



# JUDICIAL REFORM INDEX

# KOSOVO

VOLUME III  
AUGUST 2007



**ABA** RULE OF LAW INITIATIVE



**JUDICIAL REFORM INDEX**  
FOR  
**KOSOVO**

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**VOLUME III**

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## Introduction

The Judicial Reform Index (JRI) is an assessment tool implemented by the American Bar Association's (ABA) Rule of Law Initiative (ROL Initiative). It was developed in 2001 by the ABA's Central European and Eurasian Law Initiative (ABA/CEELI), now a division of the ROL Initiative, together with the other regional divisions in Africa, Asia, Latin America, and the Middle East/North Africa. Its purpose is to assess a cross-section of factors important to judicial reform in emerging democracies. In an era when legal and judicial reform efforts are receiving more attention than in the past, the JRI is an appropriate and important assessment mechanism. The JRI will enable the ROL Initiative, its funders, and the emerging democracies themselves, to better target judicial reform programs and monitor progress towards establishing accountable, effective, independent judiciaries.

The ROL Initiative embarked on this project with the understanding that there is not uniform agreement on all the particulars that are involved in judicial reform. In particular, the ROL Initiative acknowledges that there are differences in legal cultures that may make certain issues more or less relevant in a particular context. However, after a decade of working in the field on this issue, the ROL Initiative has concluded that each of the 30 factors examined herein may have a significant impact on the judicial reform process. Thus, an examination of these factors creates a basis upon which to structure technical assistance programming and assess important elements of the reform process.

The technical nature of the JRI distinguishes this type of assessment tool from other independent assessments of a similar nature, such as the U.S. State Department's COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES and Freedom House's NATIONS IN TRANSIT. This assessment will *not* provide narrative commentary on the overall status of the judiciary in a country. Rather, the assessment will identify specific conditions, legal provisions, and mechanisms that are present in a country's judicial system and assess how well these correlate to specific reform criteria at the time of the assessment. In addition, this analytic process will not be a scientific statistical survey. The JRI is first and foremost a legal inquiry that draws upon a diverse pool of information that describes a country's legal system.

## Assessing Reform Efforts

Assessing a country's progress towards judicial reform is fraught with challenges. No single criterion may serve as a talisman, and many commonly considered factors are difficult to quantify. For example, the key concept of an independent judiciary inherently tends towards the qualitative and cannot be measured simply by counting the number of judges or courtrooms in a country. It is difficult to find and interpret "evidence of impartiality, insularity, and the scope of a judiciary's authority as an institution." Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 611 (1996). Larkins cites the following faults in prior efforts to measure judicial independence:

- (1) the reliance on formal indicators of judicial independence which do not match reality,
- (2) the dearth of appropriate information on the courts which is common to comparative judicial studies,
- (3) the difficulties inherent in interpreting the significance of judicial outcomes, or
- (4) the arbitrary nature of assigning a numerical score to some attributes of judicial independence.

*Id.* at 615.

Larkins goes on to specifically criticize a 1975 study by David S. Clark, which sought to numerically measure the autonomy of Latin American Supreme Courts. In developing his "judicial effectiveness score," Clark included such indicators as tenure guarantees, method of removal,



method of appointment, and salary guarantees. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L. Q. 405 – 442 (1975).

The problem, though, is that these formal indicators of judicial independence often did not conform to reality. For example, although Argentine justices had tenure guarantees, the Supreme Court had already been purged at least five times since the 1940s. By including these factors, Clark overstated ... the independence of some countries' courts, placing such dependent courts as Brazil's ahead of Costa Rica's, the country that is almost universally seen as having the most independent judicial branch in Latin America.

Larkins, *supra*, at 615.

Reliance on subjective rather than objective criteria may be equally susceptible to criticism. *E.g.*, Larkins, *supra*, at 618 (critiquing methodology which consisted of polling 84 social scientists regarding Latin American courts as little more than hearsay). Moreover, one cannot necessarily obtain reliable information by interviewing judges: “[j]udges are not likely to admit that they came to a certain conclusion because they were pressured by a certain actor; instead, they are apt to hide their lack of autonomy.” Larkins, *supra*, at 616.

## Methodology

In designing the JRI methodology, the ROL Initiative sought to address these issues and criticisms by including both subjective and objective criteria and by basing the criteria examined on some fundamental international norms, such as those set out in the *United Nations Basic Principles on the Independence of the Judiciary* and the *Bangalore Principles on Judicial Conduct*. In addition, these criteria also rely upon norms elaborated in regional documents, such as the *Council of Europe Recommendation R(94)12 “On the Independence, Efficiency, and Role of Judges”*; the *European Charter on the Statute for Judges*; the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*; the *Arab Justice Conferences’ Beirut and Cairo Declarations on Judicial Independence*; and the *Caracas Declarations of the Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts*. Reference was also made to a Concept Paper on Judicial Independence prepared by ABA/CEELI and criteria used by the International Association of Judges in evaluating membership applications.

Drawing on these norms, the ROL Initiative compiled a series of 30 statements setting forth factors that facilitate the development of an accountable, effective, independent judiciary. To assist assessors in their evaluation of these factors, the ROL Initiative developed corresponding commentary citing the basis for the statement and discussing its importance. A particular effort was made to avoid giving higher regard to American, as opposed to other regional concepts, of judicial structure and function. Thus, certain factors are included that an American or a European judge may find somewhat unfamiliar, and it should be understood that the intention was to capture the best that leading judicial cultures have to offer. Furthermore, the ROL Initiative reviewed each factor in light of its decade of experience and concluded that each factor may be influential in the judicial reform process. Consequently, even if some factors are not universally-accepted as basic elements, the ROL Initiative determined their evaluation to be programmatically useful and justified. The categories incorporated address the quality, education, and diversity of judges; jurisdiction and judicial powers; financial and structural safeguards; accountability and transparency; and issues affecting the efficiency of the judiciary.

The question of whether to employ a “scoring” mechanism was one of the most difficult and controversial aspects of this project, and the ROL Initiative debated internally whether it should include one at all. During the 1999-2001 time period, the ROL Initiative tested various scoring mechanisms. Following a spirited discussion with members of the ABA/CEELI’s Executive and Advisory Boards, as well as outside experts, the ROL Initiative decided to forego any attempt to provide an overall scoring of a country’s reform progress to make absolutely clear that the JRI is not intended to be a complete assessment of a judicial system.

Despite this general conclusion, the ROL Initiative did conclude that qualitative evaluations could be made as to specific factors. Accordingly, each factor, or statement, is allocated one of three values: *positive*, *neutral*, or *negative*. These values only reflect the relationship of that statement to that country's judicial system. Where the statement strongly corresponds to the reality in a given country, the country is to be given a score of "positive" for that statement. However, if the statement is not at all representative of the conditions in that country, it is given a "negative." If the conditions within the country correspond in some ways but not in others, it will be given a "neutral." Cf. Cohen, *The Chinese Communist Party and 'Judicial Independence': 1949-59*, 82 HARV. L. REV. 972 (1969) (suggesting that the degree of judicial independence exists on a continuum from "a completely unfettered judiciary to one that is completely subservient"). Again, as noted above, the ROL Initiative has decided not to provide a cumulative or overall score because, consistent with Larkin's criticisms, the ROL Initiative determined that such an attempt at overall scoring would be counterproductive.

Instead, the results of the 30 separate evaluations are collected in a standardized format in each JRI country assessment. Following each factor, there is the assessed correlation and a description of the basis for this conclusion. In addition, a more in-depth analysis is included, detailing the various issues involved. Cataloguing the data in this way facilitates its incorporation into a database, and it permits end users to easily compare and contrast performance of different countries in specific areas and – as JRIs are updated – within a given country over time.

The follow-on rounds of implementation of the JRI will be conducted with several purposes in mind. First, they will provide an updated report on the judiciaries of emerging and transitioning democracies by highlighting significant legal, judicial, and even political developments and how these developments impact judicial accountability, effectiveness, and independence. They will also identify the extent to which shortcomings identified by earlier JRI assessments have been addressed by state authorities, members of the judiciary, and others. Periodic implementation of the JRI assessments will record those areas where there has been backsliding in the area of judicial independence, note where efforts to reform the judiciary have stalled and have had little or no impact, and distinguish success stories and improvements in judicial reform efforts. Finally, by conducting JRI assessments on a regular basis, the ROL Initiative will continue to serve as a source of timely information and analysis on the state of judicial independence and reform in emerging democracies and transitioning states.

The overall report structure of follow-on JRI reports as well as methodology will remain unchanged to allow for accurate historical analysis and reliable comparisons over time. However, lessons learned have led to refinements in the assessment inquiry, which are designed to enhance uniformity and detail in data collection. Part of this refinement includes the development of a more structured and detailed assessment inquiry that will guide the collection and reporting of information and data.

Follow-on JRI reports will evaluate all 30 JRI factors. This process will involve the examination of all laws, normative acts and provisions, and other sources of authority that pertain to the organization and operation of the judiciary, and will again use the key informant interview process, relying on the perspectives of several dozen or more judges, lawyers, law professors, NGO leaders, and journalists who have expertise and insight into the functioning of the judiciary. When conducting the follow-on assessments, particular attention will be given to those factors which received negative values in the prior JRI assessment.

Each factor will again be assigned a correlation value of positive, neutral, or negative as part of the follow-on JRI implementations. In addition, all follow-on assessment reports will also identify the nature of the change in the correlation or the trend since the previous assessment. This trend will be indicated in the Table of Factor Correlations that appears in the JRI report's front-matter and will also be noted in the conclusion box for each factor in the standardized JRI report template. The following symbols will be used: ↑ (upward trend; improvement); ↓ (downward trend; backsliding); and ↔ (no change; little or no impact).



Social scientists could argue that some of the assessment criteria would best be ascertained through public opinion polls or through more extensive interviews of lawyers and court personnel. Sensitive to the potentially prohibitive cost and time constraints involved, the ROL Initiative decided to structure these issues so that they could be effectively answered by limited questioning of a cross-section of judges, lawyers, journalists, and outside observers with detailed knowledge of the judicial system. Overall, the JRI is intended to be rapidly implemented by one or more legal specialists who are generally familiar with the country and region and who gather the objective information and conduct the interviews necessary to reach an assessment of each of the factors.

One of the purposes of the JRI assessment process is to help the ROL Initiative – and its funders and collegial organizations – determine the efficacy of their judicial reform programs and help target future assistance. Of course, many of the issues raised (such as judicial salaries and improper outside influences) cannot necessarily be directly and effectively addressed by outside providers of technical assistance. The ROL Initiative also recognizes that those areas of judicial reform that can be addressed by outsiders, such as judicial training, may not be the most important. Having the most exquisitely educated cadre of judges in the world is no guarantee of an accountable, effective, or independent judiciary; and yet, every judiciary does need to be well-trained. Moreover, the nexus between outside assistance and the country's judiciary may be tenuous at best: building a truly competent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, it is important to examine focal areas with criteria that tend toward the quantifiable, so that progressive elements may better focus reform efforts. The ROL Initiative offers this product as a constructive step in this direction and welcomes constructive feedback.

## **Acknowledgements**

Lisa Dickieson, Director, Judicial Reform Programs, the American Bar Association's Central and East European Law Initiative (1995 to 2000), and Mark Dietrich, Member, New York State Bar and Advisor to ABA/CEELI, developed the original concept and design of the JRI. Scott Carlson, Director, Judicial Reform Programs at ABA/CEELI (2000-2003) directed the finalization of the JRI. Assistance in research and compilation of the JRI was provided by Jenner Bryce Edelman, Program Associate at ABA/CEELI, and James McConkie, Student Intern, ABA/CEELI.

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## **Assessment Team**

The Kosovo JRI 2007 Analysis assessment team was led by The Honorable Evelyn B. Lance, a retired State of Hawaii judge and a long-term volunteer for ABA's international rule of law programs, with the assistance of Legal Assistant Arianit Osmani. The team received strong support from the ROL Initiative's staff in Pristina and Washington, D.C., including Kosovo Country Director David Sip, Rule of Law Legal Specialist Kathy Ladun, Regional Director Robert Lochary, Research and Program Director Simon Conté, Program Officers Melissa Zelikoff and Laura Berger, as well as Judith Goeke. Research Coordinator Olga Ruda and Legal Analyst Brenner



Allen provided guidance throughout the assessment process, served as editors, and prepared the report for publication. The conclusions and analysis are based on interviews that were conducted in Kosovo in July 2007 and relevant documents that were reviewed at that time. Records of relevant authorities and a confidential list of individuals interviewed are on file in the Washington, D.C. office of the ROL Initiative. The assessment team is extremely grateful for the time and assistance rendered by those who agreed to be interviewed for this project.



## Executive Summary

### Brief Overview of the Results

The 2007 Judicial Reform Index (JRI) for Kosovo demonstrates overall progress in judicial reforms and in strengthening of the judiciary, despite the remaining challenges and increased concerns regarding some of the conditions. Of the 30 factors analyzed in the assessment, the correlations assigned for 7 factors improved since 2004, while 3 factors (those relating to judicial buildings, judicial advancement process and criteria, and number of judicial positions) demonstrated a decline. The most notable improvements occurred in the preparation and education of judges, both before appointment and during judicial tenure. Additionally, factors related to the appellate process and to codes of ethics improved from a neutral to positive correlation, and factors related to judicial enforcement of civil liberties and to budgetary process improved from a negative to neutral correlation. Overall, 6 factors received positive correlations in 2007, compared to only 1 positive factor (relating to public access to court proceedings) in 2004. A total of 12 factors were assigned neutral correlations, down from 18 factors in the 2004 Kosovo JRI. The number of negative factor correlations increased from 11 to 12.

Many of the improvements demonstrated between 2004 and 2007 result from the passage of legislation necessary for a functional and independent judiciary, such as the 2006 adoption of a new Judicial Ethics Code, as well as overall improvements in the functioning of Kosovo's institutions. Many of the challenges that remain stem from two major concerns which face all of Kosovo's government institutions: the political turmoil and uncertainty regarding Kosovo's future status, which has reduced morale and motivation to implement reforms, and limited financial resources. As illustrated in this JRI analysis, these two realities affected the functioning of the judiciary in many ways.

### Positive Aspects Identified in the 2007 Kosovo JRI

- A major recent development is the ***transfer of court administration responsibilities to the Kosovo Judicial Council (KJC)***, an independent body within the judiciary that receives international training and support to develop its capacities in many areas. Among other responsibilities, the KJC is charged with setting administrative policies for the judiciary, preparing and managing judicial budgets, and overseeing judges and courts. In addition, the ***KJC now largely oversees the judicial selection process***, which for the most part occurs in a transparent fashion and based on objective criteria and provides for ***special legal protections for minority candidates***. It also plays a large role in the ***removal and discipline of judges***, a process which is conducted ***in a fairly orderly and transparent manner***.
- The past few years have seen ***growth in the independence and efficacy of judicial institutions***. Thus, the ***Kosovo Judicial Institute*** has increasingly become a locally administered institution, and has ***expanded its curricula*** for both the pre-appointment judicial training programs and the continuing legal education courses for judges, although these programs are not yet mandatory. The ***Kosovo Judges Association has also increased its programming***, though it has not yet been very successful in affecting change to the judiciary.
- ***A new Judicial Ethics Code that was adopted in 2006*** is fairly comprehensive and closely tracks the language of the Bangalore Principles of Judicial Conduct in many respects. All ***judges have received trainings on the new Code***, even though such trainings are not yet mandatory.

## Concerns Relating to the Lack of Adequate Funding

- A pervasive lack of economic resources affects many different aspects of the judiciary's functioning. **Judicial salaries have not been increased since a 5% raise in 2002 and remain low** compared to senior legislative and executive branch officials and advocates in private practice. This makes it difficult to attract and retain qualified judicial candidates, including ethnic Serbian candidates who reportedly accept higher-paid positions in parallel courts or in Serbia proper. The lack of funds also results in **shortages of court personnel**. In particular, respondents reported a shortage of law clerks (*praktikants*).
- Insufficient funds, coupled with ongoing ethnic tensions, create **problems related to the security of court facilities and judges**. While judges are rarely concerned for their safety within the court premises, **many judges had received personal threats and some were even subject to physical violence or crimes against their property**. The situation in ethnic Serbian enclaves, such as Northern Mitrovica, has generated exceptional concerns regarding judicial security, and the judicial authorities are yet to address those problems.
- The quality of judicial infrastructure also suffers as a result of limited financial resources. Despite having legislation that guarantees publicity of court proceedings, **lack of adequate space and overcrowding in court buildings negatively affect the public's access to trials**. Proceedings often occur in small spaces such as judges' chambers, where there is little room for public or media access. Poor conditions of court facilities have also **impaired the implementation of systemic and technological improvements**, such as introduction of audio recording for verbatim trial transcripts. On a positive note, however, **proceedings generally remain open** to the public, and **efforts have been made to increase the public and media awareness** of their rights to access court proceedings.
- Despite increasing court caseloads and backlogs, the **number of judicial positions in the court system has been decreasing in recent years**. While the KJC has contemplated the need for the development of a system to create new judicial positions as needed, no such system has been created. The KJC has also requested an increase in the judicial budget that would enable increasing the number of judges by about 25% in 2008; however, it is uncertain whether this request would be granted.
- There are **severe shortages in the numbers of support staff** in the judiciary. These are especially prominent in the **lack of trained legal assistance available to judges**, most of whom must rely on a handful of "pooled" law clerks. Although the KJC has recently approved the creation of a one-year *praktikant* (clerkship) program in the courts, no funding has yet been appropriated for stipends for these positions.

## Concerns Relating to Judicial Selection and Tenure

- Continuing problems arise from ethnic tensions in Kosovo, including **problems related to attracting ethnic minority candidates for positions within the judicial system**. While recent efforts have made some headway in resolving these problems, there are still concerns over the **reluctance of ethnic Serbians to seek appointments to the judiciary**, which stems primarily from family and community pressure, as well as the fear of physical danger. In addition, **women continue to be underrepresented** in the judiciary, and while legislation exists which seeks to promote gender equality within the judiciary, few efforts have been made to promote such equality in practice.
- There is **significant uncertainty regarding the tenure of Kosovo's judges**, which is currently **tied to the duration of the UN Mission in Kosovo (UNMIK) administration**.

At that time, judicial tenures will expire and all judges will presumably be subject to a one-time evaluation of their suitability for appointment. At this time, **no settled procedure exists for this reselection and reappointment**. However, it is contemplated that an Independent Judicial and Prosecutorial Commission (IJPC) would be established, which would supervise the evaluation and reappointment process. Implementation of the IJPC was intended to start in May 2007; however, the signing of the enabling memorandum of understanding has been delayed indefinitely.

- **Judicial advancement criteria are not set forth specifically in any law**, and the **advancement process itself is not transparent**, which results in a general sense that judicial advancement is tied to connections and cronyism more than experience and ability. While there was an elaborate judicial evaluation process previously conducted by the Kosovo Judicial and Prosecutorial Council, it has reportedly ceased since the KJC assumed the responsibility for promotion of judges.

### Other Concerns Identified in the 2007 Kosovo JRI

- **The judiciary continues to lack the power to review the constitutionality of legislation** passed by the Kosovo Assembly, or to provide commentary to current legislation. A Special Chamber of the Supreme Court has been tasked with these functions in 2001, but this body is yet to actually be established. Similarly, **UNMIK regulations** and subsidiary acts **remain outside of review** by either the Kosovar judiciary or the international judges.
- Uncertainties regarding Kosovo's future status have resulted in the rapidly evolving nature of Kosovo's laws and institutions, and the **conflicting and confusing nature of some of the new laws being passed**, including laws which affect the functioning of the judiciary. Despite these deficiencies, there is currently only a **limited system in existence to distribute new laws**, and that distribution does not always occur in a timely fashion.
- Several **shortcomings exist regarding the handling of cases** by the judiciary. These include: lack of objective case assignment process; significant backlogs, especially with respect to enforcement of court judgments; poorly written judicial decisions; and limited mechanisms to ensure the timely publication of judicial decisions or the creation and maintenance of accurate trial records.



## Kosovo Background

### Legal Context

Kosovo was an administrative region of Yugoslavia for most of the twentieth century, either as part of “South Serbia” within Royalist Yugoslavia between the two World Wars, or as a province of Serbia within the Socialist Federal Republic of Yugoslavia [hereinafter SFRY] that was created in 1944. Under the 1974 SFRY Constitution, Kosovo enjoyed the status of an “autonomous province” within the Serbian Republic, with power over the police, courts and civil defense, as well as economic, social and educational policy, taken over by Serbia. In 1989, Kosovo’s autonomy was severely restricted by Serbian President Slobodan Milosevic. At that time, the over 80% ethnic Albanian majority was placed under martial law.

War broke out in Serbian-controlled Kosovo in 1997-1998, as the Kosovo Liberation Army [hereinafter KLA] began a political and military struggle for an autonomous Kosovo. The Yugoslav army and paramilitary police responded by trying to crush the KLA’s separatist movement. Following a period of bitter local conflict in 1998 and periods of international negotiations, forces of the North Atlantic Treaty Organization [hereinafter NATO] began an air war against Yugoslavia in March 1999. After a 78-day war, the Yugoslav forces withdrew from Kosovo.

Since the cessation of major hostilities in June 1999, Kosovo has been administered by an international civil administration and military security presence as authorized by the United Nations Security Council Resolution 1244 (June 10, 1999) [hereinafter Resolution 1244], as a United Nations [hereinafter UN] Protectorate. The Special Representative of the UN Secretary General [hereinafter SRSG] heads the international civil administration, which is called the United Nations Mission in Kosovo [hereinafter UNMIK]. Three cooperating international organizations now operate the 4 pillars of the UNMIK structure: Pillar I “Police and Justice” (UN); Pillar II “Civil Administration” (UN); Pillar III “Democratization and Institution Building” (Organization for Security and Co-operation in Europe [hereinafter OSCE]); and Pillar IV “Economic Reconstruction” (European Union [hereinafter EU]). UNMIK is charged with administering Kosovo, and until the status of Kosovo is resolved, it will continue to possess certain powers, such as the functions of policing, defense, foreign affairs, and certain justice matters. See Resolution 1244; see also UNMIK REGULATION NO. 2001/9 ON A CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT IN KOSOVO, *as amended by* REGULATION NO. 2002/9 [hereinafter CONSTITUTIONAL FRAMEWORK]. To date, the international security presence has been operated through the NATO Kosovo Force [hereinafter KFOR], separate from UNMIK. KFOR troops and its international personnel are not subject to the authority of UNMIK, and enjoy immunity from the Kosovo justice system. See MILITARY TECHNICAL AGREEMENT BETWEEN THE INTERNATIONAL SECURITY FORCE (KFOR) AND THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF YUGOSLAVIA AND THE REPUBLIC OF SERBIA (June 9, 1999); UNMIK REGULATION NO. 2000/47 ON THE STATUS, PRIVILEGES AND IMMUNITIES OF KFOR AND UNMIK AND THEIR PERSONNEL IN KOSOVO art. 2.

A further step toward the resolution of Kosovo’s status was taken on March 26, 2007, with the publication of Special Envoy Martti Ahtisaari’s report and addendum on the status of Kosovo.<sup>1</sup> See *generally* REPORT OF THE SPECIAL ENVOY OF THE SECRETARY-GENERAL ON KOSOVO’S FUTURE STATUS (March 26, 2007); COMPREHENSIVE PROPOSAL FOR THE KOSOVO STATUS SETTLEMENT (Feb. 2, 2007) [hereinafter both documents are collectively referred to as AHTISAARI PROPOSAL]. The

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<sup>1</sup> The Ahtisaari Proposal has been submitted to the UN Security Council, but as of the writing of this assessment, no action has been taken by that organ and no date has been set for the consideration of the Proposal. Instead, in late September 2007, a 6-nation group (France, Germany, Italy, Russia, the UK, and the US) began a new round of talks regarding the status of Kosovo. Thus, the Ahtisaari Proposal will not be addressed in depth throughout this report, as its relevance to Kosovo’s judiciary is still uncertain.

