



A D V I C E

EULEX Justice Component

Pristina, 23 October 2008

To: the President of Kosovo judicial Council

CC:

From: EULEX Justice Component

Subject: Advice to the Kosovo Judicial Council regarding the case allocation system in the Courts of Kosovo

1. Executive Summary

As foreseen by article 3 of the Joint Action of the Council of the European Union of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, this has the task to “(a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities”.

Article 2.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 13 March 2008 (Law no. 03/L-053) provides that: “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.”

In particular, advising consists in formal and official positions taken by the EULEX judges collectively in the Assembly of EULEX judges and directed to the national judicial, legislative or governmental authorities to stimulate their actions in the respective fields of competences. In other words, 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. The advising provides the Kosovan stakeholders with the necessary insights to intervene in those areas of the justice system that need general and structural improvements to be implemented for the all judicial system and that cannot be performed by the mentoring activity of single EULEX judges.

The present advice to the KJC on case allocation system represents the result of the monitoring and mentoring activities of EULEX Judges, in close

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consultation with the Kosovan counterparts. In particular, the findings of these activities demonstrate the urgent need to adopt guidelines for a fair and transparent case allocation system in all Courts of Kosovo.

2. Introduction

The “right to a fair trial” is a principle accepted all over Europe (art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ECHR), meaning that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Being “established by law” means not only that the sovereign authority of a Country has decided to settle a court in a certain region and for a certain jurisdiction but also that the single judge of that court has been appointed and discharges his duties according to general provisions set up in advance by the law.

According to this principle the European Countries have adopted general rules for case allocation, implemented every year by decisions of the Judiciary.

Law and bylaw decide in advance the criteria according to which the single judge is assigned to, is the “natural law judge” of the single file.

The article 22 of the Constitution of the Republic of Kosovo guarantees and recognizes the direct applicability of human rights and fundamental freedoms as stated, among others, by the European Convention for the Protection of Human Rights and Fundamental Freedoms which “have priority over provisions of laws and other acts of public institutions”.

The following article 31 repeats the text of the article 6 of ECHR mentioning an independent and impartial tribunal established by law.

Organization, functioning and jurisdiction of the Supreme Court and other courts are regulated by law (art. 103) and the Kosovo Judicial Council is foreseen as responsible for developing court rules in accordance with the law (art. 108).

3. The state of the matter

A recent report of the Peer Assessment Mission Rule of Law Judiciary¹ recognises that in Kosovo “the allocation of files remains a problem as well. There are often only a very small number of public prosecutors or judges working in the office or court. Therefore it is **up to the chief prosecutor and president of the court to decide about allocation of cases, without any regulations**”.

¹ Focus on Public Prosecution and Court System in Peja and Prizren Regions, 19-23 May 2008, expert Stephanie Sauer, Public Prosecutor from Germany,

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This can result in a violation of the right to the natural law judge as foreseen by Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The “Strategic Plan for a transparent and non-corrupted Judicial System² indicates in the “irregular management by the superiors (deadline, schedule of cases)” and in the “responsibility of presidents for distribution and deadlines of cases to judges” two possible “disadvantages of judicial system in combating the corruption”.

In other words it seems necessary to adopt regulations (law or bylaw) which set up in advance and on objective elements a system for the allocation of files to single judges or panels of the court.

A transparent system, through which can be observed and controlled by everyone the impartial discharge of judicial functions by the “natural law judge.”

This system must be general for all courts of Kosovo and therefore must be established by law and bylaw provided by the Kosovo Judicial Council.

Generality, objectivity, publicity of these rules will help to increase non corruptibility of judges and improve public confidence in the Judiciary.

On the other hand these measures, and particularly panels established in advance and fixed in their composition, will improve clear jurisprudence of the Municipal, District and of the Supreme Court in the interpretation of the applicable law and will reduce the number of unfounded or inadmissible appeals.

4. Recommendations

A proposal regarding the case allocation system for Kosovan Courts must take into account the complexity of Judicial System of this Country and the tasks this has to fulfil either in civil and in criminal matters.

Kosovo Judiciary is composed by different types of courts with competences in first and second instance and as a ruling judge.

The Supreme Court has its seat in the Capital; the other Courts are disseminated in the regions.

All courts need a chart of internal organisation in order to guarantee the respect of principles of transparency and objectivity in individuating the proceeding judge for each case.

