the President of the relevant court.

The right of access of EULEX judges will have the only purpose to check the conduct of the cases

EULEX judges will not be assigned to the cases in which they are involved as monitors.

The reports of the EULEX judges shall be a description of possible fields of improvement and recurrent violations of the mentioned standards and best practices, without any reference to the local judges eventually responsible for the violations. Moreover, the reports are meant to be at this stage absolutely confidential, in the sense that they have the only function to tailor and shape the subsequent mentoring activity. Reports shall not be made available to the national counterparts, as they only serve as tools for the EULEX judges to shape the mentoring activity, focusing only on the issues that have come up in the reports.

MENTORING

If the monitoring has detected some recurrent gaps or violations of the international and European standards or areas of possible improvement, the EULEX judges shall start, based on the confidential monitoring reports, a mentoring activity.

Mentoring includes coaching, showing how to deal with a specific task, sharing the “know how”, encouraging. Mentoring is an informal support, based on mutual trust and professional respect, to assist the national counterparts to uphold their exercise of the judicial functions to the European standards. In addition, mentoring means to cooperate with local judges in a trustful, professional atmosphere based on mutual respect. To analyze together with them problems relating to court and case administration, case assignment and allocation, defining those problems and finding – mentoring – solutions. In that respect, the work in mixed panels can realize a form of learning and mentoring based on imitation. The opinion of the EULEX judges is to be discussed on the merits of any given case, if asked by the single local judge or in the mixed panel, during the pretrial or trial stage. Common research work offers a great opportunity for local judges to give their valuable input in the discussions on the interpretation of relevant legal provisions.

Mentoring will be exercised by the EULEX judges in a manner acceptable to the national judges. It can be done through the following activities: coaching (sharing experience regarding the carrying out of a specific task), facilitating (creating opportunities for national judges to apply new techniques), counseling (helping national judges to explore the consequences of potential decisions) and offering network (referring national judges to other national or international colleagues with more significant experience in similar cases or issues). Mentoring might also include: exchanging of experiences, information, opinions; providing relevant legal sources or doctrinal essays or international jurisprudence; organizing, together with the competent international actors (such as OSCE or EU Commission or ICTY or Ministries of Justice), short and focused training programmes or study visits abroad.

In particular, on the training of national judges it should be mentioned that although monitoring and mentoring are not pure capacity-building activities, they are still strictly linked to the institution building. Perhaps, one of the most important lessons from the field mission experiences is the essential complementarity between human rights monitoring-mentoring and institution-building. In fact, monitoring and mentoring are aimed to investigate and verify whether the national courts are operating properly, as to understand the strengths and weaknesses of the justice system. Based on sound monitoring and mentoring activities the capacity building projects will be based on a thorough understanding of actual practice, including ongoing weaknesses and problems. Finally, field monitoring and mentoring provides direct feedback on the effectiveness of reform strategies or programs as they were implemented. Indeed, training programs should reach the following results: develop the necessary practical skills and substantive knowledge to efficiently discharge the judicial functions; facilitate interaction between different justice sector stakeholders; foster confidence, mutual respect and operational cooperation between the different branches of the criminal justice system; develop recommendations on public integrity and code of conduct.

Mentoring can also include the developing of checklists and templates for trial procedures. New templates on rulings and other court measures developed by EULEX Judges and old ones of the local judges should be reviewed and openly discussed to develop common standards for such templates. There should also be open discussions on the provisions of the PCPCK and their application in a given trial. Mentoring includes as well the counseling on the interpretation of relevant legal provisions in conformity with sound and logical legal thinking and based on judiciary's comments and legal opinions.

The learning model based on submission is not applicable. The mentoring activities settle in a relationship of parity, "between colleagues". Types of learning - typical for the school system, which are based on obedience; the imposition of rules and asymmetrical relations - are absolutely to be excluded. The best way to achieve this is by our being embedded with the local colleagues. Indeed, there has been some criticism from the local counterparts that the international judges have emasculated them in the past.

It is crucial that in the process of mentoring European judges demonstrate:

- Professionalism
- Attention
- Sensibility
- Ethic oriented behavior
- Engagement in a bidirectional learning relationship

The quality of justice and judicial decision cannot increase without a well furnished tool box. The mentoring activity aims at filling up the tool box with:

- Job techniques and methods
- Self improvement and self learning methods
- laws

- national jurisprudence
- European and International Courts judgments
- case-law
- best practices
- scientific literature

Court meetings with the participation of both local and EULEX judges shall also be organized on a regular basis to exchange views and share best practices.

The mentoring activity should also produce reports, which, once again, shall make reference to the institutions as such (not to the individuals) and shall be kept confidential, as they have the only aim of providing grounds for further action, the advising.

ADVISING

If monitoring and mentoring have not succeeded, in the sense that some recurrent violations or structural dysfunctions continue to occur even after those activity have been put in place, the last step to be taken for the EULEX judges is the advising.

Advising is intended to provide professional counseling to the competent authorities (MoJ, KJC, KJI, President of the Courts, Supreme Court, Parliament, Law Faculties) on each topic raising from the monitoring and mentoring experience. Advising consists in formal positions that the EULEX judges collectively take in the Assembly of EULEX judges and which are officially communicated by the President of the EULEX judges to the competent judicial, legislative or administrative authorities, in order to activate the necessary measures and remedies. Advising is directed to the national institutions as such and not to the individual counterparts. The advising provides the Kosovan stakeholders with the necessary insights to intervene in those areas of the justice system that have been proved to need improvement.

To make some examples, if recurrent dysfunctions in the Kosovan justice system seem to depend on the low level salaries of the local judges or on the excessive participation of lay judges in the panels, the EULEX judges could advice and support, in the respect of the respective constitutional attributions, the Kosovo Parliament to draft laws that would contribute to overcome the mentioned dysfunctions.


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