Ahtisaari Proposal does not specifically refer to Kosovo's "independence," but instead provides that "Kosovo shall be a multi-ethnic society with full respect for rule of law through its legislative, executive and judicial institutions," and mandates that Kosovo adopts a constitution. If the Ahtisaari Proposal eventually becomes effective, there would be a 120-day transition period, during which a new constitution would be adopted. UNMIK would then depart, and new elections would be held within 9 months after the effective date of the settlement. Under the Ahtisaari Proposal, Kosovo would be administered by its own government, but would be supervised and supported for an interim but open-ended period by an International Civilian Representative [hereinafter ICR] acting on behalf of the EU, and an International Steering Group [hereinafter ISG], with powers to ensure successful implementation of the settlement. These powers would include the ability to annul laws and decisions of Kosovo authorities and the authority to sanction or remove public officials. Security would be provided by a NATO-led military presence, supplementing a new multi-ethnic Kosovo force, until such time as Kosovo's institutions are determined to be capable of the full range of security responsibilities.

The law presently applicable in Kosovo is comprised of UNMIK regulations (including the Constitutional Framework) and subsidiary instruments, Kosovo Assembly laws, and the laws in force in Kosovo on March 22, 1989 (the last day on which Kosovo held autonomous status within the SFRY). The latter body of laws includes the federal provisions of the former SFRY, Kosovo's former provincial law, as well as some provisions of the law of the former Socialist Republic of Serbia. UNMIK regulations and subsidiary instruments take precedence over any conflicting prior laws. See UNMIK REGULATION NO. 1999/24 ON THE LAW APPLICABLE IN KOSOVO art. 1, as amended by UNMIK REGULATION NO. 2000/59. In addition to these laws, the Constitutional Framework incorporates by reference and makes directly applicable in Kosovo several international human rights instruments, including: the Universal Declaration on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (with protocols) [hereinafter ECHR], the International Covenant on Civil and Political Rights (with protocols) [hereinafter ICCPR], the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women [hereinafter CEDAW], the Convention on the Rights of the Child, the European Charter for Regional or Minority Languages, and the Council of Europe's Framework Convention for the Protection of National Minorities. CONSTITUTIONAL FRAMEWORK arts. 3.1, 3.2. Many respondents interviewed for this assessment reported that the plethora of laws creates confusion, and judges sometimes apply different legal provisions to similar fact situations.

## History of the Judiciary

As part of the former SFRY, Kosovo shares its legal tradition, including the influence left behind as part of the Austro-Hungarian Empire. As an "autonomous province" since 1974, Kosovo had its own Constitution, Assembly, Supreme Court, and Constitutional Court. It shared criminal and civil procedure codes with the rest of the SFRY but had its own criminal code, augmented by federal and Serbian provisions. As common in other socialist systems, executive branch and party influence in the judiciary were pervasive.

Following the 1997-98 war and the Milosevic takeover, virtually all Kosovo Albanian judges and prosecutors were dismissed from their positions. In 1992, Serbian authorities ceased administering the jurisprudence examinations, further restricting the access of ethnic Albanians to the legal profession. In the following decade, many professionals who had served in the judiciary fled the province. The remaining legal professionals lacked recent judicial experience and many had not worked within the profession for a decade. Moreover, the experience from the prior socialist system was not adequate preparation for work in a new democracy. Few had direct knowledge of international human rights standards incorporated into domestic law by the Constitutional Framework.

Thus, after cessation of hostilities in 1999 and commencement of UNMIK administration, there was a severe lack of competent judges and other legal professionals. Furthermore, many court

facilities were dilapidated and in a state of severe disrepair. Due to the efforts of UNMIK, OSCE, and several international NGOs, the jurisprudence examination resumed in Kosovo in December 2001, and since then it has been administered every 3 months. The Kosovo Judicial Association [hereinafter KJA] and the Kosovo Chamber of Advocates [hereinafter KCA] were reactivated and assisted by donors' institution building efforts. However, even with these steps, the system is still in the process of trying to fill the human resources gap both as to quantity and quality.

UNMIK has gradually handed over some of its powers to local bodies. The Constitutional Framework and subsidiary legislation provided for Kosovo-led Provisional Institutions of Self-Government [hereinafter PISGs], including an Assembly, Prime Minister, and President of Kosovo, as well as 9 central government ministries and various executive agencies. UNMIK REGULATION NO. 2001/19 ON THE EXECUTIVE BRANCH OF THE PROVISIONAL INSTITUTIONS OF SELF-GOVERNMENT OF KOSOVO, *as amended by* UNMIK REGULATION NO. 2006/34 [hereinafter EXECUTIVE BRANCH REGULATION]. The 120-member Assembly was first elected in November 2001, and the Kosovo government was formed in March 2002. Since then, UNMIK has transferred responsibilities for additional ministries and created more positions and agencies within the Kosovo executive branch. Among others, the Constitutional Framework had transferred limited powers regarding judicial affairs to the PISGs, such as participation in judicial appointments and training, organization of judicial qualification examinations, appointment, training and dismissal of court personnel, and provision of material resources to the judiciary. The tasks of a traditional justice ministry were divided between the internationally-run UNMIK Department of Justice [hereinafter DOJ] and the Kosovo-led Department of Judicial Administration [hereinafter DJA] under the Ministry of Public Services. In addition, there was a Kosovo Judicial and Prosecutorial Council [hereinafter KJPC], appointed by the SRSG and consisting of local and international members. The KJPC served as an advisory body to the SRSG, consulting on matters related to judicial appointment, removal, and discipline. See UNMIK REGULATION NO. 2001/8 ON THE ESTABLISHMENT OF THE KOSOVO JUDICIAL AND PROSECUTORIAL COUNCIL [hereinafter KJPC REGULATION].

In late 2005, a Kosovo Ministry of Justice [hereinafter MOJ] was established with limited competencies. See UNMIK REGULATION NO. 2005/53, amending the EXECUTIVE BRANCH REGULATION. In addition, the Kosovo Judicial Council [hereinafter KJC] was established to replace of the KJPC, as an independent body under the authority of the SRSG. See UNMIK REGULATION NO. 2005/52 ON THE ESTABLISHMENT OF THE KOSOVO JUDICIAL COUNCIL [hereinafter KJC REGULATION].<sup>2</sup> The KJC is composed of 11 members, 7 of whom are judges. The President of the Supreme Court serves as the KJC President. The 4 non-judge members are the Minister of Justice, the Chair of the Assembly Committee on Legislative, Judicial, and Constitutional Framework Matters, the President of the KCA, and a law professor. The KJC sets administrative policies for the judiciary, prepares and manages judicial budgets, and oversees judges and courts. It is responsible for training, recruitment, appointment, evaluation, promotion, and discipline of judges and court personnel, and it also functions as the administrative office of the courts. It is also charged with maintaining statistics concerning judges and court administration.

Recent increases in the devolution of responsibility for the judicial system to Kosovar bodies manifests the desire of UNMIK to create a phased transfer so that institutions will have the capacity to function independently when the international status changes. For instance, at the time of the writing of this assessment, a draft Law on the Judiciary [hereinafter DRAFT LAW], which has been in the process of being written for over two years, is under consideration. If passed, it will supersede the existing Law on Regular Courts. Passage of the Draft Law by the Assembly and its promulgation by the SRSG, followed by acceptance of the Ahtisaari Proposal, would complete the legal transition toward independent administration of the courts by the judiciary rather than by an executive ministry.

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<sup>2</sup> Until a separate prosecutorial council is established, the KJC Regulation shall also be deemed to refer to prosecutors. See art. 1.6. This continues to be the case, except that prosecutors and their staff now receive their salaries from the MOJ budget.

## Structure of the Courts

Kosovo's regular court system is composed of 26 municipal courts, 5 district courts, the Commercial Court of Kosovo, and the Supreme Court. The minor offenses court system includes 26 municipal courts of minor offenses and the High Court for Minor Offenses. According to July 2007 KJC statistics, the judiciary had 322 judicial positions with 301 serving judges, including 13 judges serving on the Supreme Court, 4 judges on the Commercial Court, 5 judges on the High Court for Minor Offenses, 49 judges on the district courts, 141 judges on the municipal courts, and 89 judges on the minor offenses courts.

**Municipal courts** operate in each of Kosovo's municipalities and serve as courts of first instance for criminal offenses punishable with sentences of up to 5-year imprisonment, for property and labor disputes, inheritance matters, and other civil matters. Municipal courts generally adjudicate in panels of one professional and 2 lay judges. Criminal offences punishable by a fine or by imprisonment of less than 3 years are considered by an individual judge.

**District courts** are located in each of Kosovo's 5 regional capitals (Pristina, Gjilan, Peja, Prizren, and Mitrovica). They hear appeals from the decisions of the municipal courts. They also serve as courts of first instance for criminal offenses punishable by prison sentences of more than 5 years, major property disputes, intellectual property rights disputes, and other enumerated matters. First instance panels generally consist of one professional and 2 lay judges. Panels of 2 professional and 3 lay judges hear cases punishable by imprisonment of more than 15 years, as well as appeals from the municipal courts.

The **Commercial Court** is located in Pristina, and has Kosovo-wide first instance jurisdiction over disputes between private business entities, bankruptcy proceedings, and certain commercial criminal offenses.

The **Supreme Court of Kosovo** is the highest body in the regular court system. It operates as a third instance appellate court in a limited number of criminal cases; i.e., it hears appeals from district court decisions on appeal from municipal courts. It also hears direct appeals in cases originating in the district courts, and serves as a court of first instance for extraordinary matters and other matters as provided by law (e.g., administrative disputes). A Special Chamber of the Supreme Court, consisting of 2 Kosovo Supreme Court judges and 3 international judges, was established to resolve challenges to privatization decisions by the Kosovo Trust Agency [hereinafter KTA]. See UNMIK REGULATION 2002/13 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS [hereinafter REGULATION ON SPECIAL CHAMBER ON KTA MATTERS]. Another Special Chamber is intended to address conflicts between laws passed by the Assembly and the Constitutional Framework, but this Chamber has yet to be established. See CONSTITUTIONAL FRAMEWORK § 9.4.11. The Supreme Court is also charged with ensuring uniform application of the law by all courts and it may give instructions to lower courts.

The Supreme Court generally operates in panels of 3 professional judges; however, 5-judge panels hear cases in which imprisonment may exceed 15 years, and where the Court is sitting as a third instance court.

**Minor offenses courts** are located within each municipality and have jurisdiction over traffic tickets and cases where the offense is punishable by a fine or imprisonment of no more than 60 days. Decisions appealed from minor offenses courts are taken to the **High Court of Minor Offenses**, which has territorial jurisdiction covering all of Kosovo.

**Lay judges** serve alongside professional judges on municipal court and district court panels. Lay judges have are not required to have special legal training and have equal votes to those of professional judges. There are presently 610 lay judges. Lay judges will also serve on 3-judge

panels of the Supreme Court's Special Chamber on KTA Matters, although these judges have yet to be appointed.

**International judges** are appointed and assigned pursuant to UNMIK regulations. See UNMIK REGULATION NO. 2000/6 ON APPOINTMENT OF INTERNATIONAL JUDGES/PROSECUTORS AND/OR CHANGE OF VENUE [hereinafter INTERNATIONAL JUDGES REGULATION]; see also UNMIK REGULATION NO. 2000/64 ON ASSIGNMENT OF INTERNATIONAL JUDGES/PROSECUTORS AND/OR CHANGE OF VENUE [hereinafter INTERNATIONAL JUDGES ASSIGNMENT REGULATION]. As of June 30, 2006, there were 11 international judges assigned to Kosovo courts. International judges may sit in panels with local judges in any court, and hear cases involving war crimes, inter-ethnic crimes, organized crime, official corruption, human trafficking, and other practices which threaten the establishment of the rule of law.

**Parallel courts**, run by ethnic Serbians and supported by the Serbian government, continue to operate in Serbian enclaves without UNMIK authorization. UNMIK Kosovo courts do not recognize or execute the decisions of these courts. Decisions of parallel courts may only be appealed to higher courts within Serbia proper. Similarly, Serbian courts have been known to hear cases that fall within the territorial jurisdiction of Kosovo and involve Kosovo Serbs.

## Conditions of Service

### Qualifications

Qualifications for appointment to the judiciary have recently changed. To be appointed as a professional judge in Kosovo, a candidate must now: (1) be a habitual resident of Kosovo; (2) be of high moral integrity; (3) be capable of performing full-time duties; (4) possess a law degree that is valid in accordance with Kosovo law; (5) have passed the bar examination or presently be a member of the Bar; (6) have passed a new additional Judicial Entry Examination; (7) complete a judicial training program provided by the Kosovo Judicial Institute [hereinafter KJI]; and (8) have a minimum of 3 years of legal experience. See KJC REGULATION § 6.1.

To serve as a lay judge, one must: (1) be a habitual resident of Kosovo for at least 5 years; (2) be at least 25 years old; (3) be of high moral integrity; and (4) "not have been engaged in discriminatory practices as defined by law and judicial rules and procedures." *Id.* § 6.2.

International judges must have: (1) a university degree in law; (2) 5 years service as a judge or prosecutor in their own country; (3) high moral integrity; and (4) not have a criminal record. See INTERNATIONAL JUDGES REGULATION § 2.

### Appointment and Tenure

The SRSG appoints judges from the list of candidates proposed by the KJC and endorsed by the Assembly. The tenure of current judges is tied to the duration of UNMIK's mandate, subject to good behavior and mandatory retirement at age 65. The current situation regarding judicial tenure is especially uncertain. There are two relevant UNMIK documents which provide for the creation of an Independent Judicial and Prosecutorial Commission [hereinafter IJPC], as an autonomous body of the KJC. See UNMIK REGULATION NO. 2006/25 ON A REGULATORY FRAMEWORK FOR THE JUSTICE SYSTEM IN KOSOVO § 7 [hereinafter JUSTICE SYSTEM FRAMEWORK REGULATION]; see also UNMIK ADMINISTRATIVE DIRECTION NO. 2006/18 Implementing UNMIK REGULATION NO. 2006/25 [hereinafter IJPC DIRECTION]. The IJPC is envisioned to consist of 5 international members, and it will be given the task of evaluating judges for reappointment as their tenures end with the end of UNMIK's mandate. The IJPC is also intended to oversee the appointment of new judges at that time. The IJPC was intended to be formed in May 2007, with UNMIK's signing of a memorandum creating the IJPC, but this signing has not yet occurred as of the date of the writing of this report.

## ***Training***

The KJC Regulation requires all prospective judicial candidates to attend and complete a training program provided by the KJI, in order to be considered for judgeships. This recently enacted rule represents an improvement over past circumstances, because in the years following the 1989 usurpation of Kosovo's autonomy, legal and judicial training was severely curtailed. To date, the KJI has organized only one Initial Legal Education Program [hereinafter ILEP] for future judges in 2005; however, a proposal for a more comprehensive ILEP was awaiting approval at the time of writing of this assessment.

Sitting judges are not explicitly required by any law to attend continuing legal education [hereinafter CLE] courses, although a provision to that effect can be found in the new judicial ethics code. Nonetheless, the KJI has organized numerous training programs for judges since its establishment in 2000. The KJI was originally an OSCE-administered entity, but since April 2006, it has become an independent entity, funded by the Kosovo Consolidated Budget. Its trainings currently cover a range of topics, including criminal law and procedure, enforcement of judgments, judicial ethics, and international human rights standards.

## Kosovo JRI 2007 Analysis

While the correlations drawn in this exercise may serve to give a sense of the relative status of certain issues, the ROL Initiative would underscore that the factor correlations and conclusions in the Kosovo JRI 2007 possess their greatest utility when viewed in conjunction with the underlying analysis and compared to the Kosovo JRI 2004. The ROL Initiative considers the relative significance of particular correlations to be a topic warranting further study. In this regard, the ROL Initiative invites comments and information that would enable it to develop better or more detailed responses to future JRI assessments. The ROL Initiative views the JRI assessment process as part of an ongoing effort to monitor and evaluate reform efforts.

### Table of Factor Correlations

Judicial Reform Index Factor		Correlation 2004	Correlation 2007	Trend
<b>I. Quality, Education, and Diversity</b>				
Factor 1	Judicial Qualification and Preparation	Neutral	Positive	↑
Factor 2	Selection/Appointment Process	Neutral	Positive	↑
Factor 3	Continuing Legal Education	Neutral	Positive	↑
Factor 4	Minority and Gender Representation	Neutral	Neutral	↔
<b>II. Judicial Powers</b>				
Factor 5	Judicial Review of Legislation	Negative	Negative	↔
Factor 6	Judicial Oversight of Administrative Practice	Negative	Negative	↔
Factor 7	Judicial Jurisdiction over Civil Liberties	Negative	Neutral	↑
Factor 8	System of Appellate Review	Neutral	Positive	↑
Factor 9	Contempt/Subpoena/Enforcement	Negative	Negative	↔
<b>III. Financial Resources</b>				
Factor 10	Budgetary Input	Negative	Neutral	↑
Factor 11	Adequacy of Judicial Salaries	Negative	Negative	↔
Factor 12	Judicial Buildings	Neutral	Negative	↓
Factor 13	Judicial Security	Neutral	Neutral	↔
<b>IV. Structural Safeguards</b>				
Factor 14	Guaranteed Tenure	Neutral	Neutral	↔
Factor 15	Objective Judicial Advancement Criteria	Neutral	Negative	↓
Factor 16	Judicial Immunity for Official Actions	Neutral	Neutral	↔
Factor 17	Removal and Discipline of Judges	Neutral	Neutral	↔
Factor 18	Case Assignment	Negative	Negative	↔
Factor 19	Judicial Associations	Neutral	Neutral	↔
<b>V. Accountability and Transparency</b>				
Factor 20	Judicial Decisions and Improper Influence	Negative	Negative	↔
Factor 21	Code of Ethics	Neutral	Positive	↑
Factor 22	Judicial Conduct Complaint Process	Neutral	Neutral	↔
Factor 23	Public and Media Access to Proceedings	Positive	Positive	↔
Factor 24	Publication of Judicial Decisions	Negative	Negative	↔
Factor 25	Maintenance of Trial Records	Negative	Negative	↔
<b>VI. Efficiency</b>				
Factor 26	Court Support Staff	Negative	Negative	↔
Factor 27	Judicial Positions	Neutral	Negative	↓
Factor 28	Case Filing and Tracking Systems	Neutral	Neutral	↔
Factor 29	Computers and Office Equipment	Neutral	Neutral	↔
Factor 30	Distribution and Indexing of Current Law	Neutral	Neutral	↔

# I. Quality, Education, and Diversity

## Factor 1: Judicial Qualification and Preparation

**Judges have formal university-level legal training and have practiced before tribunals or, before taking the bench, are required (without cost to the judges) to take relevant courses concerning basic substantive and procedural areas of the law, the role of the judge in society, and cultural sensitivity.**

<b>Conclusion</b>	<b>Correlation: Positive</b>	<b>Trend: ↑</b>
<p>Judicial candidates are required to meet a number of qualifications, including obtaining a university-level legal education, passing the bar examination and a judicial entry examination, and demonstrating moral fitness. All judicial candidates are now also required to complete an initial training program at the KJI, although this program is not yet fully operational. Additional recent improvements in judicial preparation include the establishment of institutions to oversee judicial training and the licensing of law schools.</p>		

### Analysis/Background:

The 2005 KJC Regulation introduced new qualifications for judicial service. The most notable change resulting from the new law is that judicial candidates are now required to participate in KJI trainings before being appointed as judges. KJC REGULATION § 6.1(g). In addition, judicial candidates must: (1) be a habitual resident of Kosovo; (2) be of high moral integrity; (3) be capable of performing full-time duties; (4) possess a law degree that is valid in accordance with Kosovo law; (5) have passed the bar examination or presently be a member of the Bar; (6) have passed an additional Judicial Entry Examination; and (7) have a minimum of 3 years of legal experience. *Id.* § 6.1. To serve as a lay judge, one must be: (1) a habitual resident of Kosovo for at least 5 years; (2) at least 25 years old; (3) of high moral integrity; and (4) “not have been engaged in discriminatory practices as defined by law and judicial rules and procedures.” *Id.* § 6.2. To be eligible for appointment as an international judge, one must have: (1) a university degree in law; (2) 5 years of service as a judge or prosecutor in his/her own country; (3) high moral integrity; and (4) no criminal record. See INTERNATIONAL JUDGES REGULATION § 2.

The quality of the education of Kosovo’s judges has suffered due to ethnic tensions and the resulting lack of oversight of the educational system. The recently-formed Kosovo Accreditation Agency [hereinafter KAA] may aid in standardizing and improving the quality of legal education. The KAA is charged with monitoring law faculties, and advising the government regarding the licensing of such institutions. See LAW ON THE HIGHER EDUCATION IN KOSOVO arts. 4.3, 4.4 (*promulgated by UNMIK REGULATION NO. 2003/14*) [hereinafter LAW ON THE HIGHER EDUCATION LAW]. The KAA is overseen by a 9-member managing board, 3 of the members of which are representatives of the international community. *Id.* § 4.6.

Despite these recent improvements, the quality of legal education in Kosovo continues to be of poor quality and lacks practical, hands-on training for future judges. At present, the University of Pristina campus primarily serves law students of ethnic Albanian origin, while a campus in Northern Mitrovica accommodates mostly ethnic Serbs. Both are public entities receiving government funds, and technically they are part of the same university, although they operate independently of each other. During the 1990s, ethnic Albanians were not allowed to teach or study law on the Pristina campus, so the law faculty in Pristina was almost exclusively comprised of ethnic Serb professors and students. Meanwhile, Kosovar Albanian professors ran an illegal parallel law faculty for Albanian students from a private house in Pristina. Following the 1998-1999 war, ethnic Albanians returned to the Law Faculty in Pristina; however, ethnic Serbians have been unable to attend the Faculty since then, due to language barriers and a lack of

security. Instead, Serbian students have been attending a faculty of the University of Pristina relocated to Northern Mitrovica, which teaches a curriculum adopted from that taught at the University of Belgrade, resulting in the present state of de facto segregation. In addition, there are 5 private law faculties recognized by the Ministry of Education. As the KAA is not yet operational, there is presently little quality control over any of these schools.

As a result of instability in the 1990s, much of the preparation which today's judges have received was substandard. It is acknowledged that the home-based education provided to Kosovo Albanian law students in the 1990s was inferior. While reforms were commenced at the Pristina Law Faculty following the war in 1999, little progress has been made recently in preparing students to enter the legal profession or in preparing them for a judicial career. The Pristina Law Faculty requires incoming students to submit secondary school transcripts and pass an entrance examination; however, there are still 1,000 students admitted each year, 500 of whom are "regular" students, while the rest are "correspondence students" (who pay higher fees but are not required to actually attend classes). There are 42 faculty members. The large number of students makes it impossible to teach most subjects in any manner other than a large lecture format, and for the most part the subject matter taught is limited to the traditional "theoretical" subjects. A recent law graduate stated that he had never read a law or a case during his law school experience. Lack of relevant preparation in the law faculty is reflected in the fact that most sitting judges lack legal analysis, reasoning, and writing skills. Few students are able to take advantage of newly introduced practical educational opportunities, such as civil and criminal law clinics, a legal methodology course, moot court, and trial simulation organized by donors such as the ROL Initiative. However, clinical students are excited about these courses; some reported that they had never met a lawyer or judge face-to-face prior to the clinic.