Goals of organisational charts are to rationalise the use of resources and to improve the efficacy of judicial services.

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² “Strategic Plan for a transparent and non-corrupted Judicial System” issued in October 2007 by the Kosovo Judges Association, the Kosovo Prosecutors Association and the Kosovo Chamber of Advocates



1. Every court has therefore to plan periodically its general and particular organisation; this should happen once a year or once every two years. The organisational chart must take into account on the one side the quality and quantity of expected cases and on the other side the number and the specialisation of the judges.

The first aspect is represented usually by the workload of previous years, this can of course suffer exceptions in case of particular events or situations, which let foresee a diverse impact of new cases, or when the court has a consistent backlog caused by exceptional circumstances verified in the past (i.e. war crimes not yet decided).

Experience from other Countries suggests either: 1) to individuate two or three judges (one of them should come from the District Court, the others from different Municipal Courts) for every District Court charged with the task to monitor the workload both of District and Municipal courts and to advice the management of the courts on the issue of the internal organisation, or 2) to use instruments already existing in Kosovo like the "Court Improvement Team" provided by the Model Courts Program Action Plan of other Organisation (USAID).

On the ground of this analysis the President of each court will prepare his draft of organisation, after having consulted the interested judges.

2. The main division is of course between civil and criminal judges, the considerable workload of the Kosovan court system suggests dividing equally the judges assigned to each court between civil and criminal sector.

Criminal judges attend trials or are pre trial judges.

Either in civil or in criminal matters judges who attend trials are working in panels or singularly, and the organisational chart sets forth the names of the judges composing a section and every panel and the days of the week when the panels or the singular judges sit in hearing as well.

The singular matters, which fall in the competence of every judge and panel and the criteria for the distribution of cases to the judges of a panel, are foreseen too.

3. The distribution among panels and single judges must follow automatic and objective criteria, i.e. the number of the case or the first letter of the family name of the first defendant.

Individuation of the composition and of the competence of single sections and judges is decisive in order to respect the principle of the due judge of law.

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4. Organisational charts must foresee substitutions of judges due natural or procedural causes and also the possibility to call judges normally attending civil cases for substitutions in case of strict necessity.

A suggestion to the Kosovo Judicial Council is to make possible, through a specific bylaw, substitutions of judges among different courts.

A first option could provide substitutions of judges from and to District and Municipal Courts of a single region.

A more radical option could provide substitutions of judges among Courts of different regions.

The mechanism of the substitution must be ruled at different levels.

So, for example, the substitution within the same court is decided by the President and must be (only) communicated to the Kosovan Judicial Council, whereas the substitutions among different courts must be decided by the President of the interested superior court and approved by the KJC because of the movement of judges from their natural sit and on the territory.

5. Either in the drafting or during its application there is room for the judges to express their needs, proposals and eventually to contest the organisational chart.

6. This document, drafted by the Chief of the Court, must be indeed approved by the Kosovan Judicial Council.

The KJC should periodically issue general guidelines on the draft of organisational charts for the courts and address each court with specific peaces of advice, whenever deemed necessary.

7. Because of the importance of the smooth functioning of the court for the local community and with the aim to improve the public confidence in the judiciary, representatives of the attorneys, of the university and of the local community should be entitled to have a word say power on the organisation of the courts.

Drafts of organisational chart should therefore be sent to these subjects, which will have the opportunity to address their observations to the interested Court and to the KJC.

In approving the organisational charts the KJC will have to consider the observations of these subjects.

8. Once approved by the KJC the Court Organisational Chart must be made public through adequate systems.

It must be remarked the fundamental importance of the public knowledge either of criteria of case allocation and of scheduling the single trials.

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The above mentioned "Strategic Plan for a transparent and non-corrupted Judicial System" reminds that lack of knowledge by the citizens on their rights stimulates corruption.

Therefore the Court Organizational Chart should be published every year in the Official Gazette, attached to the Official Board (Albo Pretorio) of the Court-hall and of it should be given information to the Media and via Internet.

9. Conclusion

Developing and implementing general and objective rules regarding the case allocation and giving them an adequate publicity are of core importance in the amelioration of the Judiciary and in the prevention of corruption.

These activities enhance the functionality of the system and are able to increase the confidence of the citizens.

For the above mentioned reasons, the Assembly of EULEX Judges

ADVICES

The Kosovo Judicial Council to adopt and implement a fair and transparent case allocation system in all Courts of Kosovo.

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