To address these deficiencies, the KJI, in cooperation with the KJC, is charged with offering pre-appointment training to judges, and accordingly, it has begun to develop such trainings. However, the amount and nature of the training required for incoming judges is not specified by the KJI Law. See *generally* LAW ON ESTABLISHING THE KOSOVO JUDICIAL INSTITUTE (*promulgated by UNMIK REGULATION NO. 2006/23*) [hereinafter KJI LAW]. Additionally, the KJC Regulation does not provide specifics regarding the exact requirements for pre-appointment training. Rather, it requires judicial aspirants to "have attended and completed the training required by law and other applicable rules." KJC REGULATION § 6.1(g).<sup>3</sup>

In 2005, the KJI conducted a 3-month pilot pre-appointment training program, the ILEP. It was funded by the European Agency for Reconstruction [hereinafter EAR] and co-organized with other organizations. For the ILEP pilot, the KJPC chose 60 candidates from 200 applicants. The candidates received 15 modules of high quality training concerning the judicial profession from distinguished international and local legal professionals. The training was interactive, and featured case studies, legal research, and opportunities to learn and apply the new material through practical applications. Following a written final examination, 57 candidates passed and were recommended to the KJPC; 20 of these 57 were then appointed to the judiciary. This pilot pre-appointment training is the only ILEP held so far.<sup>4</sup> However, an expansion of the ILEP pilot program is planned for 2008. The program is expected to be funded from the Kosovo budget, as well as by contributions from UNDP and the United States Agency for International Development [hereinafter USAID].

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<sup>3</sup> If passed, the Draft Law is anticipated to require pre-appointment training at the KJI for all judicial candidates. Those interested in becoming judges would still need to pass the bar examination and meet other preliminary requirements. Candidates would then apply to the KJI training program by submitting to a written entrance examination. Those accepted would receive one year of training, and then the KJC would recommend them for appointment as judges.

<sup>4</sup> Prior to the ILEP pilot, the KJI held a number of brief induction courses for newly appointed judges. However, there is no reference to these courses in the KJI's latest annual report for 2006, and it is therefore unclear whether these activities have continued after 2005.



## Factor 2: Selection/Appointment Process

***Judges are appointed based on objective criteria, such as passage of an exam, performance in law school, other training, experience, professionalism, and reputation in the legal community. While political elements may be involved, the overall system should foster the selection of independent, impartial judges.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Positive</i></b>	<b><i>Trend: ↑</i></b>
Professional judges are appointed primarily on the basis of objective criteria, including their professional and educational qualifications, past experiences, and ethical stances. However, a number of concerns remain regarding the lack of transparency in the judicial selection process. Additional uncertainties regarding the judicial appointment process also stem from the fact that all judicial terms are set to automatically expire with the departure of UNMIK.		

### Analysis/Background:

Since it replaced the KJPC in 2006, the KJC has been the institution charged with recommending judges for appointment by the SRSG. See KJC REGULATION § 5. The KJC is comprised of 7 judges and 4 non-judges (including the Minister of Justice; the Chair of Assembly Committee on Legislative, Judicial and Constitutional Framework Matters; the President of the KCA; and a law professor). See *id.* § 2.1, 2.3. The President of the Supreme Court serves as the KJC President. *Id.* § 2.5. The composition of the 11-member KJC is required to reflect “gender equality and ethnic diversity.” *Id.* § 2.1. As part of its responsibility for overseeing the selection and appointment of judges, the KJC has created a Committee on Judicial Appointment and Development. See KOSOVO JUDICIAL COUNCIL INTERNAL ORGANIZATION REGULATIONS § 10.6 [hereinafter KJC INTERNAL REGULATIONS]. This Committee is intended to review applications for judicial appointments and make recommendations regarding those applications to the KJC, as well as create rules of procedure regarding the review of those applications. However, the KJC has not yet adopted any procedural rules for this committee. Regarding the Committee and the KJC’s review of judicial candidates, the KJC Regulation’s only guidelines are that “[KJC] members shall be guided by the need to establish a professional, independent, impartial and multi-ethnic judiciary.” KJC REGULATION § 5.2; KJC INTERNAL REGULATIONS § 13.1. Respondents generally reported favorably on the ability of the Committee on Judicial Appointment and Development to select judicial candidates, with reportedly few instances of discrimination occurring.

The KJC must publicly announce judicial vacancies and invite applications to fill those vacancies. See KJC REGULATION § 5.1. The KJC is complying with this requirement in the sense that it publishes such announcements in local newspapers. The KJC Regulation also permits the Council to “accept recommendations from regional and municipal authorities, or judicial authorities and other bodies within the legal profession, regarding persons suitable to be interviewed as lay-judges.” *Id.* Accordingly, the KJC does accept recommendations from such sources. Following the solicitation of applications, the KJC Secretariat reviews applications and decides whether candidates meet the minimum judicial selection criteria discussed in Factor 1 above. The vetting process also includes a police background check, followed by interviews with the Committee on Judicial Appointment and Development. During their interviews, candidates are asked to discuss the professional and educational qualifications, their past experiences, and their ethical stances. Provisions are also in place to encourage appointment to the judiciary of candidates from underrepresented ethnic groups. See Factor 4 below for additional details. However, as the KJC Regulation does not contain any provisions regarding review of applicants for judicial positions, court presidents are not always asked to provide input regarding judicial candidates. Additionally, the KCA and the public also do not have the opportunity to provide

feedback. Thus, a major concern is lack of transparency regarding the Committee's decision-making process.

After the interviews, the Committee recommends successful applicants to the full KJC, which must approve the recommendation by the majority vote of the members present. KJC INTERNAL REGULATIONS § 13.2(a). The KJC may request additional information concerning the candidates. *Id.* § 13.2(b). If the KJC rejects the Committee's recommendation, it must recommend another short-listed candidate; however, if the KJC rejects 3 consecutive recommendations for the same vacancy, the position must be reopened and a new selection process be conducted. *Id.* § 13.2(c)-(d). After the approval, the KJC makes its recommendations to the SRSG, which appoints judges from the list of candidates proposed by the KJC and endorsed by the Assembly. CONSTITUTIONAL FRAMEWORK § 9.4.8. The Assembly is required to respond to the KJC within 30 days of receiving the list. It may request additional information from the KJC, but it may not substitute names; however, the KJC itself may modify its recommendation based on reviewing such additional information. KJC INTERNAL REGULATIONS § 13.3. Some Assembly members have expressed concern regarding the appointment of particular judges, with whom they were dissatisfied, but it was unclear to the assessment team what the source of this dissatisfaction was.

In addition to addressing the typical issues which arise during the judicial selection and appointment process, the Kosovo judiciary is in a unique situation in that all of its currently sitting judges will have to be evaluated for reappointment upon the expiration of UNMIK's mandate in Kosovo. See JUSTICE SYSTEM FRAMEWORK REGULATION § 7. To address this situation, the Justice System Framework Regulation contemplates the creation of the IJPC as an autonomous body of the KJC. The IJPC is intended to oversee the reappointment of existing judges and the appointment of new judges at the end of UNMIK's mandate in Kosovo. The IJPC model was used successfully in Bosnia-Herzegovina in 2001. Implementation of the IJPC in Kosovo was to start in May 2007, prior to the exodus of UNMIK. However, the signing of the enabling memorandum of understanding has been delayed indefinitely, and thus the IJPC's work of reappointing judges has not yet begun. If the IJPC is eventually finalized, its work is to proceed in 3 phases. The first phase will be the evaluation of applicants for appointment or re-appointment to the Supreme Court. The second phase will be the selection of judges for the High Court of Minor Offenses, district courts, and the Commercial Court. Selection for municipal courts and courts of minor offenses will constitute the third phase. See IJPC DIRECTION § 2.3. In making its recommendations, the IJPC will be required to take into account the following criteria: (1) professional knowledge, work experience, and performance; (2) capacity for legal reasoning as manifested by academic written works, other professional activities, and during the interviews; (3) professional ability based on previous career accomplishments, including participation in trainings; (4) capacity to analyze legal problems; (5) ability to perform judicial duties impartially, conscientiously, diligently, decisively, and responsibly; (6) communication abilities; (7) relations with colleagues, conduct out of office, and integrity; and (8) managerial experience and qualifications (for candidates to court president positions). *Id.* § 3.2.

The IJPC's new selection are based on the collection of background information and materials, as well as an interview conducted with a standardized form. See IJPC DIRECTION § 2.6.2. Serving judges will not generally be required to take an examination. However, individual judges may be asked to do so, based on the IJPC panel's need for supplemental information on the candidate's legal knowledge and ability. *Id.* § 2.6.3. Despite the one-time nature of the IJPC, its creation manifests movement toward improvement of the quality of the existing judiciary, as well as recognition of the need for standardized procedures in the judicial selection process. Hopefully, this momentum will be maintained by the KJC at the conclusion of the international process.

### Factor 3: Continuing Legal Education

***Judges must undergo, on a regular basis and without cost to them, professionally prepared continuing legal education courses, the subject matters of which are generally determined by the judges themselves and which inform them of changes and developments in the law.***

<b>Conclusion</b>	<b>Correlation: Positive</b>	<b>Trend: ↑</b>
<p>While not legally required, continuing legal education for judges is included as an obligation under the new judicial ethics code. The KJI works closely with the KJC to offer a range of CLE courses, taking into account the needs of judges. The KJI drafts an annual training program, and most judges attend at least one program per year.</p>		

#### Analysis/Background:

While continuing legal education courses are not explicitly required for judges under any law, the new Code of Ethics and Professional Conduct for Judges provides that “a judge shall maintain and improve the highest standards of professionalism and legal expertise and for that purpose shall engage in continuing legal education and training as determined by the KJC.” CODE OF ETHICS AND PROFESSIONAL CONDUCT FOR JUDGES § III(A)(3) (*adopted by KJC on April 25, 2006*) [hereinafter 2006 JUDICIAL ETHICS CODE]. To that end, the KJI was initially established in 2000 by the OSCE Mission in Kosovo. The KJI was founded to serve as a training institution, and its functions include the creation of preparatory exams for judges and the creation of continuing education coursework for judges.<sup>5</sup>

The KJI Law established the KJI as an independent legal entity with its own Managing Board. See KJI LAW art. 1. The 13 members of the Managing Board include representatives from the Government, the Supreme Court, the Public Prosecutor’s Office, the KJA, the KCA, the Kosovo Prosecutors Association, the Kosovo Lawyer Association, the University of Pristina Law Faculty, UNMIK, and OSCE, as well as two *ex officio* members (the KJC President and the DJA Director). *Id.* arts. 3.1-3.4. The Managing Board is tasked with the responsibility for adopting the KJI’s budget and training program, and overseeing the methodology employed for KJI trainings. *Id.* art. 3.6. Recently, local control over the KJI has been increasing. In April 2006, a former Kosovar judge was appointed as sole director of the Institute, and the OSCE’s administrative participation is now limited to advisory status. The KJI is now funded by the Kosovo Consolidated Budget. For the fiscal year of 2007, the KJI requested an annual budget of EUR 600,000, and received EUR 250,000.

The number of trainings offered by the KJI has been steadily increasing in the past few years. Between January 2000 and December 2006, the KJI conducted 311 training sessions, including 24 trainings in 2000, 20 in 2001, 42 in 2002, 55 in 2003, 52 in 2004, 55 in 2005, and 63 in 2006. See KJI BROCHURE (2007). In 2006, 1,179 judges attended the KJI’s sessions (as Kosovo had over 300 judges during 2006, most judges attended, on average, 3-5 programs). See KJI ANNUAL REPORT 2006 at 2. There were 46 training sessions during the first half of 2007. All judges interviewed by the assessment team indicated that they had attended at least one session, and all judges have received training on the Code of Ethics and Judicial Conduct. Attendance at trainings by minorities has also increased in recent years, with 61 Serbian and 19 other minority attendees in 2006. *Id.* The KJI utilizes Serbian trainers, and all of its programs are simultaneously translated into Albanian, Serbian, and English, the 3 official languages of Kosovo.

<sup>5</sup> In addition to providing judicial trainings, the KJI also trains prosecutors, court staff, and senior police officers.

The KJI drafts its curriculum in October and November of each year, based on feedback gleaned from several sources. These include exit evaluations eliciting suggestions after each training session, a training needs assessment questionnaire sent to all judges, regular meetings with court presidents, and the OSCE's legal system monitoring reports, issued periodically by the OSCE Mission in Kosovo's Department of Human Rights and Rule of Law. Prior to drafting the annual plan, the KJI holds a meeting in each of the 5 judicial districts, inviting every judge and prosecutor to give input. The training calendar for the year is then disseminated to all judges, along with application forms on which they may choose the programs they wish to participate in. However, some respondents opined that higher level judges are given more access to programs.

The KJI has held trainings regarding: civil and criminal procedure, new laws, property rights, expropriation and compensation, privatization, money laundering, labor law, inheritance, family law, and juvenile law. It should be noted that no KJI programs have yet been held on legal analysis and decision writing for judges, though the KJI emphasizes the importance of hands-on, interactive training. For example, trainers are required to be knowledgeable regarding the use of PowerPoint and interactive teaching methods, and they must restrict any "lectures" to a maximum of 20 minutes. The KJI has also held procedural law workshops, including a one-week roundtable on the Provisional Criminal Procedure Code of Kosovo [hereinafter PCPC],<sup>6</sup> as well as specific criminal procedure issues such as indictment procedures and evidence (including forensics, detention, and execution of penal and alternative sanctions).

The KJI has also offered information technology classes, as well as courtroom and case management skills classes. The KJI has conducted trial simulations in courtrooms in all regions of Kosovo, and these have been very popular. As the regulation establishing the KJC transferred responsibility for investigations from judges to prosecutors, investigation technique programs have been addressed to prosecutors. Throughout 2007, the KJI has offered at least one class per week, and during some weeks as many as 4 classes have been offered. These classes are held at the KJI facility, which in 2006 moved from an older building on the University of Pristina campus to a well-equipped new building that features a print and electronic library, a computer lab, and state-of-the-art training equipment. Classes are also held locally in other regions of Kosovo. Judges and prosecutors also receive a monthly newsletter from the KJI, summarizing that month's training programs.

Currently, foreign participation in the KJI's provision of CLE for judges consists of joint programs implemented with organizations such as: USAID's Justice System Reform Activity [hereinafter JSRA] project; EAR (regarding education on European anti-trafficking and corruption law); the Council of Europe (in the form of classes on the ECHR, taught by experts certified by the Council of Europe); the UN Development Program [hereinafter UNDP] (which recently arranged for a group of Kosovar judges to visit the European Court of Human Rights in Strasbourg); the EU Planning Team; and the United Nations Children's Fund [hereinafter UNICEF] (regarding trainings on issues related to juvenile justice). Many of these programs served to achieve considerable progress on judicial awareness of human rights vis-à-vis criminal procedure. While foreign experts continue to assist with KJI programs, the percentage of the local faculty at the KJI has increased since its founding. Currently, there are 2 in-house Kosovar judicial trainers and a number of adjunct faculty including judges, prosecutors, law professors, and advocates. There have been a number of recent "train the trainers" programs, including a program in which an international judge trained 4 judges to be trainers, supervising them as they taught other judges on how to be a judge, using an actual case as a study.

When fully operational, the KJI is expected to provide pre-judicial training via the ILEP program (discussed in Factor 1 above), as well as a continuing legal education programming [hereinafter CLEP]. CLEP will include basic training for all judges, as well as specialized training for higher

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<sup>6</sup> The PCPC is in effect. It is "provisional" because it is an UNMIK Code (approved by UNMIK Regulation No. 2003/26), not an Assembly Law promulgated by UNMIK, and thus will cease to be effective upon termination of UNMIK's mandate.



level judges. While the KJI’s programming has been expanded greatly since 2004, the long-term sustainability of the KJI as an independent organization and its ability to carry forward its ambitious goals will depend on resources allocated by the KCB.

#### **Factor 4: Minority and Gender Representation**

***Ethnic and religious minorities, as well as both genders, are represented amongst the pool of nominees and in the judiciary generally.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
<p>The judiciary enjoys a strong de jure framework for the protection of minority rights and gender equality. Representation of ethnic and religious minorities among judicial nominees and judges is generally on par with their respective populations in Kosovo, despite reports of reluctance of minorities to serve in the Kosovo judicial system. However, women are still underrepresented, especially at the higher levels of the judiciary.</p>		

#### **Analysis/Background:**

Kosovo has a strong de jure framework for minority equality. The judiciary is legally required to reflect the diverse nature of Kosovo’s people. See CONSTITUTIONAL FRAMEWORK § 9.4.7. The Justice System Framework Regulation echoes the Constitutional Framework’s requirement of diversity, requiring the KJC and the Assembly to “ensure that the Kosovo judiciary and prosecution services reflect the multi-ethnic character of Kosovo and the need for equitable representation of all communities in Kosovo.” JUSTICE SYSTEM FRAMEWORK REGULATION § 2.1. The KJC and Assembly must also recognize the “international principles of gender equality,” as set forth in the international instruments listed in the Constitutional Framework. *Id.* § 2.2.

The Anti-Discrimination Law’s protection of the “principle of equal treatment” and “principle of fair representation” regardless of gender or ethnic origin is applicable to the judiciary and the professional organizations to which judges belong. ANTI-DISCRIMINATION LAW art. 2 (*promulgated by UNMIK REGULATION No. 2004/32*). The law imposes a ban on direct and indirect discrimination, harassment, and segregation, all of which are defined by the law. See *id.* arts. 2, 3. These principles must be applied to selection, recruitment, promotion, dismissal, pay, membership in professional organizations, and access to vocational training. *Id.* art. 4. Affirmative action type measures, i.e., actions aimed at preventing or compensating for disadvantages related to one or more grounds for discrimination, are permitted, as long as these measures comply with international human rights standards. *Id.* art. 6.

In line with these provisions, the Justice System Framework Regulation sets forth a number of more specific instructions regarding the inclusion of ethnic minorities in the judicial system. Specifically, it provides that applications for judicial vacancies be solicited from specified underrepresented communities, giving preference to members of these communities among equally qualified applicants, and reserving a specified number of posts for these applicants. JUSTICE SYSTEM FRAMEWORK REGULATION § 2.3. The KJC must take “immediate steps” to comply with this requirement, for so long as the percentage of judges and prosecutors from non-Albanian Kosovo communities is below 15%, and/or below 8% from Serbian Kosovo communities. *Id.* § 2.4. In addition, there are provisions for the creation of an Advisory Committee on Minorities, comprised of a majority of judges and prosecutors from under-represented communities, to advise the KJC on these matters. *Id.* § 2.5; see also KJC INTERNAL REGULATIONS § 10.11.

As shown in the following table, while the number of minority judges has increased only slightly since 2005, it is not grossly disparate from the overall ethnic composition of Kosovo’s general

population. As of December 2006, ethnic Albanians constituted approximately 92% of Kosovo's population of 2,100,000. "Other ethnic groups" (including Serbians, Bosniaks, Turks, Roma, Gorani, Ashkali, and Egyptians) constituted approximately 8%. Serbians constituted a majority of these other groups. See STATISTICAL OFFICE OF KOSOVO, KOSOVO IN FIGURES 2006 at 10.

### MINORITY REPRESENTATION IN THE JUDICIARY

	2005		2006		2007	
	Total	%	Total	%	Total	%
<b>Total number of judges</b>	307	100	313	100	309	100
<b>Albanian judges</b>	278	91	279	89	274	88.7
<b>Serbian judges</b>	13	4	15	5	15	4.9
<b>Other ethnic judges</b>	16	5	19	6	19	6.5

As Serbians are said to constitute a majority of the 8% of "other ethnic groups," it appears that a figure of 4.9% of Serbian judges may not be quite representative of the true percentage of Serbians in the general population. While there does not appear to be overt discrimination against minorities within the judicial selection and appointment process, there are reasons why minorities, particularly Serbians, are reluctant to apply for judicial positions. Indeed, respondents reported that a minority Serb judge recently turned down a position in the Kosovo court system. The concerns facing minority judges opting to work in Kosovo's judiciary include pressure from family, friends, and the community, as well as the fear of physical danger. Serbians working in Kosovo's majority Albanian courts are often viewed as traitors by family and neighbors and may be threatened with reprisal. There are constraints placed on the movement of minority judges within their communities, and respondents reported a number of concerns about their personal security. A procedure is in place for judges to make written requests to the police to be provided security, but these requests may or may not be granted, depending on the police's assessment of the situation.

Another significant obstacle to the recruitment of Serbian judges is the existence of parallel courts, located in Serbian enclaves in Kosovo, as well as the reliance by Kosovo's Serbs on the Serbian court system. Decisions by parallel courts are not recognized by UNMIK and are not enforceable in Kosovo courts. However, there are financial incentives for minority judges to work in the parallel or the Serbian court systems rather than Kosovo's court system. Minority judges who work in legitimate courts in Serbia proper generally earn more than their counterparts in Kosovo's judiciary and receive reasonable pension benefits upon retirement. See Factor 11 below for a discussion of the adequacy of judicial salaries in Kosovo.

Attracting minority judges would increase the legitimacy of the judiciary. In the past, ethnic minorities have been reluctant to use the Kosovo courts, as they had little confidence that they would be treated fairly. This attitude is especially prevalent in smaller communities. However, the situation appears to be changing for the better. Reportedly, minority citizens are now more willing to take their disputes to the Kosovo courts rather than to the parallel courts. One factor contributing to increased minority participation has been the opening of courts and liaison offices in minority enclaves such as Gračanica. Additionally, the consensus expressed by both majority and minority respondents is that the court system is presently treating minority litigants equally and fairly, and that judges are aware of international equal rights standards that are incorporated into domestic law by the Constitutional Framework. See CONSTITUTIONAL FRAMEWORK § 3.2. The OSCE has not reported any instances of ethnic bias among the 81 cases it monitored during 2005. OSCE LEGAL SYSTEM MONITORING SECTION, KOSOVO REVIEW OF THE CRIMINAL JUSTICE SYSTEM 1999-2005 (2006) at 29 [hereinafter 2006 OSCE MONITORING REPORT].

Kosovo also enjoys a strong de jure framework regarding gender equality. The Law on Gender Equality in Kosovo sets forth several provisions for the promotion of women's rights, including a guarantee of equal rights within the judiciary. The Law calls on the government to take affirmative steps to establish equal participation for women in judicial bodies of all levels. See

LAW ON GENDER EQUALITY IN KOSOVO § 3.1 (*promulgated by UNMIK REGULATION No. 2004/18*) [hereinafter GENDER EQUALITY LAW]. It defines “equal gender participation” as having “the participation of the particular gender ... [at] 40%.” *Id.* § 3.2. The 40% level of compliance is required for appointments made to government bodies, including the judiciary. *Id.* § 3.3. As discussed earlier in this factor, the Anti-Discrimination Law also provides protection against harassment and other forms of discrimination based on sex or gender. See ANTI-DISCRIMINATION LAW arts. 2, 3.

De facto gender equality has been more difficult to achieve. The current representation of female judges in the judiciary is set forth in the table below.

**REPRESENTATION OF WOMEN IN THE JUDICIARY**

<b>Year</b>	<b>Total No. of judges</b>	<b>No. of female judges</b>	<b>% of female judges</b>
<b>2005</b>	307	84	26
<b>2006</b>	313	84	26
<b>2007</b>	309	82	26.5

There are no female district court presidents; however, there is one Serbian woman serving on the 11-member KJC. As is apparent from the table above, there has been little recent change in the representation of women in the judiciary, and the current percentage of female judges is not on par with the gender balance of the general population. Some respondents attributed this attrition rate to the generally low participation of women in the legal profession, and female students’ traditional perception of their roles, making women reluctant to apply to become judges, prosecutors, or advocates. As of April 2007, only 48 advocates, or 10% of all advocates, were women, a small improvement since 2004, when 7.1% of all advocates were women. ABA ROL Initiative, KOSOVO LEGAL PROFESSION REFORM INDEX VOLUME II 38 (2007). The percentage of female students at the Pristina Law Faculty was 44.3% for the 2005-2006 academic year, though women comprised only 35% of graduates in September 2005. See OSCE MISSION IN KOSOVO, GENDER AND MINORITY COMMUNITY REPRESENTATION IN THE KOSOVO CHAMBER OF ADVOCATES 10 (2006).

It is unclear what specific efforts the KJC has made to solicit women for initial judicial positions or for advancement. However, the KCA has taken several de facto steps to increase the representation of women in Kosovo’s legal profession. In 2004, the KCA established a Committee for Women and Minorities [hereinafter KCA Committee] to encourage participation of both groups in the legal profession. See KCA EXECUTIVE COUNCIL DECISION No. 169-1/05. With assistance from the ROL Initiative, in March 2007 the KCA Committee began holding monthly meetings and has also organized two roundtable discussions. The first roundtable discussion, held in June 2007, was focused on entering the legal profession in Kosovo and featured panel discussions on how to join the KCA, how to obtain a position as a *praktikant* (i.e., a law clerk), and how Kosovo’s judiciary is structured. This event was attended by a number of Serb law graduates, and it was the first event that the KCA has organized specifically for Kosovo’s Serbs. The second roundtable discussion, held in October 2007, featured instruction regarding Kosovo’s laws and the structure of the judiciary. However, no Serbian judges attended this roundtable.

## II. Judicial Powers

### Factor 5: Judicial Review of Legislation

***A judicial organ has the power to determine the ultimate constitutionality of legislation and official acts, and such decisions are enforced.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↔</b>
<p>No judicial organ has the authority to review the constitutionality of legislation and official acts. A Special Chamber of the Supreme Court on Constitutional Framework Issues, tasked with reviewing the constitutionality of Assembly legislation, has been envisioned, but it has yet to be established.</p>		

#### Analysis/Background:

No currently existing judicial entity has the power to review the constitutionality of legislation or to provide commentary or interpretation of current legislation. Prior to the dissolution of SFRY, there was a Constitutional Court with 7 members. In 2001, the Constitutional Framework provided for the establishment of a Special Chamber of the Supreme Court on Constitutional Framework Matters [hereinafter Constitutional Framework Chamber].<sup>7</sup> See CONSTITUTIONAL FRAMEWORK § 9.4.11. However, no such Chamber has been created as of the writing of this report. Respondents reported that a Chamber could not be established because the Supreme Court did not know how many judges the Chamber was meant to include, or how it would function, or what entity would be responsible for enforcement of its decisions. The Supreme Court has requested direction on the above-listed uncertainties from the SRSG's Office of Legal Advisor [hereinafter OLA], but the OLA has not been forthcoming with guidance.

In the event that the Constitutional Framework Chamber is created, the Constitutional Framework also specifies who may bring a direct challenge before the Chamber: the President of Kosovo, any member of the Presidency of the Assembly, any Assembly committee, no fewer than 5 members of the Assembly petitioning together, or the Government (i.e., the cabinet). CONSTITUTIONAL FRAMEWORK § 9.4.11. Private individual do not have the standing to petition the Chamber. However, there does not appear to be a direct prohibition against a private individual challenging the constitutionality of a law before a trial court in a situation where such a law allegedly violates that individual's rights under the Constitutional Framework or a domestically incorporated human rights provision. Similarly, there is no prohibition on a trial judge ruling on such an issue. Among other responsibilities, the Constitutional Framework Chamber would have the power to determine whether any Assembly law is incompatible with the Constitutional Framework or the incorporated international human rights instruments. *Id.* § 9.4.11(a). In addition, the Constitutional Framework Chamber is granted the power to resolve disputes between PISGs, or between Assembly members, or members of the Presidency, regarding "the extent of their rights and obligations" under the Constitutional Framework. *Id.* § 9.4.11(b). It is also envisioned to have the power to determine whether a decision made by a PISG has infringed upon the independence and responsibilities of the Ombudsperson, or any one of several independent offices established by the Constitutional Framework. *Id.* § 9.4.11(c).

It has also been consistently noted that neither the Kosovar judges in the national judiciary nor the international judges have authority to review UNMIK regulations and subsidiary instruments.

<sup>7</sup> If passed, the Ahtisaari Proposal would provide for the creation of a Constitutional Court; however, the role of this body is not completely clear.

This would continue to be true of the Constitutional Framework Chamber once it is formed. Judges may request clarification of laws from the OLA, though in practice they rarely do so.

## Factor 6: Judicial Oversight of Administrative Practice

***The judiciary has the power to review administrative acts and to compel the government to act where a legal duty to act exists.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↔</b>
<p>The judiciary has the power to review the Kosovo government’s administrative acts. However, there is confusion as to jurisdictional issues, applicable laws, and procedures regarding this review. This confusion impairs the effective use of judicial power. In addition, the judiciary has no power to review acts by the international administration.</p>		

### Analysis/Background:

Every person adversely affected by a decision of the Government or its executive agency has the right to judicial review after exhausting all administrative remedies. CONSTITUTIONAL FRAMEWORK § 9.4.2. At the time of the promulgation of the Constitutional Framework, there were two laws governing administrative procedure. See LAW ON ADMINISTRATIVE LAW SUITS, Official Gazette [hereinafter OG] SFRY No. 4/77 [hereinafter LAL]; see also LAW ON GENERAL ADMINISTRATIVE PROCEDURE, OG SFRY No. 585/86 [hereinafter LGAP]. The Kosovo Assembly has since passed a new Law on Administrative Procedure. See LAW ON THE ADMINISTRATIVE PROCEDURE (*promulgated by* UNMIK REGULATION NO. 2006/33) [hereinafter LAP]. The LAP controls the procedures before administrative bodies, while the older LAL still applies to judicial review and restates the right of review following exhaustion of administrative remedies. LAL art. 7. The new LAP does not completely replace the old LGAP; rather, LAP only supersedes those provisions of the applicable laws with which it is in contradiction. LAP art. 142. Thus, LAP does not reduce confusion over conflict of laws, as each administrative hearing must start with a determination of which provisions of which law apply to the particular case. Overall, the LAP has not made a significant difference in terms of judicial review of administrative decisions.

Individuals may appeal administrative decision only after exhausting all available administrative remedies of appeal. *Id.* art. 127.4; see also LAW ON REGULAR COURTS art. 29, OG Kos. No. 21/78. Individuals may challenge in court either the decision of a second instance administrative authority, or the decision of a first instance administrative authority, if no administrative appeal is possible from such a decision. LAL art. 7.

The grounds for challenging an administrative decision include: (a) if the laws upon which the decision was based were not properly applied; (b) if the administrative authority which reached the decision was incompetent; or (c) if administrative procedure was not correctly followed, or the facts were not correctly ascertained. *Id.* art. 10. Any individual with a personal stake in the administrative decision may bring an appeal. *Id.* art. 13. After a court makes a decision regarding an administrative appeal, it has power to compel administrative bodies to act where a legal duty exists. *Id.* arts. 42, 62-65.

The Law on Regular Courts authorizes district courts, in panels of 3 judges, to hear claims concerning illegal actions by government agencies. LAW ON REGULAR COURTS art. 29. It also provides that an administrative panel of the Supreme Court can decide on the legality of a final administrative enactment in administrative disputes. *Id.* art. 31. However, as the Supreme Court only has 16 judges, 2 of which are designated to hear KTA cases, it has designated only 2 justices to sit on the Administrative Panel (prior to 1989, there were 5 Supreme Court judges

designated to hear administrative appeals). OSCE Legal System Monitoring Section, REPORT ON THE ADMINISTRATIVE JUSTICE SYSTEM IN KOSOVO at 16 (2007) [hereinafter ADMINISTRATIVE JUSTICE REPORT]. Accordingly, there was a backlog of 2,164 administrative cases as of December 31, 2006. There are no provisions for interim remedies such as temporary injunctions.

The Ombudsperson has investigated a number of instances where such backlogs have occurred, and has issued reports finding violations of the complainants' rights to a remedy. See, e.g., Ombudsperson Institution of Kosovo, SIXTH ANNUAL REPORT at 77 (2006) (describing an administrative appeal which was delayed by the death of a Supreme Court judge, and the Supreme Court's resulting failure to provide for resolution of the deceased judge's cases until he could be replaced). The OSCE has also identified problems with the LAL and LAP which exacerbate delays in judicial review. See ADMINISTRATIVE JUSTICE REPORT 8-12. For instance, there are no courts which specialize in reviewing administrative appeals, except the Supreme Court's Administrative Panel. As such, the Supreme Court is the only court reviewing administrative decisions, and it is overwhelmed with administrative reviews, many of which should properly be addressed by a lower court (e.g., disputes regarding the amounts of pensions or child custody decisions).

The question of whether lower courts may also judicially review administrative decisions is not yet settled. If the administrative body does not act on the appeal, the applicant may address the court "in conformity with the applicable law on civil procedure." LAP art. 131.2. The OSCE has concluded that the civil procedure law and its subsequent amendments suggest that municipal and district courts should deal with these actions. See e.g. ADMINISTRATIVE JUSTICE REPORT 18; see also LAW ON CONTESTED PROCEDURE, OG SFRY No. 4/77, as amended by OG SFRY No 36/80, 69/82, 58/84, 74/87, 57/89, 20/90 and 35/91 [hereinafter LAW ON CONTESTED PROC.].

Regarding the judiciary's inability to review UNMIK and KFOR's administrative acts, there have been no new legislative developments since 2004. See UNMIK REGULATION NO. 2000/47 ON THE STATUS, PRIVILEGE, AND IMMUNITIES OF KFOR AND UNMIK AND THEIR PERSONNEL IN KOSOVO § 3.1. However, it has been reported that complaints of rights violations by UNMIK and KFOR have significantly decreased in recent years. The few instances when the international authorities have waived their immunity were cases involving grave criminal charges.

## Factor 7: Judicial Jurisdiction over Civil Liberties

***The judiciary has exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↑</b>
<p>The judiciary has jurisdiction over human rights cases except where the actions of UNMIK and KFOR are at issue. Outreach and training efforts on human rights issues have increased recently, leading to increased judicial awareness of the human rights standards and improvements in the practice of many judges; however, many judges still continue to demonstrate the lack of working knowledge in the application of relevant standards.</p>		

### Analysis/Background:

All persons in Kosovo shall enjoy "without discrimination on any ground and in full equality, human rights and fundamental freedoms." See CONSTITUTIONAL FRAMEWORK § 3.1. The PISGs are obliged to ensure the human rights and freedoms set forth in the following documents: the Universal Declaration of Human Rights; the ECHR; the ICCPR; the Convention on the Elimination of all Forms of Racial Discrimination; the CEDAW; the Convention on the Rights of the Child; the



European Charter for Regional or Minority Languages; and the Council of Europe's Framework Convention for the Protection of National Minorities. See *id.* § 3.1, 3.2. The rights and freedoms spelled out in these instruments are incorporated into domestic legal framework and directly applicable in Kosovo. *Id.* § 3.3.

Several pieces of domestic legislation directly address the judiciary's role in the protection of civil liberties. Generally speaking, courts have the jurisdiction to review cases involving alleged human rights violations, and to assure that standards regarding detention, speedy trial, public hearings, and the like are followed in criminal prosecutions and civil matters. This jurisdiction was clearly established from the beginning of UNMIK's mandate. Thus, the PCPC includes several human rights protections related to criminal procedure. It grants judges jurisdiction to "make decisions on actions and measures which limit the human rights and basic freedoms of persons" during pretrial proceedings. PCPC art. 9.3. Detained persons are entitled to a judicial review of the legality of their detention and other deprivation of liberty, and they must be brought before a judge within 72 hours of arrest. *Id.* arts. 13(2), 14(2), 211, 212. The PCPC also has a provision which is analogous to habeas corpus: at any time during detention, a detainee may petition a judge to determine the lawfulness of his/her continued confinement. *Id.* art. 286(3). Additionally, the Anti-Discrimination Law grants the judiciary the power to hear discrimination-related cases, and to hear appeals from cases before administrative bodies, so long as all administrative appeals are exhausted. See ANTI-DISCRIMINATION LAW arts. 3, 7.

Despite these protections, both UNMIK and KFOR continue to be shielded with criminal and civil immunity. Although UNMIK grants the Ombudsperson the authority to enter into a bilateral agreement with the SRSG on procedures for cases dealing with UNMIK, the assessment team has not been made aware of any such agreement. See UNMIK REGULATION No. 2006/6 ON THE OMBUDSPERSON INSTITUTION IN KOSOVO § 3.4 [hereinafter OMBUDSPERSON INSTITUTION REGULATION]. In January 2005, the Parliamentary Assembly of the Council of Europe recommended that UNMIK and KFOR, in cooperation with the Council of Europe, establish a Human Rights Court for Kosovo with jurisdiction over alleged violations of the rights guaranteed by the ECHR (including, but not limited to, violations of those rights committed by UNMIK and KFOR). Council of Europe, RESOLUTION 1417: COE PROTECTION OF HUMAN RIGHTS IN KOSOVO (2005). However, as of the time this assessment was written, no such Court had been established. The Venice Commission of the Council of Europe also recommended convening a Human Rights Advisory Panel until such a Court might be established. See VENICE COMMISSION OPINION No. 280/2004; see also UNMIK REGULATION No. 2006/12 ON THE ESTABLISHMENT OF A HUMAN RIGHTS ADVISORY PANEL. That Panel has been created and its members have been appointed, but it is not yet operational. See Ombudsperson Institution in Kosovo, SEVENTH ANNUAL REPORT 2006-2007, ADDRESSED TO THE ASSEMBLY OF KOSOVO, at 14 (July 2007) [hereinafter OMBUDSPERSON'S 7TH ANNUAL REPORT].

Increased numbers of trainings and increased judicial participation in those trainings have raised judicial awareness of the human rights standards incorporated into Kosovo's laws and improved the practice of many judges. For example, the KJI, in conjunction with the Council of Europe, has presented trainings on the ECHR and European Court of Human Rights law. During the first half of 2007, the KJI has had numerous workshops on criminal procedure, including a workshop on the relationship between prosecutors, police, and judges (but not advocates), as well as a 3-day workshop on the PCPC and a two-day seminar on EU criminal law.

Despite the progress noted above, effective enforcement of civil rights by the judiciary is weakened by several factors. Some protections incorporated into the laws have yet to be fully embraced. One such protection, is equality of arms between the defendant and prosecutor in criminal proceedings. See PCPC art. 10. While some defense advocates are becoming increasingly knowledgeable and vigorous in representing clients, many advocates have not yet adopted a pro-active role in criminal litigation. Moreover, many are reluctant to utilize legal concepts and arguments which judges may not yet accept.

A further weakness reported by respondents is the continued lack of working knowledge and interest displayed by many judges regarding the application of international human rights standards, despite increased availability of and participation in training. As confirmed by complaints received by the Ombudsperson, this shortcoming is reflected in the lack of specific findings of fact and conclusions of law in written judicial decisions. Court decisions which lack specific findings raise inferences that the judge did not properly consider the facts or the law (perhaps due to discrimination or corruption). This has implications on the propriety of detention, and also results in an incomplete record on appeal.

## Factor 8: System of Appellate Review

*Judicial decisions may be reversed only through the judicial appellate process.*

<b>Conclusion</b>	<b>Correlation: Positive</b>	<b>Trend: ↑</b>
While the appellate process itself is often slow and subject to some defects, judicial decisions are reversed only through the appellate process. Neither UNMIK nor KFOR have reversed Supreme Court decisions since 2001.		

### Analysis/Background:

Kosovo's laws guarantee a party or its legal representative the right to appeal any judgment issued by a court of first instance. See PCPC art. 398; LAW ON CONTESTED PROC art. 348. Minor offenses courts have first-instance jurisdiction in criminal cases punishable by a sentence of up to 60 days. Cases there are tried by a single judge. The High Court for Minor Offenses, which sits in panels of 3 judges, exercises exclusive and final appellate jurisdiction over these cases. All appeals from municipal courts – which try criminal offenses where the maximum punishment is a fine or imprisonment of up to 5 years and most civil cases – go to the district courts, which also conduct first-instance trials in criminal cases where the maximum punishment exceeds 5 years of imprisonment, as well as certain civil matters.<sup>8</sup> District courts may conduct *de novo* review of both the facts and the legal reasoning behind the decision. See LAW ON REGULAR COURTS art. 29; PCPC art. 23(2). As the highest appellate jurisdiction in Kosovo, the Supreme Court hears appeals from district courts and the Commercial Court's first instance decisions. In limited instances, there is also a right to a second appeal of certain criminal judgments to the Supreme Court (i.e., the right to appeal to the Supreme Court a district court decision which is on appeal from a municipal court). See LAW ON REGULAR COURTS art. 31; PCPC arts. 25(1), 398-414. These include cases where a district court imposed long-term imprisonment,<sup>9</sup> or affirmed such a sentence issued by a municipal court, or where a district court reversed a municipal court acquittal and rendered a conviction in its place, or if a district court based its decision on appeal on a different conclusion of facts than the municipal court that rendered the original decision. See PCPC art. 430. Depending on the type of jurisdiction exercised by the Supreme Court in a given case, it conducts hearings in panels of 3 or 5 professional judges, while the entire Supreme Court sits when reviewing petitions for certiorari. *Id.* art. 26; see also LAW ON CONTESTED PROC. arts. 44-45.

<sup>8</sup> If passed, the Draft Law would reorganize the appeals process for the judiciary. The Draft Law calls for the creation of a Court of Appeals, to hear appeals from all first instance courts. A 3-judge panel of the Court of Appeals would hear all such cases, and its decisions would in turn be reviewed by the Supreme Court.

<sup>9</sup> Long-term imprisonment is defined as imprisonment for a term of 21-40 years, and can be imposed only for the most serious criminal offenses; committed intentionally, under particularly aggravating circumstances, or causing especially grave consequences. See PROVISIONAL CRIMINAL CODE art. 37 (*promulgated by UNMIK Regulation No. 2003/25*) [hereinafter PCC].

Kosovo’s laws specifically address appeals by parties from court decisions, based on perceived “discrimination based on community membership.” See JUSTICE SYSTEM FRAMEWORK REGULATION § 6. An individual subjected to an allegedly discriminatory decision may petition the SRSG to assign a panel of judges (including one or more international judges) to review that decision. The SRSG will grant the petition and appoint the panel if he finds “reasonable grounds for believing that the decision may be the result of discrimination.” See *id.* It is unclear whether these provisions have succeeded in increasing the confidence of ethnic minorities in the court system. The SRSG office has not received any such requests, and respondents interviewed for this assessment were generally unaware of the existence of this provision. No public awareness campaign has been launched to inform the population of the existence of this remedy.

In practice, since 2001 judicial decisions have been reversed only through the judicial appellate process. In 2006, 2,882 civil decisions (approximately 26.11% of the total caseload) and 1,777 criminal case decisions (18.4% of the caseload) were appealed from municipal courts to the district courts. No data was provided as to the percentage of appeals to the Supreme Court, or from the courts of minor offenses to the High Court of Minor Offenses. It is also not clear what portion of the district courts’ caseload consists of second instance cases; nor is the average length of time for resolution of an appeal at the Supreme Court known.

Interviewees reported some backlogs in the appeals process, especially in the Pristina District Court. Reportedly, there were much fewer delays in Prizren and Gijilan’s District Courts. At the beginning of 2007, there were 224 outstanding criminal appeals cases before the Supreme Court. From the beginning of 2007 through end of June 2007, the Supreme Court received 321 additional criminal appeals; and resolved a total of 337 appeals, leaving the number of outstanding appeals at 208. Similarly, the Supreme Court began 2007 with 25 outstanding civil appeals, and as of June 30, 2007, there were only 22 outstanding civil appeals.

**Factor 9: Contempt/Subpoena/Enforcement**

***Judges have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers are respected and supported by other branches of government.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↔</b>
<p>The judiciary has adequate subpoena and contempt powers, but judges do not always use these powers effectively. The judiciary also has the sole authority for the enforcement of judgments; however, serious problems persist regarding the failure to enforce civil judgments, and to a lesser degree there is also a backlog in the enforcement of criminal sanctions. Recent pilot projects are setting a model for more effective enforcement of civil judgments.</p>		

**Analysis/Background:**

The judiciary in Kosovo has the power to subpoena witnesses and hold parties in contempt of court. Anyone called as a witness is obliged to appear and provide testimony, with a few exceptions based on evidentiary law (e.g., self-incrimination). See PCPC arts. 158(3), 159-162. The president of the court panel makes the determination as to whether a witness may refuse to give testimony. LAW ON CONTESTED PROC. art. 235, 238. A witness who fails to appear, or who fails to testify upon appearance, may be compelled to appear and may also be fined or imprisoned for failing to do so. See *id.* art. 248; PCPC art. 167. Expert witnesses who fail to appear may be compelled to do so in certain circumstances, and may also be fined for a failure to appear. See PCPC art. 177; LAW ON CONTESTED PROC. art. 255. The PCPC allows fines of up to 250 Euros for a witness’ failure to appear or testify. PCPC arts. 167, 177. In civil proceedings, the court may also order that a party to proceedings or any third party produce a document in its

possession within a specified time. See LAW ON CONTESTED PROC. art. 233. The court may issue a default judgment if a civil respondent fails to appear at a hearing, to deny allegations of the complaint, or to submit a defense to the claim. *Id.* art. 332.

The failure of defendants, advocates, witnesses, and even prosecutors to appear at hearings continues to be a major cause of unacceptable delays in criminal proceedings. Quite often, it is the accused who is absent. Many of these individuals no longer live in Kosovo, or no longer live at their most recent pre-war address, or the street name in their address has been changed. In one instance observed by the assessment team, a court had scheduled 6 indictment confirmation hearings for the month of July, anticipating that many out-of-country workers would be returning to Kosovo for summer holidays during that month. Despite that fact, none of the accused appeared. An additional problem has been the difficulty of delivery of summons to defendants and witnesses in ethnic enclaves, particularly in Northern Mitrovica. Safety concerns for the people delivering the summons, lack of cooperation by the police and postal service, and threats or pressure on witnesses or families are still a significant, although decreasing, obstacle. Respondents reported that judges are becoming more accustomed to availing themselves of the power to have defendants and witnesses forcibly brought to court, but only after second non-appearances. However, judges are reportedly reluctant to sanction expert witnesses, as they understand that the latter often fail to appear because they are not being paid by the court.

Failure by prosecutors to appear also causes delays in municipal courts. One reason for this may be geographic inconvenience: public prosecutors are assigned by district rather than by court, so one prosecutor may be assigned to several municipal courts. Prosecutors' workloads have increased recently, exacerbating the problem of absent prosecutors. Prior to the 2003 passage of the PCPC, prosecutors were not required to be present at all detention and other pre-trial hearings, and so the PCPC has increased their workload. The PCPC also transferred responsibility for investigation from investigative judges to prosecutors. See PCPC arts. 46.1, 51.

Advocates also contribute to delays, either intentionally or by failing to carefully manage and follow their hearing calendars. Intentionally delaying proceedings is punishable by a fine. See *id.* art. 146. However, judges rarely use their power to sanction advocates. Respondents suggested that the imposition of fines or referral to the KCA disciplinary committee for appropriate action would not only move cases along but would have broader benefits in putting the bar on notice that delays will not be condoned.

The disruption of trials by unruly behavior may also be the subject of direct contempt charges by the presiding judge. See *id.* art. 335; LAW ON CONTESTED PROC. art. 317. In response to contempt, the judge may issue a warning or remove the offending individual, and may also issue a fine of up to 1,000 Euros. PCPC art. 336(1); LAW ON CONTESTED PROC. art. 318. The judge may also deny defense counsel the right to represent a client if counsel persists in being disruptive. PCPC art. 336(3). However, dismissing defense counsel could be counterproductive, as it not only requires a continuance of the proceeding, but may also involve substitution of a less prepared advocate and thus further disadvantage the accused.

The judiciary has the sole power to enforce both criminal and civil decisions; however, the enforcement process is backlogged. Indeed, USAID has reported that nearly 33% of all pending cases in Kosovo were civil enforcement cases. USAID, *Justice System Reform Activity in Kosovo Newsletter 7* (March 2007). Enforcement of civil judgments is not automatic. To have a civil judgment enforced, the prevailing party must file a request for enforcement of the court decision with the judge responsible for overseeing enforcement. The municipal courts oversee the enforcement of judgments handed down by both district and municipal courts. The judiciary also oversees the enforcement of administrative decisions. LAW ON EXECUTIVE PROCEDURE arts. 3, 16, OG SFRY No. 20/78 [hereinafter LEP]. Decisions made by first instance courts are enforced by an individual judge, while decisions resulting from appeals proceedings are enforced by a panel of 3 judges. *Id.* art. 7. In both instances, court clerks handle the enforcement process after enforcement judgments have been handed down.



In addition to requiring a separate judicial hearing, the LEP, which dates back to before the breakup of Yugoslavia, provides further protection to debtors and allows many opportunities for debtors to raise objections during court proceedings. Not surprisingly, this law is used and abused by debtors to create delays in enforcement. As a result, the enforcement system for civil judgments suffers from severe backlogs, as illustrated in the following table.

#### ENFORCEMENT OF CIVIL JUDGMENTS BY MUNICIPAL COURTS, 2004-2006

Year	New cases received	Cases resolved	Outstanding cases
2004	22,345	16,228	45,343
2005	11,969	12,615	44,655
2006	19,156	18,903	44,874

Many problems in the enforcement process stem from the inability of prevailing parties to collect on judgments from impoverished parties. Often, debtors cannot afford to pay their obligations. Businesses and individuals do not always keep their money in Kosovo's banks, making collection more difficult. Backlogs in the enforcement process compound these problems.

In addition to ordinary civil judgments, Kosovo courts are also charged with enforcing the so-called "authentic document" cases, such as utility bills. Authentic documents have inherent characteristics of reliability, so they have the same value as a civil judgment for the purpose of proving a debt. Holders of authentic documents may access the enforcement court process without an underlying judgment. These authentic document cases constitute the bulk of the courts' civil enforcement caseload. Thus, 72% of the enforcement cases in 4 of the pilot courts reported on (those in Pristina, Prizren, Gjilan, and Ferizaj) were authentic document cases. 80% of these cases involved unpaid telephone bills, and only 6% of the cases involved values of more than 500 Euros. *Justice System Reform Activity in Kosovo Newsletter* 7-8. The proportion of authentic documents is higher among older (and therefore backlogged) cases. Of the remaining 28% of civil enforcement cases which were not authentic document cases, more than half were civil enforcement cases aimed at collecting from convicted defendants the expenses incurred during criminal proceedings. The amounts at issue were usually less than 100 Euros. Some courts also sought to collect criminal fines. The remainder of cases consists of civil cases in which a private party seeks to enforce a civil judgment.

During the past year, USAID's JSRA program has made efforts aimed at reducing backlogs in civil enforcement proceedings. This pilot project has grown to cover 10 municipal courts. The project involved identifying, classifying, and taking inventory of pending civil enforcement cases, to produce a detailed mapping of existing court procedures and a new backlog reduction action plan. The program's backlog reduction plan provides for dealing with authentic document cases separately from other civil judgment cases, and some of the pilot courts have instituted mechanisms by which large creditors (mostly utility companies) can participate more actively in monitoring the progress of their cases. For instance, the Prizren Municipal Court entered into a Memorandum of Agreement with a utility company for cooperation in collection of these debts. The Court's plan involves weekly meetings between the Court's enforcement coordinator and a utility company's staff member with the aim of resolving difficult cases.

As in Prizren, other courts have appointed staff to supervise the enforcement cases and oversee the activities of trained field officers. Standard forms are being created for reports by the field workers and for disposition reports by the enforcement officer, as well as case disposition forms for the presiding judge. There has been insufficient time to evaluate whether these reforms lead to backlog reductions throughout the court system without further donor involvement.

There is also legislation providing for the execution of criminal judgments. The PCPC provides that sanctions shall be enforced immediately upon the finality of a decision, and that the body that rendered the decision shall enforce it, without the need to file any separate enforcement proceeding. See PCPC art. 138. If any questions arise regarding what the sanction against the

guilty party should be, or whether the guilty party should benefit from time already served in pre-trial detention, a final determination on the issue is made by the president of the court which rendered the judgment. *Id.* art. 139. The PCPC also provides that if a fine cannot be collected, even by compulsion, alternative sanctions spelled out in the PCC (e.g. installment payments or community service) would apply. PCPC art. 136; *see also* PCC art. 39(3). Provisions for enforcement of criminal sanctions shall be set forth in separate legislation. PCPC art. 135(4); *see also generally* LAW ON EXECUTION OF PENAL SANCTIONS (*promulgated by* UNMIK REGULATION No. 2004/46) [hereinafter LEPS].

As is the case with the enforcement of civil judgments, there are growing backlogs regarding the execution of criminal judgments. These trends are shown in the following table.

#### ENFORCEMENT OF CRIMINAL JUDGMENTS, 2004-2006

Year	New cases received	Cases resolved	Outstanding cases
2004	1,782	1,043	1,808
2005	2,194	1,621	2,342
2006	2,726	2,354	2,686

While the number of pending criminal enforcement cases is much smaller than the number of pending civil cases, enforcement delays are steadily increasing. Respondents reported that, as is the case when issuing subpoenas, the inability to locate a criminal defendant is often a significant obstacle to the enforcement of criminal judgments.

### III. Financial Resources

#### Factor 10: Budgetary Input

*The judiciary has a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches, and, once funds are allocated to the judiciary, the judiciary has control over its own budget and how such funds are expended.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↑</b>
While the judiciary does not receive sufficient funds from the Kosovo budget to manage an effective court system, the judiciary has recently been granted greater control over the drafting and management of its budget.		

#### Analysis/Background:

The KJC oversees the preparation, management, and execution of judiciary's budgets, and is responsible for monitoring the expenditure of allocated funds, as well as for accounting and auditing functions.<sup>10</sup> The KJC is independent in performing these functions." See KJC REGULATION § 9. In managing the court budgets, the KJC works in cooperation with the courts themselves, through the presidents of the courts; however, the KJC Regulation is silent on how this cooperation is intended to occur. *Id.* Each court president also has the responsibility for managing the budget of his/her court. LAW ON REGULAR COURTS art. 57.

<sup>10</sup> Control over the prosecutorial office budget was recently shifted to the MOJ, while salaries for international judges and prosecutors have remained the province of the DOJ.



In order to develop recommendations regarding the judiciary's budget and to review and provide feedback on the proposed budget, the KJC has established a Committee on Budget, Finances, and Human Resources. See KJC INTERNAL REGULATIONS § 10.10. This Committee consists of 6 members and is chaired by an international judge. The Committee has accountants and financial professionals on staff, as well as an UNMIK advisor and a USAID-JSRA project representative who provided training to its budget and finance department. After convening, the Committee must submit the draft judicial budget to the entire KJC for approval. In drafting the budget, the Committee analyzes current and anticipated caseloads of the courts, as well as expenditures from the previous year. However, respondents reported that while the Committee visited all 5 court districts to identify needs, and while court presidents had an opportunity to submit budget requests, these requests were apparently not significantly reflected in the final budget proposals approved by the KJC.

Despite the transfer of power from the KJPC to the KJC, both the Kosovo government and UNMIK continue to play an active role in the approval of the judiciary's budget. After the KJC approves a draft budget for the judiciary, it must submit the proposal to the Ministry of Economy and Finance [hereinafter MEF], which initially approves the proposal before sending it on to the Kosovo Assembly for review. Following approval by the Kosovo Assembly, the SRSG promulgates the budget. In order to maintain as much distance from the executive branch as possible, the KJC must provide a copy of the budget to the MOJ; however, the budget is not directly submitted to the MEF through the MOJ. See KJC REGULATION § 9.5.

The judiciary's budget has generally been decreasing in recent years, as the number of salaried positions in the judiciary has been cut. According to the KJC, the judiciary's 2006 budget was approximately 1.5% of the total Kosovo Consolidated Budget of 700,000,000 Euros.

#### **JUDICIAL BUDGET: FUNDS REQUESTED AND FUNDS RECEIVED, 2004-2007 (IN EUROS)**

<b>Year</b>	<b>Funds requested by KJC</b>	<b>Funds received</b>
<b>2004</b>	12,000,471	11,436,471
<b>2005</b>	12,390,364	12,182,580
<b>2006</b>	11,582,281	10,693,464
<b>2007</b>	10,196,024	9,126,782

Presently, the judicial budget contains funding for salaries, goods and services, and capital expenditures. According to a transmittal letter from the KJC Secretariat to the MEF, the KJC's 2006 budget included 5,007,967 Euros to pay salaries for 1,731 positions. There was uniform agreement among interviewees on the need to raise judicial salaries, and the increase in the total funds requested for 2008 reflect significant planned salary increases. See Factor 11 below for further details. The need for renovation and construction of court buildings is also widely recognized. See Factor 12 below for a description of the court improvement projects included in the most recent judiciary budget request.

In April 2007, the KJC released a Strategic Plan for the Kosovo Judiciary, with 10 stated goals for improving the courts. Strategic Goal 3 was to "establish effective procedures and practices for budgeting and financial management in and for the courts." See KJC, STRATEGIC PLAN FOR THE KOSOVO JUDICIARY 2007-2012 at 12, 18 (2007) [hereinafter KJC STRATEGIC PLAN]. With the help from a USAID-JSRA advisor, the KJC has started working towards this goal.

The KJA is also attempting to play a larger role in the budgetary process. The KJA Strategic Plan for 2007-2009 listed as contributing problems to the judiciary's budget situation the failure of the courts to report their budgetary needs, as well as the lack of cooperation between the KJC and the courts regarding the judiciary's budget. KJA, STRATEGIC PLAN 2007-2009 at 9-10 (2007) [hereinafter KJA STRATEGIC PLAN]. The KJA reported that it was developing a list of the judiciary's needs in order to address this disconnect in budget planning. These efforts are especially relevant, given that the judiciary's budget has decreased over the past several years.

The transfer of power from the KJPC to the KJC had the further effect of changing the sources of revenue for the judiciary's budget. Prior to establishment of the KJC, revenue generated by the courts (traffic and other fines, as well as court fees) was allocated to the Kosovo Consolidated Budget. A proposed agreement between the KJC and the MEF calls for the KJC to receive 40% of the revenue generated by court fees in 2008, with the MEF receiving the remaining amount. This revenue from court fees would go towards the payment of lay judges, judicial experts, and the compensation of persons who were punished without legal basis (to the extent that the KJC budget cannot afford such payments and compensations). It should be noted that court fee amounts still vary considerably from court to court and region to region. Efforts have been made since 2004 to develop a uniform fee schedule; however, it has not been promulgated yet.

## Factor 11: Adequacy of Judicial Salaries

***Judicial salaries are generally sufficient to attract and retain qualified judges, enabling them to support their families and live in a reasonably secure environment, without having to have recourse to other sources of income.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↔</b>
<p>Judicial salaries continue to be lower than the salaries of senior legislative and executive branch officials. The KJC and the KJA have expressed concern over the need to raise salaries in order to attract and retain qualified judges. While judicial salaries are on par with those of similarly situated prosecutors, private sector work is seen as much more lucrative than judicial appointments.</p>		

### Analysis/Background:

Judicial salaries have remained extremely low since the first Kosovo JRI assessment was conducted in 2002. They are insufficient to enable judges to support their families without having to resort to other sources of income. Judicial salaries have not been increased since a 5% increase in 2002, and there are no legal provisions to protect judicial salaries.

### **CURRENT JUDICIAL SALARIES (IN EUROS)**

<b>Court level</b>	<b>Judicial salary range</b>	
	<b>Judge</b>	<b>Court president</b>
<b>Supreme Court</b>	628	667
<b>District courts</b>	550	589
<b>Minor offenses courts</b>	393	446

After retirement, judges are entitled to pensions of only about 40 Euros a month. The low judicial salaries and pensions are particularly problematic as the cost of living has risen considerably in the past 5 years. Respondents reported that many judges leave the judiciary after years of service to enter practice as an advocate where they can earn substantially more.

Judicial salaries are considerably lower than those paid to senior government leaders in the executive branch and the Assembly. However, judicial salaries are much higher than the average salaries of both public and private sector employees in Kosovo, who earn, respectively, an average of 190 and 211 Euros a month. See STATISTICAL OFFICE OF KOSOVO, KOSOVO IN FIGURES 2006 at 42. Judges earn roughly the same salaries as their counterparts in the prosecutors' offices. For instance, municipal level prosecutors earn 472-551 Euros each month, and district level prosecutors earn 550- 589 Euros per month. It was also reported that ethnic Serbian judges accept positions in the parallel courts or even in Serbia proper, where the average monthly salary

of municipal court judges is 800-1,000 Euros, or 120-1,400 Euros for district court judges, while Serbian Supreme Court judges earn up to 2,000 Euros a month. As a result of the low salaries, it is difficult to attract the best and the brightest law graduates to a career in the judiciary. When a group of students interviewed by the assessment team was asked if they wanted to be judges, almost all replied in the negative. Among the reasons cited for their disinterest were low judicial salaries as well as security concerns.

The KJC Strategic Plan lists low judicial salaries as a primary concern, in combination with other poor working conditions such as outdated and inadequate court facilities. KJC STRATEGIC PLAN at 9. The KJC's budget request for 2008-2010 points out that it is not possible to adequately staff the judicial system if judicial salaries are not on par with legislative and executive salaries. Accordingly, the KJC's proposed 2008-2010 budget envisions significant salary increases for judges. The budget proposal, outlined in the following table, presents an hierarchical chart allocating the salaries of different level judges as a percentage of the salary of the President of the Supreme Court.

### PROPOSED JUDICIAL SALARIES (IN EUROS)

Court level	Proposed judicial salary range	
	Judge	Court president
Supreme Court	1,800	2,000
District courts	1,500	1,700
Municipal courts	1,200	1,300
Minor offenses courts	800	900
High Court of Minor Offenses	1,000	1,500
Commercial Court	1,400	1,500

The KJA Strategic Plan similarly called for an increase in judicial salaries. KJA STRATEGIC PLAN at 12. Individual judges echoed these complaints; they view their low salaries as a reflection of a lack of respect for the judiciary.

## Factor 12: Judicial Buildings

*Judicial buildings are conveniently located and easy to find, and they provide a respectable environment for the dispensation of justice with adequate infrastructure.*

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↓</b>
Judicial buildings are conveniently located and easy to find; however, increasing disrepair and overcrowding frequently make them inadequate and can lead to a lack of transparency and efficiency in court proceedings.		

### Analysis/Background:

Most judicial buildings are conveniently located and easy to find. However, while the actual number and condition of courthouses and courtrooms have not deteriorated significantly since the Kosovo JRI 2004, the poor condition of court facilities have impaired the implementation of systemic improvements, such as introduction of audio recording for verbatim trial transcripts. Thus far, recording systems have been installed in few courtrooms. See discussion in Factor 25 below. There are also reports that court buildings generally lack private facilities for lawyers to meet with their clients. This situation was especially troubling to a number of respondents, who reported that the lack of space leads to lawyer-client meetings occurring in hallways, in the

prosecutors' offices, or in the judges' chambers (sometimes even with the judge or prosecutor present).

As noted in Kosovo JRI 2004, most courthouses do not have a sufficient number of courtrooms. This situation has not changed in the past few years, and meanwhile, caseloads have continued to increase. These space constraints have resulted in judges being forced to conduct court proceedings in their chambers. This has negative effects on the public access to proceedings, as discussed in greater detail in Factor 23 below. Conditions in certain cities are particularly in need of improvement. For instance, the Northern Mitrovica court building houses the region's district, municipal, and minor offense courts in only 4 courtrooms, shared by 15 judges. There are also reports that Pristina's court facilities are overcrowded, especially in regards to the municipal court, the minor offenses court, and the Supreme Court. Thus, the Pristina Municipal Court is staffed by 28 judges, and it serves the largest population of any courthouse with only one poorly maintained courtroom. In Pristina, judges have to sign up for courtrooms on a whiteboard in an administrative office; they are granted courtrooms on a first-come, first-served basis. While the Prizren District Court has a state-of-the-art courtroom with audio and video equipment, and 2 other adequate courtrooms, the Prizren Municipal Court has no useable facilities and must share the District Court's 3 courtrooms. The assessment team also received reports of overcrowding in the Gjilan court facilities. UNMIK has recently suggested that mobile courts could be employed to improve overcrowding as needed in these sorts of situations.

The KJC recognizes the need for renovation and construction of new court buildings. The KJC's 2008-2010 budget proposal envisions a number of such projects which, if implemented, would greatly improve the situation in Kosovo's courts. These projects include the construction of new court buildings for the Pristina Municipal Court, Minor Offenses Court, and District Court, as well as the construction of new facilities for the Commercial Court and the KJC.<sup>11</sup> The cost of these proposed projects would total 4.6 million Euros between 2008 and 2010. The KJC 2008-2010 budget proposal also allots additional funds for renovations to the Vushtrri Municipal Court and Minor Offenses Court, the Peja District Court and Municipal Court, and the Istog Municipal Court.

### Factor 13: Judicial Security

***Sufficient resources are allocated to protect judges from threats such as harassment, assault, and assassination.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
Court buildings are reasonably well secured, but resources have not been allocated to ensure the physical security of judges outside courthouses. While recommendations have been made to increase security, these recommendations have not yet been fully implemented.		

#### Analysis/Background:

While legislation addresses the security in court facilities, there is no legislation specifically addressing the provision of security for individual judges, either inside or outside of courthouses. By law, the KJC's Court Administration Committee is tasked with developing and recommending to the KJC policies relating to court security. See KJC INTERNAL REGULATIONS § 10.8. In addition, the Law on Regular Courts allows (but does not require) courts to hire guards to protect the "premises, property and persons," as well as to keep order. LAW ON REGULAR COURTS art. 104.

<sup>11</sup> The land for the new courthouses in Pristina has already been allocated by the Pristina Municipal Assembly; however, it remains under the control of the KTA, and so has not yet been released for use by the judiciary.

Access to court buildings is restricted throughout Kosovo. Some court buildings utilize metal detectors and, generally, individuals seeking entry into court buildings are required to present identification and face extensive inquiry from security guards. This is especially true at the Supreme Court, where visitors must leave identification with the security guard and are required to tell guards what their business is in the court building. While this may not be fully consistent with an open atmosphere which fosters transparency, such precautions appear to be necessary at least until the situation in Kosovo has stabilized.

Once a visitor gains entrance to a court building, he/she is generally free to move around inside the building without an escort. Most respondents were not concerned for their safety within the court premises. However, almost all judges interviewed by the assessment team had received personal threats, and some have even been the subject of beatings or crimes against their property. Incidents may occur at the court facilities, on the bus ride to work, on the street, or via phone, and may target the judge or a member of the judge's family. Respondents reported that these threats and violence have generally been the domain of the Kosovo Police Service. Nevertheless, some judges expressed a desire for secure transportation to and from the court, and some felt that it would be advisable to hire bodyguards.

In particular, the situation in Northern Mitrovica has generated exceptional concerns regarding judicial security. Security problems have been increasing there as uncertainty has grown regarding the independence and future status of Kosovo. Judges and court staff who commute from homes in Southern Mitrovica are transported to and from the Northern Mitrovica courthouse in a bus reserved for that purpose. Until the spring of 2007, there was only sufficient funding for guards at the Mitrovica court to work two shifts a day. Hence, the building closed daily at 3 p.m., preventing the completion of a full work day. In spring 2007, the court president was able to negotiate funding for a third shift, but two guards have left since that time, and the court is back to its abbreviated hours. The DJA, KJC, and MOJ have all been informed of the situation but there had been no response as of the drafting of this assessment. There have been several after-hours break-ins at the Northern Mitrovica courthouse. In a 2004 incident, intruders tried to steal several computers from the courthouse and started a fire in one of the courtrooms before being apprehended by the police. In 2006, a court guard intervened in another attempted break-in. An incident was also reported where an explosive device was thrown into a judge's car; although the judge was not injured. Fortunately, no judges have been killed in Northern Mitrovica since 2000.

Judges also reported concerns about the safety of witnesses, and security is often cited as the reason for the failure of witnesses to respond to summons to appear in court. The district court in Prizren has addressed this problem through technological improvements: there is now a courtroom equipped with both audio and video recording systems and flat screen monitors for viewing, along with a contained area inside the courtroom with one-way mirrors to shield at-risk witnesses. A witness in this enclosure cannot be seen from the courtroom itself, and the witness may actually even be in another location with his/her voice (often digitally altered) being broadcast into the courtroom.

A security consultant has recommended that closed circuit cameras and radio systems also be installed in each of Kosovo's court buildings. Accordingly, funding for such systems has been included in the judiciary's 2008 budget request. It is anticipated that, beginning in 2008, the KJC will install closed circuit cameras in all of Kosovo's courts, beginning with the Supreme Court.

## IV. Structural Safeguards

### Factor 14: Guaranteed tenure

***Senior level judges are appointed for fixed terms that provide a guaranteed tenure, which is protected until retirement age or the expiration of a defined term of substantial duration.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
<p>Judicial tenure is presently tied to the duration of the UNMIK administration. A procedure for the reappointment of judges following the end of UNMIK's mandate has been tentatively approved, but it is not yet operational. Thus, uncertainty over job security is likely to increase as the departure of UNMIK draws closer.</p>		

#### Analysis/Background:

There is currently a great deal of uncertainty regarding the tenure of Kosovo's judges. Initially, UNMIK mandated that judges were appointed for 3-, 6-, or 9-month renewable terms at the discretion of the SRSG. In December 2001, following a KJPC recommendation, judicial tenures were extended through the end of the UNMIK administration. Thus, the tenure of all current judges is tied to the duration of UNMIK's mandate, subject to good behavior and mandatory retirement at age 65. At that time, all of Kosovo's currently sitting judges will be subject to a one-time, comprehensive evaluation for reappointment to permanent tenures, a process that will be carried out through an IJPC (an autonomous body of the KJC). See JUSTICE SYSTEM FRAMEWORK REGULATION § 7; IJPC DIRECTION § 1.1; see *also* Factor 2 above for additional discussion of the proposed reappointment process. Although implementation of the IJPC was to start in May 2007, the signing of the relevant operational documents has been delayed indefinitely.

If the IJPC is eventually finalized, it would initially consist of 5 international members; however, as new members from among Kosovar judges and prosecutors vetted by the IJPC are appointed to the KJC, the local control and the numerical composition of IJPC will gradually increase. See IJPC DIRECTION § 1.4, 7.2-7.4. The reappointment process will be organized in 3 successive phases. The first phase will include all Supreme Court position, the second will involve the selection of judges for the High Court of Minor Offenses, district courts, and Commercial Court, and the final stage will extend to judges of municipal courts and courts of minor offenses. *Id.* § 2.3. At each stage, all judicial positions at particular court levels will be advertised publicly, and all sitting judges, as well as other legal professionals who meet the minimum requirements for appointment to the judiciary, will be eligible to apply. *Id.* § 2.1, 2.4. External candidates will be required to pass the judicial entry examination; however, sitting judges will, with a few exceptions, be generally exempt from this requirement. *Id.* § 2.4, 2.6.3, 3.4. In addition, all candidates, without exception, will be required to pass an examination on the judicial ethics code. *Id.* § 2.6.4. All candidates who meet the criteria for appointment will be invited for an interview. In evaluating the applicants, the IJPC will use uniform criteria and standardized interview questions. *Id.* § 2.6.1-2.6.2, 3.1. Following re-selection, judges would be appointment until the mandatory retirement age of 65 (subject to disciplinary provisions provided by law). *Id.* § 1.1. Applicants who are not selected for appointment will be able to file a request for reconsideration with the IJPC, showing that the IJPC's decisions was based on material errors or omissions, or that new information is now available, which would have significantly affected the IJPC's decisions had it been available at the time of the initial reviews. *Id.* § 6. The tenure of sitting judges who have not been reappointed will terminate with the commencement of duties by new judges appointed into the respective positions. *Id.* § 2.11.

Although judges are understandably anxious given the lack of certainty regarding their tenure or their reappointment at the end of the UNMIK mandate, it must be noted that there are no reports



that the forthcoming reevaluation of judges has raised fears of politically motivated firings. Indeed, there is no evidence that the approaching expiration of judicial tenures has placed constraints on the independence of judicial decision-making. Some respondents favorably viewed the prospect of a reappointment process, as such a vetting process might weed out currently serving judges who have questionable abilities.

## Factor 15: Objective Judicial Advancement Criteria

***Judges are advanced through the judicial system on the basis of objective criteria such as ability, integrity, and experience.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↓</b>
Judicial advancement criteria are not specifically set forth in any law or regulation. Since the creation of the KJC, it is unclear whether judicial evaluations formerly performed by the KJPC have the legal authority to inform the SRSG's decisions regarding promotions.		

### Analysis/Background:

The KJPC Regulation granted the KJPC the power to recommend to the SRSG the continued service and advancement of judges and lay judges who were already employed by the judiciary. These recommendations were based on the continued fulfillment of the qualifications for appointment. See KJPC REGULATION § 5.4, 6.1. After consideration of the KJPC's recommendations, the SRSG was responsible for making the final decision regarding the continued service and promotion of judges and lay judges. *Id.* § 5.4. There were also provisions for a regular annual evaluation system of all judges and prosecutors. See *generally* ADMINISTRATIVE DIRECTION NO. 2001/17, IMPLEMENTING KJPC REGULATION [hereinafter JUDICIAL EVALUATION DIRECTION]. The Judicial Evaluation Direction provided for a detailed two-tier evaluation system. Evaluations were conducted with the purpose of advising the SRSG on promotions and the renewal of appointments. Court presidents evaluated the judges serving in their courts, while higher ranking court presidents evaluated lower ranking court presidents. The initial evaluation involved an interview and a form on which the judge could make comments. The evaluation and comments were submitted to a final evaluator, who could, in certain circumstances, seek out the opinion of a knowledgeable third party. The final evaluator affirmed or modified the initial evaluation, and then submitted the final form to the judge and the KJPC. See *generally id.*

When the KJC replaced the KJPC in 2005, the KJC Regulation superseded the KJPC Regulation. While the KJC Regulation delegates to the KJC the responsibility for evaluating, promoting, and transfer of judges, lay judges, and court personnel, it contains no provisions specifying any of these proceedings. See KJC REGULATION § 1.4(c). Reportedly, the formal evaluation process has ceased since the KJC assumed the responsibility for promoting judges. Respondents reported that, since the KJC's mandate began, some vacancies and advancement opportunities are announced publicly, but others may be filled by the KJC, in consultation with court presidents and judges. This results in a general sense that judicial advancement was tied to connections and cronyism more than experience and ability.

## Factor 16: Judicial Immunity for Official Actions

*Judges have immunity for actions taken in their official capacity.*

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
<p>Currently, judicial immunity is very limited, and neither current nor pending legislation addresses the issue of when and how immunity can be waived. Despite the lack of legislative clarity, respondents did not report instances of judges being prosecuted for activities relating to their official duties.</p>		

### Analysis/Background:

The still-applicable 1977 Law on Regular Courts provides for limited civil immunity, stating that “a judge ... cannot be called to responsibility because of the opinion given in making of a court decision.” See LAW ON REGULAR COURTS art. 11. It also establishes that judges cannot be detained in proceedings related to a criminal offense committed by them in the course of performing their official duties without the approval of the assembly that appointed them. *Id.* However, the assembly to which the Law refers no longer exists, and more recent laws provide little guidance regarding the issue of judicial immunity. The Constitutional Framework is silent on the issue, and there are no relevant UNMIK regulations.<sup>12</sup>

Similarly, the PCPC does not specifically mention judicial immunity. However, the PCC does provide for sanctions against professional and lay judges who issue unlawful decisions with the intent to gain material benefit or to damage another, setting forth terms of imprisonment ranging from 6 months to 5 years. See PCC art. 346. It also proscribes certain criminal offences by official persons,<sup>13</sup> such as abusing an official position, committing fraud, or bribery. See *generally id.* arts. 339-351. In addition, “commission of a criminal offence or commission of a minor offense which is incompatible with the obligation of a judge or lay-judge to maintain high standards of moral and ethical integrity” constitutes a disciplinary misconduct. See ADMINISTRATIVE DIRECTION NO. 2006/8, IMPLEMENTING KJC REGULATION, § 5 [hereinafter JUDICIAL DISCIPLINE DIRECTION]. The judge who had been indicted must immediately notify the KJC of this fact and “cease and desist from the functions of his or her office,” after which the KJC will decide whether the indictment warrants suspension of a judge until conclusion of criminal proceedings and trial. *Id.* § 3.1, 3.5. If a judge is subsequently convicted, the KJC must immediately evaluate the conviction to determine whether it should recommend the SRSG to remove the judge from office. *Id.* § 3.10. Even if the judge is acquitted of the criminal offense, he/she may still be subject to disciplinary proceedings and be sanctioned for disciplinary misconduct. *Id.* § 3.11. See *also* Factor 17 below for a more detailed discussion on the removal and discipline of judges.

Despite the lack of specific legislative guidance regarding judicial immunity, the assessment team has not been made aware of any instances of judges being prosecuted or subject to civil suits for handing down unpopular decisions. Nor were there any reports of judges being held criminally or civilly accountable for committing other actions in the course of their duties. Similarly, none of the judges interviewed for this assessment expressed concerns about their lack of immunity.

<sup>12</sup> If it is passed, the Draft Law will provide for judges’ civil and criminal immunity from liability for damages or offenses resulting from the lawful exercise of their official duties. However, judges will not enjoy immunity in relation to activities that fall outside the scope of their official duties. The Draft Law would not provide any clarification on when and how immunity could be waived.

<sup>13</sup> A judge is an “official person” under PCC art. 107(1).

## Factor 17: Removal and Discipline of Judges

***Judges may be removed from office or otherwise punished only for specified official misconduct and through a transparent process, governed by objective criteria.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>	<b><i>Trend: ↔</i></b>
<p>The KJC conducts judicial removal and disciplinary proceedings regularly and in accordance with an established and transparent procedure. The criteria for discipline of judges are set forth by law, though neither those criteria nor the disciplinary measures imposed for breaking those laws have been described in great detail in any legislation.</p>		

### Analysis/Background:

At the present time, disciplinary responsibility is shared between the KJC and UNMIK DOJ's Judicial Inspection Unit [hereinafter JIU].<sup>14</sup> The latter organization oversees the investigation and prosecution of complaints against judges. See ADMINISTRATIVE DIRECTION NO. 2001/4, IMPLEMENTING UNMIK REGULATION NO. 2000/15 ON THE ESTABLISHMENT OF THE ADMINISTRATIVE DEPARTMENT OF JUSTICE, § 2.1(c), 2.2 [hereinafter JIU DIRECTION]; see also KJC REGULATION § 7.3; JUDICIAL DISCIPLINE DIRECTION § 5.1. The KJC (and before it, the KJPC) has the ultimate responsibility for conducting disciplinary hearings and imposing sanctions, although recommendations for removal of a judge are subject to SRSG's approval. See KJC REGULATION § 7.1, 7.4, 7.7. In addition to the KJC Regulation and the Judicial Discipline Direction, the JIU has also developed a manual with detailed rules of procedure and commentaries [hereinafter JIU MANUAL], giving judges notice of what to expect in the investigation process.

The KJC oversees first-instance disciplinary proceedings via a Judicial Disciplinary Committee [hereinafter JDC]. See KJC REGULATION § 7.1; see also KJC INTERNAL REGULATIONS § 10.4. The JDC is composed of 3 members, including the vice-chair of the KJC and two additional KJC members who serve one year terms. *Id.* § 7.2. At least 2 of the JDC members must be judges, and no prosecutors may be appointed to the JDC. JUDICIAL DISCIPLINE DIRECTION § 1.2. Currently, JDC's membership consists of a Serbian judge, an Albanian judge, and an international judge.

Disciplinary process against a judge may be initiated by a complaint filed with the JIU by any individual or organization, as well as the JIU or the KJC acting *ex officio*. *Id.* § 2.1. All complaints from whatever source are referred to the JIU for investigation. KJC REGULATION § 7.3. The JIU investigates all potentially valid allegations by reviewing the relevant court and case files, collecting documents, interviewing witnesses, and obtaining a response from the judge in question. See JIU MANUAL Chap. C.5. After investigation, the JIU may close those cases which it finds to be frivolous, abusive, or otherwise without basis, and it may file formal charges with the JDC regarding those claims that it deems worthy of prosecution. In the latter instance, a copy of JIU's determination, the allegations, and supporting documents must be provided to the judge. JUDICIAL DISCIPLINE DIRECTION § 2.3. In addition, the SRSG may temporarily suspend the judge until a final decision is rendered, "if public confidence in the judiciary may otherwise be damaged." *Id.* § 4.1. However, such suspensions reportedly occur infrequently. In fact, respondents reported that some judges have continued to serve for lengthy periods while subject to investigations of multiple charges of serious misconduct, until the matters were resolved at the KJC level.

<sup>14</sup> If passed, the Draft Law would transfer oversight for the JIU from the DOJ to the MOJ. Concerns have been expressed as to whether placing the JIU within the MOJ may create an opportunity for excessive executive branch interference in the judiciary's activities.

After the JIU files charges in a case with the JDC, the JIU prosecutes the case at a hearing before the JDC. *Id.* § 5.1. The Judicial Discipline Direction spells out in detail the procedures for such a hearing. JDC's disciplinary hearing must be held within 30 working days from the date of the JIU's notice. *Id.* § 2.5 During prosecution, the accused judge has the right to counsel and has access to the complete disciplinary file. The accused judge may call witnesses and make arguments during the JDC's proceedings, as may the JIU. *Id.* § 2.6, 5.1-5.2. The Judicial Discipline Direction also sets forth general grounds for misconduct, which include the commission of a criminal offense; neglect of judicial duties; failure to act independently and impartially; failure to comply with KJC decisions or orders; giving false or incomplete information to the KJC in regards to appointment, promotion or discipline; and "any breach of the relevant code of ethics." *Id.* § 5.3. Aside from this brief listing of the grounds for misconduct, there is no further guidance in any of the applicable laws on how the KJC should determine exactly what actions constitute misconduct.

Following oral arguments, the JDC deliberates during a closed session, and then must file a "reasoned decision in writing on the charges" within 30 working days from the date of the hearing. *Id.* § 5.5. If the JDC finds the judge guilty of misconduct, it may impose any of the following sanctions: reprimand; reprimand and warning; suspension from office without pay for up to 6 months; and recommending to the SRSG removal of the judge from office. KJC REGULATION § 7.5. Any sanctions imposed must be proportionate to the severity of proven misconduct. *Id.*; see also JUDICIAL DISCIPLINE DIRECTION § 6.2(e). The judge or the JIU may then appeal this decision to the full KJC, which will confirm, revise, overrule, or remand the JDC's decision. See KJC REGULATION § 7.6; JUDICIAL DISCIPLINE DIRECTION § 6.1, 9; KJC INTERNAL REGULATIONS § 12. The KJC will make its decision on the basis of written submissions unless one of the parties to the case requests oral hearing. JUDICIAL DISCIPLINE DIRECTION § 8.5-8.6; KJC INTERNAL REGULATIONS § 12.5-12.6. As is the case for JDC's decisions, KJC's decisions on appeal must be in writing and include reasoning for the decision. JUDICIAL DISCIPLINE DIRECTION § 9.2; KJC INTERNAL REGULATIONS § 12.10(b).

The KJC is required to maintain a public registry of the JDC and the KJC decisions, with the name of the judge excised if the sanction that was handed down is something other than a recommendation for removal. JUDICIAL DISCIPLINE DIRECTION § 11. The JIU also provided the assessment team with statistics regarding the complaints that it had investigated. These statistics showed that, since commencement of operations in 2001, the JIU had received a total of 1,921 complaints. From this number, it rejected 757 complaints, and investigated 593 complaints but found no violations. It referred 73 of the 1,921 complaints directly to the KJC, and completed an additional 211 complaints that are awaiting referral to the KJC. The remaining 287 complaints are still under investigation.

One judge interviewed by the assessment team reported that the public generally views the KJC's procedures as transparent and fair. According to him, accused judges are permitted to be represented by counsel, and hearings are open to the public. Upon sanctioning, judges are provided with written judgments. Nonetheless, there remain a number of outstanding concerns regarding the judicial discipline process. Under the KJPC, judicial disciplinary hearings were open to the public, subject to the Council's discretion to restrict attendance to the parties "in the interests of justice." KJPC REGULATION § 7.9. However, neither the current Judicial Discipline Direction nor the KJC Regulation contain any such restrictions on access to disciplinary hearings. Additionally, removal of a judge from the office can become a lengthy process. In cases where permanent removal has been recommended, review by the SRSG may take an inordinate amount of time, as decisions must also be reviewed by a UN staff person based in New York. Further concerns have also been reported regarding the relationship between the JIU and UNMIK. The JIU operates pursuant to a UNMIK regulation, and thus, it is unclear what will happen to the JIU once UNMIK withdraws from Kosovo. Upon UNMIK's departure, it is unclear whether the JIU will operate as an independent body, or under the supervision of the KJC or MOJ.



## Factor 18: Case Assignment

***Judges are assigned to cases by an objective method, such as by lottery, or according to their specific areas of expertise, and they may be removed only for good cause, such as a conflict of interest or an unduly heavy workload.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Negative</i></b>	<b><i>Trend: ↔</i></b>
There is no objective method for assigning cases to local or international judges. Court presidents generally assign cases by numerical order of filing, while continuing to exercise discretion in assigning cases and in selecting lay judges for trials.		

### Analysis/Background:

Methods of case assignment vary from court to court, and there are no legislative guarantees that cases will be assigned in an objective manner. Case assignment procedures are set forth in the 1981 Rules on the Internal Activity of the Courts, promulgated under the Law on Regular Courts. The Rules do not specifically delegate oversight of case assignment to court presidents. Instead, they name the chief of the clerk's office as the person in charge of assigning official documents taken into delivery, including new cases. RULES ON THE INTERNAL ACTIVITY OF THE COURTS ART. 167, OG Kos. No. 7/81 [hereinafter INTERNAL RULES OF THE COURTS]. The clerk's office then delivers the case to the "competent" judge or panel of judges. Internal Rules of the Courts do not contain any reference to how cases are assigned to specific judges; nor does the KJC Regulation. However, the Judicial Ethics Code does contain a rule that case assignment should not be influenced by wishes of a party or any other interested person; to enable this, the case assignment system should be "based on drawing of lots, automatic distribution according to alphabetic order, or some similar system." JUDICIAL ETHICS CODE § III(B)(5).

Internal Rules of the Courts are clear in granting the court presidents the authority to hear and decide requests for dismissals of judges from cases. *Id.* art. 175. In criminal cases, court presidents have the authority to remove judges from cases at a party's request, based on conflicts of interest, bias, or participation in an earlier hearing of the case. INTERNAL RULES OF THE COURTS art. 175; *see also* PCPC art. 40. Court presidents may also reallocate cases based on excessive workloads. In addition, judges are required to recuse themselves from hearing any case where their participation might be in violation of the conflicts of interest or other provisions of the Judicial Ethics Code. *See* JUDICIAL ETHICS CODE § II(A)(3)(c).

In practice, the presidents of most courts assign cases to judges according to a numbering system. Each case is assigned a number in the order of filing, and that number corresponds to a judge. When all judges have been assigned a case, the numbers start over. In one court, respondents reported that the civil case assignment system entailed assigning a number of 0-9 to each judge, and then assigning cases to judges based on the last digit of each new case's registration number. One court president stated that he himself does not know who is assigned to which case, though he acknowledged that the expertise of particular judges is considered in the process. Some respondents complained that registration clerks and court presidents do not assign judges to newly filed cases because there are too many old cases still pending, and these old cases have priority. Apparently, it is not uncommon for civil cases to not be assigned to a judge for as long as one year. Thus, no pretrial matters or settlement conferences take place in such cases.

A few recent changes may result in improvements in the efficiency of the case assignment process. Since the KJC promulgated new time standards, which measure case resolution running from the time of file registration, criminal cases are being assigned in a more timely manner, especially for cases where the accused is in custody. KJC JUDICIAL CIRCULAR NO.

2006/1 ON IMPLEMENTATION OF TIME STANDARDS IN DISTRICT AND MUNICIPAL COURTS [hereinafter KJC TIME STANDARDS CIRCULAR]. For instance, there are reports that all criminal cases in Prizren District Court have now been assigned. A further positive development has been the introduction of the EAR-funded Case Management Information System [hereinafter CMIS], which aims, among others, at automating case registration. See discussion in Factor 28 below for additional details.

The International Judges Assignment Regulation, which controls assignment of cases to international judges, also fails to guarantee objectivity in assignments to international judges. At any stage of a criminal proceeding, the prosecutor, defendant, or defense counsel may submit a petition to the DOJ requesting the assignment of international judges. The DOJ may also make such a request on its own motion. The DOJ will assign international judges subject to the SRSG's approval, when such assignment is "considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice." INTERNATIONAL JUDGES ASSIGNMENT REGULATION § 1. In such instances, cases may be transferred to a 3-judge panel, with 2 international judges and one local judge. *Id.* § 2. Respondents expressed concerns that this method of assignment of cases to international judges does not meet accepted standards of transparency.

## Factor 19: Judicial Associations

***An association exists, the sole aim of which is to protect and promote the interests of the judiciary, and this organization is active.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
<p>A judicial association, the KJA, exists to protect and promote the interests of the judiciary and judges. The KJA has continued to increase its activity; however, it is not completely transparent, and it has not yet been particularly successful in affecting change to the judiciary.</p>		

### Analysis/Background:

The KJA was established in May 2001 as a non-governmental organization of active judges of Kosovo. The KJA's main objectives include contributing to the development of a legal structure which will be able to support judicial independence, as well as promoting the interests of judges. ROL Initiative, KOSOVO JUDGES ASSOCIATION ORGANIZATIONAL ASSESSMENT at 30 (2007) [hereinafter KJA ORGANIZATIONAL ASSESSMENT]. The KJA has a 9-member managing board, consisting of judges representing all levels of the judiciary and all regions of Kosovo. *Id.* One position on the KJA Managing Board is reserved for a judge from the ethnic Serbian community, and another from the international community. *Id.* There are 5 regional branches of the KJA, each with its own delegates who select the managing board members for 4-year terms. *Id.* at 31. Each branch has its own membership, meetings, and assembly. Although membership is voluntary, nearly all of Kosovo's judges belong to the KJA. Dues are 2.5 Euros per month, though respondents reported that they would be willing to pay more, especially if the KJA would advocate on their behalf. Given the small amount of revenue generated by membership fees, most of the KJA's activities are funded through contributions by donors, such as the Open Society Foundation and USAID.

The KJA has formed a number of ad hoc committees, which address issues such as fundraising, human resources, discipline, and continuing education. There are also administrative, civil, and criminal law committees, with experts who can draft and comment on laws. The KJA has organized a number of professional development activities in cooperation with the KJI, as well as on its own; for example, it held a workshop on advocacy and coalition building in December 2006.



Through press statements in major daily newspapers in Kosovo, it has pursued advocacy activities related to judicial appointments, court personnel training, the improvement of work conditions, and security of judges. It has also worked on human rights projects in cooperation with the Finnish Committee on Human Rights and the International Committee of Red Cross.

The KJA has participated in a number of other activities in support of the judiciary. With a grant from the Open Society Foundation, the KJA has started a professional library. It has also implemented a Judicial *Praktikant* Program with support from the ROL Initiative and USAID (who provided stipends for *Praktikants* working in the courts). The KJA publishes a free quarterly bulletin for all KJA members and partners. In cooperation with the KCA and with assistance from the ROL Initiative, the KJA also implemented a series of bench-bar roundtables to discuss issues of concern to both lawyers and judges. These roundtables took place in 2005, throughout all 5 regions of Kosovo. *Id.* at 31. The KJA is also engaged in anti-corruption efforts on behalf of the judiciary and, with USAID's assistance, it has recently initiated an Advocacy Training and Resource Center, which held anti-corruption roundtables throughout Kosovo in 2007.

Following a 3-day workshop in late 2006, the KJA developed a new 3-year strategic plan. The plan defines the organization's mission and identifies problems relating to judicial legislation; caseloads; finances; professional development; security; and corruption. The plan tackles these problems, listing recommended solutions and problem-solving techniques.

In July 2007, the KJA held its Assembly, which was attended by approximately 50 judges. Discussion at the Assembly included a review of the Strategic Plan drafted by the KJA, as well as discussion of the situation regarding the imminent IJPC reevaluation and reappointment of judges.

Despite the KJA's significant progress in the past 2 years in terms of organizational capacity and activities, many respondents felt that the organization was not sufficiently transparent, and thus, most judges did not participate because they did not know what the organization does. Respondents also reported that they want the KJA to become more involved with advocacy on the issues that concern judges, such as salaries and pensions. Interestingly enough, the KJA has been discouraged from involving itself in discussions regarding the Draft Law on the Courts, and other than the fact that a KJA member sits on the KJC's Budget and Finance Committee, the KJA has not had input into the 2008-2010 budget submitted by the KJC. An organizational assessment of the KJA, which was completed by the ROL Initiative in May 2007, also echoed the sentiments of respondents interviewed by the assessment team: judges are eager to see the KJA become more active in lobbying and advocacy efforts. *Id.* at 29.

## V. Accountability and Transparency

### Factor 20: Judicial Decisions and Improper Influence

***Judicial decisions are based solely on the facts and law without any undue influence from senior judges (e.g., court presidents), private interests, or other branches of government.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↔</b>
The judiciary is not subject to significant external pressure from political interests or other branches of government. However, it remains subject to pressure from private interests, and reports of corruption and ethnically-motivated judgments are prevalent. Pressure on judges is exacerbated by low judicial salaries, poor security, unfavorable work environment, and excessive workloads.		

## Analysis/Background:

The Constitutional Framework affirms the independence and impartiality of the judiciary, as do the international documents which it incorporates by reference. CONSTITUTIONAL FRAMEWORK § 9.4, 9.6. The Law on Regular Courts also provides that courts are independent and must make decisions on the basis of law. LAW ON REGULAR COURTS art. 6; see also PCPC art. 8; LAW ON CONTESTED PROC. art. 7. Similarly, the Judicial Ethics Code requires that judges act impartially and independently, and perform their duties free from any outside influence. Judges must avoid any conduct that could lead to questioning of their impartiality or independence. JUDICIAL ETHICS CODE § I(2)(d). They must perform their duties based on the facts and the applicable law, without any direct or indirect restriction, improper influence, inducements, pressures, or threats of interference. *Id.* § II(A)(3)(a). The Code also requires judges to avoid conflicts of interest (based on family, social, financial, or professional relationships), and to remove themselves from cases where their participation might be in violation of the conflicts of interest rules. *Id.* § II(A)(3)(b)-(c).

Judges interviewed by the assessment team consistently denied being under pressure in regard to their decision-making from senior judges, politicians, ministers, or Assembly representatives. Instead, many acknowledged that they were under pressure from private sources. Some respondents reported that such pressure, while always present, has especially increased since the recent unrest in March 2004. Such pressure may come from family and friends, or from neighbors and the community, especially in the smaller municipalities or minority enclaves. In fact, a judge in a Serbian municipality acknowledged that it was easier for him to be objective in deciding cases because he did not live in the community

Additional pressure from private interests comes from the fact that judges find it difficult to support their families on their meager salaries. Freedom House has reported that corruption remains widespread throughout the Kosovo government, including the judiciary. See FREEDOM HOUSE, NATIONS IN TRANSIT 2007: DEMOCRATIZATION FROM CENTRAL EUROPE TO EURASIA at 352 (June 2007). According to a prosecutor interviewed for the Freedom House report, corruption in the judiciary is a result of overworked judges and court personnel, unfavorable working environments, low salaries, poor security, and few efforts to monitor corruption. *Id.* at 366. As a result, there is a pervasive public perception that the independence of the judiciary is compromised. For example, a respondent interviewed by the assessment team described a recent case involving an alleged rape of a Serbian woman, wherein the accused (an Albanian man) was acquitted despite DNA evidence linking him to the crime. It has been openly suggested that considerations other than the facts and the law, such as ethnic bias, must have led to the acquittal in that case.

External pressure on the judiciary can take the form of direct or indirect threats (e.g., telephone calls, letters, courtroom presence, or actual intimidation or violence). The likelihood of such pressure, particularly in cases involving war crimes or ethnic discrimination, was a major motivation for the passage of the International Judges Assignment Regulation, regarding participation of international judges and prosecutors in certain court proceedings. This Regulation permits a prosecutor, the accused, or his/her advocate to petition for assignment of an international judge when considered necessary to ensure the independence and impartiality of the judiciary. See INTERNATIONAL JUDGES ASSIGNMENT REGULATION § 1.1.

Several organizations have recently begun addressing corruption and undue influence in the judiciary. The ROL Initiative launched public service announcements in 2007, with the aim of increasing public awareness in the judicial process and the importance of ethical conduct by members of the legal profession. The recent KJA Strategic Plan listed fighting corruption as one of its goals, and to that end, the KJA, with assistance from USAID, has initiated an Advocacy Training and Resource Center. This Center held anti-corruption roundtables throughout Kosovo in 2007. The KJA and the KCA have also co-sponsored several conferences on the topic of anti-corruption. At the most recent anti-corruption conference, a representative of the JIU opined that most complaints investigated by the JIU stem from backlogs, not corruption. However, this JIU



official did acknowledge that the lack of transparency in judicial proceedings remains a serious issue.

## Factor 21: Code of Ethics

***A judicial code of ethics exists to address major issues such as conflicts of interest, ex parte communications, and inappropriate political activity, and judges are required to receive training concerning this code both before taking office and during their tenure.***

<b>Conclusion</b>	<b>Correlation: Positive</b>	<b>Trend: ↑</b>
<p>New and fairly comprehensive codes of ethics and conduct for judges and lay judges were promulgated in 2006. The new Judicial Ethics Code largely adheres to international best practices. Training on the Judicial Ethics Code is not yet mandatory; however, in the past year all judges attended at least one training session on the new Code.</p>		

### Analysis/Background:

In 2001, the KJPC adopted codes of ethics and professional conduct for judges and for lay judges. When the KJC replaced the KJPC, UNMIK required the KJC to create new ethics codes. See JUDICIAL DISCIPLINE DIRECTION § 1.1. The new Judicial Ethics Code was adopted on April 25, 2006, shortly after the KJC commenced operations, and was promulgated in September 2006.<sup>15</sup> The new Judicial Ethics Code promulgated in 2006 does not differ drastically from its 2001 predecessor. The Code applies to all professional judges in Kosovo, and defines ethical standards that judges should adhere to. It also states that the types of misconduct defined in the Code are not exhaustive, and a judge may be sanctioned for any actions that are not specifically contemplated by the Code but have a similar effect. See JUDICIAL ETHICS CODE, Preamble.

In developing the new Code, the KJC considered a number of international standards and best practices, including the Bangalore Principles of Judicial Conduct, whose language the new Code closely tracks in many respects. Thus, the Judicial Ethics Code contains the basic principles and applications required by international documents, providing that judges are required to perform their judicial and extra-judicial activities in a manner which promotes public confidence in the integrity and independence of the judiciary. See *id.* § I(1), I(3). The Judicial Ethics Code also provides that judges have the duty protect the individual rights and freedoms, by applying the law without discrimination. *Id.* § II(A)(1)-(2). Judges are required “to act impartially and independently in all cases and free from any outside influence, and perform judicial duties based on the facts and the law applicable in each case, without any restriction, improper influence, inducements, pressures, threats of interference, direct or indirect, from any quarter.” *Id.* § IIA(3)(a). The Code also addresses conflicts of interest, as well as non-judicial activities that judges may or may not engage in. *Id.* § II(A)(3)(b), II(B). Specifically, judges may not engage in political activity or any other activity incompatible with judicial functions; hold membership in political parties; or engage in legal practice or privately carry out any adjudicative functions. *Id.* § II(B)(2)(a)-(b), II(B)(8). Judicial Ethics Code further prohibits judges from using their position for personal gains for themselves or anyone else, participating in financial and business transactions that can adversely affect their impartiality or performance of judicial duties, or accepting any kind of gifts, favors, privileges or promises of material help (the latter prohibition also extends to members of a judge’s family). *Id.* § II(B)(5), II(B)(7), II(B)(9).

<sup>15</sup> On the same day, the KJC also promulgated a Code of Ethics and Conduct for Lay Judges, which, with several minor exceptions, contains rules that are substantially identical to those found in the Judicial Ethics Code.

The Judicial Ethics Code contains no comprehensive prohibition on judges earning outside income; rather, it states that judges may not accept compensation for outside activity during working hours without the KJC's approval. *Id.* § II(B)(2)(c). For judges who obtain such permission, the compensation must be reasonable and may not exceed 25% of the judge's usual salary; nor may it create the appearance of impropriety. *Id.* § II(B)(3). Also, judges should not engage in outside activities that are incompatible with confidence in, impartiality, or independence of judges, or may impair their ability to deal with judicial matters "attentively and within a reasonable period." *Id.* § II(B)(1). These provisions correspond to the KJC Regulation, which generally prohibits judges from holding any other public or administrative office or engaging in any occupation of professional nature, regardless of whether it is remunerative or not, but allows the KJC to authorize a judge to engage in certain outside activities, such as scholarly work, lecturing, or activities related to the law, the legal system, and the administration of justice, as long as those activities do not affect the independence or dignity of the judicial office. KJC REGULATION § 5.3; *see also* JUDICIAL ETHICS CODE § II(B)(1)(a). The limited nature of Kosovo's prohibition on earning outside income by judges reflects the reality of meager judicial salaries.

Although several aspects of the Judicial Ethics Code address important specific ethical considerations, the Code frequently fails to provide all of the necessary details regarding its provisions. For instance, judges are prohibited from engaging in *ex parte* communications, and must discourage others from doing so. JUDICIAL ETHICS CODE § III(A)(7). However, *ex parte* communications are not defined, and the Judicial Ethics Code is not accompanied by any commentary to further flesh out the issue. The relationship between this provision and the concept of equality of arms, as well as the appearance of impropriety created by conviviality between judges and prosecutors, are not yet well understood and should be elaborated on during training sessions. Similarly, the Judicial Ethics Code requires judges to make annual financial disclosures for themselves and immediate family members to the KJC in accordance with law. *Id.* § II(B)(10). However, there is no reference to such financial disclosure in the KJC Regulation or the Judicial Discipline Direction. Additionally, the Judicial Ethics Code does not fully recognize the importance of the appearance of impropriety; rather, it merely states that the Code's principles apply not only to a judge's professional life but also to his/her private life, when a judge's actions may have a negative effect on the public perception of the image of a judge or the judiciary as a whole. *Id.* § I(3).

The Judicial Ethics Code also requires judges to engage in continuing education and training "when available." *Id.* § III(A)(3). While this does not specifically mandate training related to the Code itself, the KJI and the USAID-JSRA project have succeeded in training all of Kosovo's judges on the new Code. Beginning in 2005, the two entities collaborated on a series of interactive workshops (including train-the-trainer workshops) for sitting judges, dealing with specific ethical issues arising in individual and panel decision-making. Initially, the workshops focused on the 2006 Judicial Ethics Code while it was still in draft form. To date, all judges have attended at least one KJI ethics training.

While the Judicial Ethics Code speaks directly to what judges may and may not do, it is also intended to inform parties and attorneys as to what they may expect from judges. So far, no efforts have been made to educate the public regarding the new Code, and thus, the population remains largely unaware of its content. Moreover, it remains to be seen what practical effect the Judicial Ethics Code will have on judges' behavior.



## Factor 22: Judicial Conduct Complaint Process

***A meaningful process exists under which other judges, lawyers, and the public may register complaints concerning judicial conduct.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Neutral</i></b>	<b><i>Trend: ↔</i></b>
A meaningful process exists by which judges, lawyers, and the public may register complaints regarding alleged judicial misconduct. Despite attempts that have been made to inform the public about the process, the complaint process has reportedly been misused in certain instances to harass judges via ungrounded complaints.		

### Analysis/Background:

A meaningful process exists by which any member of the public or any organization, lawyer, or judge may file a complaint concerning alleged judicial misconduct. See JIU DIRECTION § 2.1(c); JUDICIAL DISCIPLINE DIRECTION § 2.1(a). The JIU accepts complaints from any source, including individual litigants, members of the public, advocates, other judges, the Ombudsperson, the SRSG, and organizations such as local NGOs, the KJC, OSCE, and others. The JIU receives written complaints through regular post or via email, and it also employs 12 inspectors who take oral confidential reports. These reports must be composed using a standard form provided for that purpose. The JIU also receives and copies any supporting documents. Further, it accepts anonymous and unsigned complaints, which have been “productive,” according to the Director of the JIU. In addition, the KJC Director has reported that individuals also file complaints with the KJC, which it then refers to the JIU for investigation.

As discussed in Factor 17 above, the JIU must reject complaints which are “outside the mandate” of the JIU; or which are frivolous or harassing; or which allege facts that, if true, would nonetheless not constitute misconduct. In such instances, the JIU must send a letter to the persons who filed the complaints, rejecting their complaint and providing reasons for the rejection. See JIU MANUAL Chap. C.2(a). Regardless of whether they are accepted or rejected, all received complaints must be recorded in the JIU’s database. Those cases which contain evidence of misconduct are referred to the JDC of the KJC for disciplinary hearing, as explained in Factor 27 above. The JIU Manual sets forth in detail the timeline for investigation of complaints. The complaint intake procedure, like the rest of the JIU’s actions, is confidential. *Id.* Chap. B.1.

Between January 1, 2007 and November 7, 2007, the JIU received a total of 435 complaints. In 2006, it received 446 new cases, up from 73 during 2001, its first year of operation. Of the 446 complaints received in 2006, 221 were rejected as ungrounded. Of the remaining number, 95 investigations were completed, with 89 resulting in a finding of no misconduct and 6 referrals to the JDC. Overall, the JIU had received a total of 1,921 complaints since 2001. It rejected 757 of these complaints, and investigated 593 complaints but found no violations. It referred 73 complaints to the JDC, and completed an additional 211 investigations that are awaiting referral to the JDC. The remaining 287 complaints are still under investigation.

The most common complaints received by the JIU relate to delays in court proceedings. In many instances, delays are not caused by misconduct of the individual judge complained against, but by systemic defects, such as insufficiency of judicial staffing, court personnel, and buildings, as well as issues of record-keeping and case management. The judicial inspector must evaluate whether a case contains facts that suggest an inference that the judge in question was influenced by external pressure (e.g., threats or offers of compensation) for delaying the proceeding, or whether the delay was systemic. The JIU has a separate Audit Division designed to deal with issues which the court system itself is not addressing in a manner that will dispense timely justice. The Audit Division became active in 2006, and has thus far completed audits regarding the

application of statutes of limitations in criminal cases, the timeliness of decision writing in civil and criminal cases, the process of registration and filing of documents in the courts, and the chain of custody of evidence.

Respondents also reported that parties frequently bring complaints simply because they are displeased with a judge's decision, using the complaint process in lieu of appeal. More disturbingly, parties may file a complaint against a judge for purposes of harassment, vendetta, or other personal benefit. One respondent interviewed by the assessment team raised the concern that many of the cases brought before the JIU were without merit, and were simply brought by unsuccessful parties to harass judges. Therefore, outright rejection of unfounded claims is necessary, as it allows the JIU to use its limited resources to focus on serious cases. Nonetheless, respondents also opined that the JIU did not sufficiently weed out such unfounded claims.

Large sectors of the public remain unaware of their right to initiate a complaint when they believe that judicial misconduct may have occurred, despite efforts to educate the public about this right. The lack of funding for public information campaigns regarding the existence of the JIU and its complaint process have hampered the dissemination of information. Several recent efforts have been made to publicize the availability of the judicial conduct complaint mechanisms. The JIU distributes to complainants a well-written informational flyer which describes in simple language what the JIU does and does not do, as well as what types of misconduct it will investigate, and what behavior may be expected from judges and lay judges. Additionally, the ROL Initiative recently assisted in the development of public service announcements for television broadcast related to the judicial conduct complaint process. Apparently, these announcements resulted in a significantly increased number of contacts with the JIU in the following weeks. Finally, the USAID-JSRA project has produced a 22-minute documentary about the courts and the KJC's case disposition timeframes, which also urges the public to be more active in informing themselves about the justice system.

### **Factor 23: Public and Media Access to Proceedings**

*Courtroom proceedings are open to, and can accommodate, the public and the media.*

<b>Conclusion</b>	<b>Correlation: Positive</b>	<b>Trend: ↔</b>
<p>By law, courtrooms are open to the public and the media, and in practice, the media is genuinely free to report on the courts. However, insufficient courtroom space continues to be a barrier. Similarly, there is a lack of awareness among judges regarding the right to access court proceedings.</p>		

#### Analysis/Background:

The requirement for public trials is set forth in several laws. According to the Constitutional framework, all courts proceedings in Kosovo must be public, unless provided otherwise in the applicable laws. See CONSTITUTIONAL FRAMEWORK § 9.4.5. This is echoed in the Law on Regular Courts, providing that “the work of the courts is public.” Courts must guarantee public access to each of their proceedings by announcing the names of judges who will hear the case, informing the public on the progression of the case through the media, and publicly announcing court decisions. See LAW ON REGULAR COURTS art. 7; see also PCPC arts. 328-331; LAW ON CONTESTED PROC. art. 306. If a judge wishes (on the motion of one of the parties or on the judge's own motion) to close the courtroom for all or part of a trial, the judge must first allow the parties or the public (including media representatives) to be heard. PCPC art. 329. Then, the judge may close the hearing only if it is necessary for protecting official secrets, the confidentiality



of information, maintaining law and order, protecting personal or family life of participants, protecting interests of children, or protecting injured parties or witnesses. *Id.* However, parties, victims, their representatives, and defense counsel may not be excluded from proceedings, and the court may also permit certain officials, academics, public figures, and the spouse or extra-marital partner of the accused to attend proceedings that are closed to the public. *Id.* art. 330. The ruling on the issue of closure must be supported by reasons and made public, and is not subject to an interlocutory appeal. *Id.* art. 331. Regarding the extent of the media's access during the hearings themselves, the PCPC forbids photography, video or audio recording during the confirmation hearing or the main trial, unless specifically requested by the parties or the court president and authorized by the President of the Supreme Court. *Id.* art. 93(2)-(3).

To ensure that the media and public will be aware of the court's proceedings, the relevant legislation requires that a list of cases be posted in a place accessible to the public in all courthouses. See INTERNAL RULES OF THE COURTS art. 8; DOJ JUSTICE CIRCULAR NO. 2003/7 ON PUBLIC ACCESS TO JUSTICE [hereinafter JUSTICE CIRCULAR]. The JUSTICE CIRCULAR also requires that such information be made available upon request to all members of the public. However, this requirement is far from uniformly applied. The assessment team did not observe any such calendars in any of the courthouses visited. In addition, an individual asking for the location of a specific hearing may then be subject to uncomfortable questioning.

Several other practical barriers to courtroom access persist. For instance, while trials in high-profile cases are occasionally held in an auditorium outside of the courthouse in order to enable public and media access, most cases occur within overcrowded court facilities. Given the shortage of courtrooms, most judges hear at least some of their cases in their chambers. With the exception of court presidents, whose chambers are large enough to accommodate a conference table, these offices are small rooms, housing a desk, a small table for the judge's stenographic clerk, and several chairs for parties and, sometimes, for one or two family members. Hearings must be conducted with closed doors to avoid distractions, and so observers or media representatives who attend cannot help but disturb the proceedings. With such space limitations, it is physically impossible to comply with the legislative requirements that proceedings be public. Insufficient courtroom space has, therefore, decreased transparency of the judiciary, at a time when it is making strides in its efforts to be worthy of respect.

An additional problem is that many judges do not fully understand their responsibilities regarding public and media access to court proceedings, even though they have been informed about the relevant legal provisions. Both print and broadcast journalists indicate that, while the majority of judges take this responsibility seriously and close hearings only for valid reasons under the law, some judges use the provisions of PCPC art. 329 as excuses to close the courtroom, without allowing argument and without making oral or written findings as to the basis for the ruling. The lack of more specific definitions of reasons for holding trials *in camera* makes it easy for judges to close proceedings without consequences. In one case described to the assessment team, a judge did not even permit a party's representative to be present, despite the PCPC's clear rule to the contrary.

Several efforts have been made to increase awareness of the public's and the media's right to access court proceedings. The USAID-JSRA project and IREX have produced trainings for journalists regarding understanding of the judicial system and legal terminology, in order to promote accurate reporting. Additional USAID-JSRA programming has included a documentary (referenced in Factor 22 above) which stresses that courts are open, and that citizens should attend court proceedings and become informed. The USAID-JSRA project has also created a handbook for court public information officers, and funding for such positions has been requested in the judiciary's 2008-2010 budget proposal.

## Factor 24: Publication of Judicial Decisions

***Judicial decisions are generally a matter of public record, and significant appellate opinions are published and open to academic and public scrutiny.***

<b><i>Conclusion</i></b>	<b><i>Correlation: Negative</i></b>	<b><i>Trend: ↔</i></b>
<p>Generally, judicial decisions are not disseminated to the public. While selected Supreme Court decisions have been published by the Kosovo Law Center, most appellate decisions are still not readily available to other judges and lawyers. Judicial decisions are also not very well written, and quality would possibly improve if decisions were more widely available for review.</p>		

### Analysis/Background:

The Law on Access to Official Documents establishes the rules for public access to judicial decisions. Under this Law, judicial decisions may be classified as “official documents.” See LAW ON ACCESS TO OFFICIAL DOCUMENTS § 2(b), 3.3 (*promulgated by UNMIK Regulation No. 2003/32*) [hereinafter LAW ON ACCESS TO OFFICIAL DOCUMENTS]. All such documents are “accessible to the public either following a written application or directly in electronic form or through a register.” *Id.* § 3.4. Access can be denied only in specified circumstances, where disclosure could negatively affect the protection of public interests in the areas of public security, defense, and military matters or international relations, or if disclosure could negatively affect individual privacy and integrity interests. *Id.* § 4.1-4.2.

While judicial decisions are available to the public, usually they are not widely disseminated. Instead, final written verdicts are provided to interested persons upon request.<sup>16</sup> See PCPC arts. 89, 123, 395; LAW ON CONTESTED PROC. arts. 150, 337. However, decisions issued by the Supreme Court’s Special Chamber on KTA Matters are legally required to be made available to the public in addition to being made available to the parties. See REGULATION ON SPECIAL CHAMBER ON KTA MATTERS § 9.4-9.5.

Several efforts have been made to improve public access to judicial decisions. With funding from the U.S. Department of State, the Kosovo Law Center [hereinafter KLC] has published 4 volumes of the Kosovo Supreme Court Bulletin, containing selected Supreme Court judgments entered since 1999, translated into English, Albanian, and Serbian. Volume I of the Bulletin (published in June 2005) contained all Supreme Court judgments rendered on the new PCPC and the PCC. Gathering these decisions was a difficult process. Given the absence of a centralized archive, all Supreme Court judges had to be contacted individually, and their decisions photocopied. As these difficulties caused the production of Volume I to exceed budget, the remaining volumes (all published in 2007) were limited to summaries of decisions, with substantially similar decisions marked in footnotes. One advance that facilitated continuation of the project was that all decisions rendered after the publication of Volume I were also added into an electronic archive.

Funding constraints have limited the distribution of hard copies of the Supreme Court Bulletin to only judges, prosecutors, attorneys, and other legal professionals. In order to meet additional demand from interested parties, including diplomatic offices, the KLC also produces an electronic version of the Bulletin, available on a CD or as a downloadable file on the KLC website,

<sup>16</sup> If passed, the Draft Law would help improve the situation, as it provides that written opinions put forth by the Intermediate Court of Appeals (which would be created by the Draft Law) and the Supreme Court must be provided to lower instance courts and to the parties. However, even if the Draft Law is implemented, the situation will not be completely remedied, as the public and the media would still not have easy access to the judicial decisions. Further complicating the situation is the need for decisions to be accessible in English, Albanian, and Serbian.



<http://www.kosovolawcenter.org>. As funding for the Bulletin project expired in July 2007, Supreme Court decisions are still not uniformly available.

In addition to making the decisions of Kosovo’s domestic courts available, respondents have also suggested translating European Court of Human Rights decisions into Albanian and Serbian and distributing them to judges, since the ECHR has been incorporated into domestic law in Kosovo.

Hopefully, the wider dissemination of judicial decisions will have the added benefit of encouraging judges to include factual determinations and legal rationales in their written judgments. Increased publication of judicial decisions might also help improve the timeliness of submission of written decisions by judges. Delays in the submission of judgments have been a source of frequent complaints to the JIU. Its Audit Division investigated this issue in 2006, finding that only approximately 30% of decisions were submitted within the timeframes required, and that the submission of some decisions was up to 3 years late.

Respondents also reported that many judicial decisions were so poorly written that was not always clear what the facts of a particular case were, and how and why the law was applied to those facts. Disciplinary complaints against judges frequently relate to poorly written decisions. Shortcomings are especially evident in judicial decisions related to the length of criminal detention or the availability of alternative sanctions. The PCPC requires sentencing judges to consider alternative sanctions and include in the conviction “an explanation of all material facts.” See PCPC art. 283. However, the OSCE monitoring team found that in the “vast majority” of cases, “the Kosovo courts still fail to properly justify decisions imposing detention on remand.” See OSCE Department of Human Rights, Decentralization, and Communities, *Monthly Report* at 1 (Oct. 2007). Respondents alleged that some judges have issued identical written decision for different cases by copying the entire text of one decision into another decision and just changing the name of the defendant. Additionally, some prosecutors reportedly fail to provide an evidentiary basis for the conditions which necessitate detention, but they are not held to account by judges.

**Factor 25: Maintenance of Trial Records**

***A transcript or some other reliable record of courtroom proceedings is maintained and is available to the public.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↔</b>
By law, courts are required to keep records of court proceedings. However, these records are not consistently kept and are not always well-maintained. Several recent projects have attempted to improve court transcripts and the storage of trial records.		

**Analysis/Background:**

Legislation mandates that court records be maintained in civil and criminal proceedings. The Law on Contested Procedure requires that records be made of “all actions conducted at court sittings.” These records must include the name and composition of the court, the date of the action, the parties and their representatives, as well as “the relevant information on the context of the taken action.” This should include a record of whether the trial is open to the public, what statements and evidence parties give, as well as the questions asked of witnesses, and any decisions made by the court. LAW ON CONTESTED PROC. arts. 123, 124. A record of the proceedings (i.e., the minutes) is typically based on the judge’s oral summation, although the law allows the recording to be conducted via stenographic or audio-recording methods. See PCPC arts. 86, 90, 92, 348; LAW ON CONTESTED PROC. art. 126; INTERNAL RULES OF THE COURTS arts. 182-186. If a case was

heard by a panel of judges, a record must also be made of their voting, and if the vote was not unanimous, a record must be made of their conferring as well. See LAW ON CONTESTED PROC. art. 128. The court record must be signed by the presiding judge, the recorder, and the parties (or their legal representatives). *Id.* art. 127.

There are no provisions guaranteeing public access to transcripts or other records of court proceedings. Only parties to the case have direct access, and other interested parties can obtain access at the discretion of the court president. LAW ON REGULAR COURTS art. 113; PCPC arts. 89(1), 350; LAW ON CONTESTED PROC. art. 150. Judges do not always provide transcripts even to advocates, although a written request to the court president usually yields the desired result.

In practice, records of court proceedings are not kept consistently, and are reportedly not very thorough. Verbatim transcripts of proceedings are rare. It was reported that in the Prizren District Court, the attorneys sign the record, as required by law, but only in civil cases. One respondent described court records as consisting only of summaries of testimony of the “main witnesses.” In addition, some advocates are apparently still voicing objections to verbatim transcripts, as inconsistencies in their presentations become more evident. However, one respondent commented that verbatim transcripts would encourage attorneys to focus on better performance. By contrast, verbatim transcripts are used in proceedings presided over by the international judges and have earned favorable comment.

Efforts have been made to encourage the maintenance of accurate and thorough records of court proceedings. In June 2004, USAID implemented a pilot project, the JSRA, which placed 10 sets of audio recording equipment in 5 courts to encourage the practice of using verbatim transcripts in criminal proceedings. Training was provided to original users, and a DJA official was trained to provide ongoing training. At the beginning of the project, apparently all but one of the pilot sites were using the equipment. Positive feedback resulted in a request for funding of 30 additional sets of equipment in the 2006 budget. However, as of July 2006, the money had not been disbursed and no new equipment had been purchased. See USAID, EVALUATION OF THE JUSTICE SYSTEM REFORM ACTIVITY – KOSOVO at 25 (July 2006) [hereinafter USAID JUSTICE SYSTEM REFORM EVALUATION]. Effectively, the use of the equipment depended on the priorities of the individuals involved, and there was no monitoring of whether the equipment was used. *Id.* The comments by the president of one of the pilot courts bear out USAID’s comments on priorities. That respondent informed the assessment team that there were initial quality problems with the audio equipment, and as a result it was not consistently used. However, at present, demand for the use of technology in that court has greatly increased since then, and the court has requested two more systems to be installed in the chambers used by the pretrial judge and the indictment confirmation judge. It should be noted that subsequent efforts were made to retrain court personnel on the use of the equipment, and the USAID-JSRA project reported greater success in 2007 in terms of the use of the equipment.

The lack of formal courtrooms has also impeded the progress of the USAID-JSRA project described in the previous paragraph, although it is unclear why audio equipment could not also be placed in the judges’ chambers where hearings were held, as occurred in the chambers of a Pristina judge.

Another problematic aspect of the maintenance of trial records was the poor state of archived records. Generally, case files remain in the judge’s office until disposition, at which point they are returned to the court clerk for a one year period, after which they are archived in the basements of the court buildings. Under the law, the number of years for which case files must be kept depends on the nature of the case and ranges from 5 to 30 years. For instance, archived records for criminal cases involving imprisonment must be kept for 10 to 30 years, depending on the duration of imprisonment imposed. Records related to administrative disputes and civil matters must be preserved for 10 years, while case files related to enforcement of judgments are kept for 5 years. Thereafter, the court may purge the files. See INTERNAL RULES OF THE COURTS art. 266.



The USAID-JSRA project has made strides related to the improvement of court archiving practices. At the commencement of the archiving project, a very large number of pre-1999 case files were still in the archives. They were not well kept or indexed, and many had been stolen or thrown away. With assistance from a USAID-JSRA court administration specialist, over 100,000 of these files were inventoried in Gjilan Municipal Court in 2002, and over 70,000 files were purged. The remainder was sorted by year and the type of case. A French donor built a storage unit to house them. The court president reported that he can now find a 30-year-old file in several minutes. However, the public is generally still not entitled to access these files.

## VI. Efficiency

### Factor 26: Court Support Staff

*Each judge has the basic human resource support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.*

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↔</b>
Generally, judges do not have adequate support staff to assist with administrative and substantive legal tasks, resulting in delays during court proceedings.		

#### Analysis/Background:

The KJC has control over all personnel decisions for the judiciary. See KJC REGULATION § 1.7(c). Court presidents have little flexibility in use of staff, and can only propose changes to the KJC. Most judges interviewed by the assessment team indicated that they had one secretarial clerk, and none had their own law clerk, although a few “pooled” law clerks are available in a limited number of courts. International judges also had only one secretarial assistant and no other staff. These responses are confirmed by the data in the chart below.

#### SUPPORT STAFF IN KOSOVO COURTS

Year	No. of judges	No. of support staff (incl. secretaries)	No. of secretaries
2004	313	1,280	287
2007	309	1,423	295

On closer inspection, some courts demonstrated especially problematic situations in regards to staffing levels. While the Northern Mitrovica courts’ caseloads have doubled in since the 1999 war, the number of judges and court staff employed there continues to be the same as in 2000- a total of 37 support staff for the 9 district judges. The 11-judge Prizren Municipal Court also reportedly suffers from severe staffing shortages, with one law clerk for the entire court.

The assessment team found several specific examples of the need for more support staff in the courts. For instance, a large number of cases on the “uncontested” docket consist of documents merely requiring certification, such as contracts and powers of attorney. In one court visited during the interviews, the assessment team observed a long line of people waiting to be helped with uncontested cases. A single court staff person was assisting the line of persons. Some people in the line had begun queuing at 4 a.m. One lawyer reported that he had been waiting in

line since 6 a.m. to get a certification on a contract for his client; he was not helped by the clerk until 11:45 a.m.<sup>17</sup>

A further example of understaffing is the lack of trained legal assistance available to judges. In this regard, it has been suggested that productivity in the courts could be increased if each judge had a *praktikant* (i.e., a law clerk). Presently, judges must review each new case file they receive for formal and substantive sufficiency, a task which *praktikants* could instead complete. *Praktikants* could also review uncontested cases, and make recommendations to the judge regarding their disposition. Additionally, *praktikants* could assist judges with legal research and preparing drafts of decisions, to improve the quality of analysis in decisions. One positive development in this area is the approval of a recent KJC regulation creating one-year *praktikant* positions in the courts. However, funds have not been appropriated for stipends for these one-year positions. See also Factor 19 for a discussion regarding the KJA/ROL Initiative program for *praktikants*.

On policy level, the KJC Strategic Plan sets forth as its Strategic Goal 4 “[e]stablish[ing] a sound organizational structure and a set of policies and procedures for managing the non-judicial/administrative staff essential for functioning of the courts.” KJC STRATEGIC PLAN at 12, 18-19. To this end, the Strategic Plan calls for gathering information about position classifications in other countries and “prepar[ing] a comprehensive proposal for a new personnel classification system.” *Id.* at 19.

## Factor 27: Judicial Positions

***A system exists so that new judicial positions are created as needed.***

<b>Conclusion</b>	<b>Correlation: Negative</b>	<b>Trend: ↓</b>
No system exists to create judicial positions as needed, and the number of salaried positions in the judiciary has been in decline in recent years. One of the goals elaborated in the KJC’s Strategic Plan provides for development of a procedure for the creation of new judicial positions, but no such procedure has been created yet.		

### Analysis/Background:

There is no established system for the creation of new judicial positions as needed. In fact, despite the increasing court backlogs and caseloads, the number of salaried positions in the judiciary has been decreasing in recent years. This downsizing of Kosovo’s judiciary corresponds to cuts in the number of employees across most of Kosovo’s government institutions. The Kosovo government’s decision to decrease staffing levels in government institutions was based on the International Monetary Fund’s findings that the number of government employees was excessive. The trends in the number of judges at different levels of Kosovo’s judiciary is illustrated in the table below.

<sup>17</sup> The pending Law on Notaries would transfer some of the judicial responsibilities in certain types of uncontested cases to notaries (i.e., professional lawyers and public officials appointed by the MOJ).

## NUMBER OF JUDICIAL POSITIONS IN KOSOVO'S COURTS

Court Level	2004		2007	
	Budgeted positions	Filled positions	Budgeted positions	Filled positions
<b>Supreme Court</b>	16	14	16	13
<b>District courts</b>	48	46	54	49
<b>Municipal courts</b>	165	139	151	141
<b>Minor offenses courts</b>	118	100	92	89
<b>High Court of Minor Offenses</b>	5	5	5	5
<b>Commercial Court</b>	11	9	4	4
<b>TOTAL</b>	<b>363</b>	<b>313</b>	<b>322</b>	<b>301</b>

It has been anecdotally reported that the total number of cases in the court system has doubled since the year 2000, while the number of judges has remained approximately the same. As shown in the table below, according to data provided by the KJC to the assessment team, the current backlog of cases in Kosovo's courts exceeds 165,000 cases, including over 150,000 cases in municipal courts alone.

## CASELOADS AND BACKLOGS IN KOSOVO'S COURTS

Year/Court level	Pending at the beginning of year	Received cases	Total cases in process	Resolved during year	Pending at the end of year
<b>2005 total</b>	<b>126,760</b>	<b>252,707</b>	<b>379,467</b>	<b>235,166</b>	<b>143,341</b>
<b>Municipal courts</b>	115,350	231,642	346,692	217,306	129,357
<b>District courts</b>	10,517	17,177	27,694	15,261	11,802
<b>Commercial Court</b>	152	451	603	469	134
<b>Supreme Court</b>	741	3,437	4,178	2,130	2,048
<b>2006 total</b>	<b>143,341</b>	<b>253,466</b>	<b>396,807</b>	<b>245,954</b>	<b>150,713</b>
<b>Municipal courts</b>	129,357	230,045	359,402	224,021	135,245
<b>District courts</b>	11,802	17,427	29,229	16,883	12,343
<b>Commercial Court</b>	134	686	820	601	218
<b>Supreme Court</b>	2,048	5,308	7,356	4,449	2,907
<b>2007 total</b>	<b>151,148</b>	<b>202,636</b>	<b>353,784</b>	<b>185,562</b>	<b>166,619</b>
<b>Municipal courts</b>	135,245	190,068	325,313	173,235	150,025
<b>District courts</b>	12,343	12,568	24,911	12,327	12,584
<b>Commercial Court</b>	653		653		653
<b>Supreme Court</b>	2,907		2,907		2,907

The KJC's 2008-2010 budget proposal requested an increase from 322 judicial positions in 2007 to 402 for 2008. Additionally, the KJC Strategic Plan proposes to use "updated weighted caseload data and other information about the caseloads and resource needs of the courts," as a basis to justify the need for more judges to the Assembly. KJC STRATEGIC PLAN at 15. The backlogs and delays in the court system seem to support the KJC Secretariat's finding that more judicial positions should be created.

As an alternative to the creation of new judicial positions in order to reduce backlogs, the KJC Strategic Plan contemplates the possibility of moving judges temporarily from courts with low caseloads to busier courts. KJC STRATEGIC PLAN at 17. The KJC also allows for the use of weighted caseload data for the limited purpose of providing a basis for allocation and utilization of judges, but not for determining how many new judges are needed. Several additional steps have

been taken to reduce backlogs and keep more current with new case filings. For example, court presidents have received training in the basic principles of court management (e.g., case flow and human resources). Further, following a survey by the USAID-JSRA project, the KJC published temporary case disposition timeframes. See generally KJC TIME STANDARDS CIRCULAR. However, it is important to note that the disposition standards were not designed to directly calendar and manage cases more efficiently. Judges interviewed by the assessment team uniformly stated that they cannot meet these standards using present resources and given the existence of old cases.

## Factor 28: Case Filing and Tracking Systems

***The judicial system maintains a case filing and tracking system that ensures cases are heard in a reasonably efficient manner.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
Kosovo courts still rely on an outdated, manual case filing and tracking system. An electronic case management system is in the process of being implemented; however, so far there is little evidence that the system is resulting in efficient scheduling and hearing of cases.		

### Analysis/Background:

At present, Kosovo courts still rely on an outdated, manual ledger-based system for filing and tracking of cases, which is fraught with inefficiencies and susceptible to easy abuse. Hence, the judiciary and other organizations have attempted to improve and update the case filing and tracking systems. The USAID-JSRA project identified caseflow management as the most important court administrative function, and thus, the project includes efforts to automate case tracking.<sup>18</sup> USAID JUSTICE SYSTEM REFORM EVALUATION at 21. Initially, the project envisioned creating the information technology program on its own, including a networking plan to allow a consistent and effective caseflow management feature. However, the effort was discontinued in 2003, as EAR began a similar initiative, the CMIS. Unfortunately, there were several flaws with CMIS. Thus, efforts to implement CMIS featured little input from end-users regarding design, and little follow-up to see whether the equipment and the acquired skills were being used. In addition, a lack of connection was noted between the involvement of court presidents and administrators and the “substantive” involvement by the DJA in the development of caseflow tracking system. *Id.* at 22. As of the date of the drafting of this assessment, CMIS has so far only been implemented for criminal proceedings in Gjilan District Court, where it has been used since early 2006. Nonetheless, the court’s president reported that the software achieved “only 1% of what is supposed to be done.” *Id.* at 23. Despite this reported shortcoming, Gjilan District Court achieved over 90% efficiency in meeting its filing to disposition standards.

As part of its JSRA project, USAID placed a technical advisor in the DJA. However, the DJA has reported that a lack of human resources and long-term planning ability may make it difficult to sustain the CMIS effort. See *id.* at 21. It is not known whether the KJC, which has taken over court administration responsibilities, will have the capacity to sustain and build on this effort. The DJA personnel now constitute the staff of the KJC Secretariat. Nonetheless, the KJC has expressed its commitment to improving the current case tracking system. In order to accomplish the goal of eliminating backlogs, Goal 5 of the KJC Strategic Plan calls for conducting an

<sup>18</sup> There are contributing factors to inefficient case disposition other than lack of a case filing and tracking system. They include delays at trial, as discussed in Factor 9 above; overcrowding in court buildings, as discussed in Factor 12 above; and overworked and under-trained court personnel and judges, as discussed in Factors 26 and 27 above.



inventory of all pending cases (including their age), and developing databases to monitor the process of cases. See KJC STRATEGIC PLAN at 12, 19-20. The Plan also includes the effective use of modern systems of information management, include the full implementation of CMIS by the end of 2007; however, pending automation of case tracking, the Plan calls for the establishment of effective manual case tracking systems. *Id.* at 12, 21.

## Factor 29: Computers and Office Equipment

***The judicial system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
The judiciary has a sufficient number of computers and other equipment, but much of this equipment is outdated. Judges also lack technical knowledge and skills, and should receive training to develop the skills needed to use the new technology effectively.		

### Analysis/Background:

Currently, the Kosovo judiciary has 971 computers. Respondents acknowledged that they generally have access to these computers, although many of the computers are old and outdated. Recently, efforts have been made to upgrade the technology used in Kosovo's courts. In 2006, EAR provided the KJC with 150 additional computers, and the KJC is currently in negotiations with EAR to receive a donation of 320 additional computers. This is expected to be supplemented with an additional donation of 580 computers by EAR. However, it was reported that many of the computers installed over the past years have not been used due to a lack of training and computer skills among judges and court personnel. One respondent described an example where a secretary deleted the judge's decisions as soon as they were written, for lack of knowledge that the machine had the capacity to store the documents.

Court support personnel charged with receiving and registering new cases reportedly do not use computers consistently, partly due to a lack of sufficient office space, and partly due to a reluctance to give up the old manual ledger systems. Some respondents reported that cases were first being entered in a ledger, and the information then transferred to the computer. In some instances, the CMIS installed by EAR is not being used. Without adequate training to build confidence, personnel place more trust in their old paper systems.

Internet access in courthouses is not common, and although judges frequently have access to computers, they are not usually able to access the Internet to conduct legal research or contact other judges by email. Typically, most courthouses have one computer with Internet access, and judges do not have Internet access in their chambers. In addition to needing newer computers, respondents also reported that they were in need of new photocopy machines, as the ones currently in use in the courts are beginning to break down. Further, respondents indicated that other necessary office supplies, such as copier paper, can be hard to procure. While power outages were reported as a problem in 2004, courts have since been supplied with generators to operate in case of power outages.

### Factor 30: Distribution and Indexing of Current Law

***A system exists whereby all judges receive current domestic laws and jurisprudence in a timely manner, and there is a nationally recognized system for identifying and organizing changes in the law.***

<b>Conclusion</b>	<b>Correlation: Neutral</b>	<b>Trend: ↔</b>
<p>A limited system exists for distribution of new laws, and distribution often does not occur in a timely fashion. The lack of a system for identifying changes to laws exacerbates the existing confusion as to which of Kosovo's many laws and UNMIK regulations are controlling.</p>		

#### Analysis/Background:

Distribution of laws occurs in a somewhat haphazard and untimely fashion, but several efforts have been made recently to increase public access to legislation, although these do not always address the need for speedy access to new laws.

In 2006, the Kosovo Government created an Office for Management and Administration of the Official Gazette [hereinafter OG]. See LAW ON THE OFFICIAL GAZETTE art. 5.1 (*promulgated by UNMIK REGULATION NO. 2005/25*). The Law requires monthly publication of the OG in Albanian, Serbian, English, Turkish, and Bosnian languages. *Id.* arts. 4.1, 3.1. The OG is distributed to all judges free of charge, and is available for purchase by anyone through the local post offices for a fee of 2 Euros. However, the OG only contains texts of Assembly laws and PISG directions (see *id.* art. 2.1), and it does not distribute these in a timely fashion. Many laws promulgated during 2005-2007 have not yet been included in the OG. Per Law, the OG's contents must also be made available to the in electronic form, free of charge (see *id.* art. 2.3), and so may be accessed on its website, [www.gazetazyrtare.com](http://www.gazetazyrtare.com), although the site is not regularly updated, and legislation is not always indexed with complete citations. The OG does not publish UNMIK Regulations or Administrative Directions; however, the separate UNMIK Official Gazette can be accessed on UNMIK's website, [www.unmikonline.org](http://www.unmikonline.org), where UNMIK's acts are listed chronologically rather than topically. UNMIK also distributes these materials to judges.

In addition to the OG and the UNMIK website, several other legislative indexes have been published or are being considered. Prior to the creation of the OG, Kosovo's laws had been published in a one-time compilation by the KLC. The KLC (with assistance from the OSCE) succeeded in publishing real estate laws, civil laws, administrative laws, and several other pieces of legislation, in 2000. Between 2002 and 2004, ABA/CEELI published a quarterly index of UNMIK Regulations, and the KLC is continuing to publish UNMIK Regulations and Assembly Laws. These volumes are available for purchase.

The Kosovo Assembly currently has a website, [www.assembly-kosova.org](http://www.assembly-kosova.org), which contains a database of new laws. This website is actually more comprehensive than the OG's website. The KJC is in the process of establishing a website intended to include all legislation relevant to Kosovo's judicial system, including international human rights documents, EU documents, and academic legal articles. It will be available to anyone with Internet access; however, at the time of writing of this assessment, no this website was not yet operational.

Unfortunately, availability of legal information online does not appear a suitable solution in light of Kosovo judiciary's existing infrastructure. As noted in Factor 29 above, while most courthouses have at least one computer with Internet access, many judges do not have Internet access in their chambers, or they lack the computer knowledge necessary to access online information.



## List of Acronyms

<b>ABA</b>	American Bar Association
<b>ABA/CEELI</b>	American Bar Association Central European and Eurasian Law Initiative
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CLE</b>	Continuing legal education
<b>CMIS</b>	Case Management Information System
<b>DJA</b>	Department of Judicial Administration
<b>DOJ</b>	UNMIK Department of Justice
<b>EAR</b>	European Agency for Reconstruction
<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>EU</b>	European Union
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICR</b>	International Civilian Representative
<b>IJPC</b>	Independent Judicial and Prosecutorial Commission
<b>ILEP</b>	Initial Legal Education Program
<b>ISG</b>	International Steering Group
<b>JDC</b>	Judicial Disciplinary Committee
<b>JIU</b>	Judicial Inspection Unit
<b>JRI</b>	Judicial Reform Index
<b>JSRA</b>	USAID Justice System Reform Activity
<b>KAAC</b>	Kosovo Accreditation Agency
<b>KCA</b>	Kosovo Chamber of Advocates
<b>KFOR</b>	NATO Kosovo Force
<b>KJA</b>	Kosovo Judicial Association
<b>KJC</b>	Kosovo Judicial Council
<b>KJI</b>	Kosovo Judicial Institute
<b>KJPC</b>	Kosovo Judicial and Prosecutorial Council
<b>KLA</b>	Kosovo Liberation Army
<b>KLC</b>	Kosovo Law Center
<b>KTA</b>	Kosovo Trust Agency
<b>LAL</b>	Law on Administrative Law Suits
<b>LAP</b>	Law on Administrative Procedure
<b>LEP</b>	Law on Executive Procedure
<b>LEPS</b>	Law on Execution of Penal Sanctions
<b>LGAP</b>	Law on General Administrative Procedure
<b>MEF</b>	Ministry of Economy and Finance
<b>MOJ</b>	Kosovo Ministry of Justice
<b>NATO</b>	North Atlantic Treaty Organization
<b>OG</b>	Official Gazette
<b>OLA</b>	Office of the Legal Advisor of the SRSG
<b>OSCE</b>	Organization for Security and Cooperation in Europe
<b>PCC</b>	Provisional Criminal Code
<b>PCPC</b>	Provisional Criminal Procedure Code
<b>PISG</b>	Provisional Institution of Self-Government
<b>ROL Initiative</b>	Rule of Law Initiative
<b>SFRY</b>	Socialist Federal Republic of Yugoslavia
<b>SRSG</b>	Special Representative of the UN Secretary General
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Program
<b>UNICEF</b>	United Nations Children's Fund
<b>UNMIK</b>	United Nations Mission in Kosovo
<b>USAID</b>	United States Agency for International Development

The **Judicial Reform Index (JRI)** is one in a series of assessment tools developed by experts in legal and judicial reform and international development at the American Bar Association (ABA). As part of the ABA Rule of Law Initiative's commitment to promoting fair and functioning judicial systems globally, the JRI provides an empirical basis for examining the independence of the judiciaries and the environment in which they operate in emerging democracies worldwide.

The JRI relies on comparative legal traditions and international standards set forth by the United Nations, the Council of Europe, and other international organizations on issues including the quality, education, and diversity of judges; judicial powers; financial resources; structural safeguards; transparency and accountability; and efficiency.

The JRI evaluates local conditions and practices using 30 factors which are characteristic of an independent, accountable, and effective judiciary. This process involves a rigorous analysis of a country's legal framework related to the operation of the judiciary, as well as structured key informant interviews with judges, legal professionals, government officials, and third sector representatives.

The JRI serves as a guiding resource for technical legal assistance providers, legal and judicial reform advocates, and the international development community. In addition, the tool empowers judges and others in the local legal community to work with governments and non-governmental organizations in supporting judicial reform initiatives.

## JUDICIAL REFORM INDEX

# KOSOVO

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