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## ON THE JUDICIAL ACTIVITIES OF EULEX JUDGES

European Union
Rule of Law Mission

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# Foreword by Judge Maria Giuliana Civinini

**President of the Assembly of EULEX Judges**

It has now been more than a year since the EULEX judges began to exercise judicial functions in the courts of Kosovo. The declaration of the Initial Operational Capability (IOC) of EULEX on 9 December 2008 marked as well the beginning of the judicial functions of the EULEX judges. However, preparations for the beginning of the judicial work began earlier.

The first European judges were deployed in Kosovo in April 2008. On 10 July 2008, the first Assembly of the EULEX judges took place. The Assembly of Judges is responsible for the management of the work of the EULEX judges. As a first action, the Assembly approved guidelines on case allocation for EULEX judges in criminal and civil cases in district courts. On 23 October 2008, the 2nd session of the Assembly of EULEX judges, with 17 participating judges, concluded the guidelines for case allocation for EULEX judges in criminal cases at the Supreme Court of Kosovo and the organizational guidelines for EULEX court teams. These rules and guidelines concluded by the 1st and 2nd Assemblies set the foundation for the organisation of the future judicial functions of the EULEX judges.

By the beginning of December 2008 various managerial aspects of the work of the EULEX court teams had been set, including the designation of administrative focal points for each court, the composition of trial panels, the identification of the backlog of criminal and civil cases to be adjudicated by EULEX judges, and the organisation of court hearings. Guidelines were also developed for a correspondence management and document flow system for the EULEX district court teams.

Currently, there are 31 EULEX judges and 25 EULEX legal officers deployed with their local counterparts in all district courts and the Supreme Court of Kosovo. The EULEX and Kosovo judges work side by side and adjudicate cases together in mixed panels. A high level of partnership has been reached with our local counterparts – Presidents, judges and registrars of the Supreme Court, district and municipal courts of Kosovo. Additionally, ties have been established with the Kosovo Chamber of Advocates by a technical arrangement defining cooperation and coordination. Only through such joint efforts can we succeed in dealing with the case backlog in Kosovo courts and promptly adjudicate new cases falling within the competences of the EULEX judges, and it is our co-location and cooperation with the local judges which can ensure our future success in the justice system in Kosovo.

This report is a compilation of information about the work of the EULEX judges in fulfilling their executive functions in Kosovo courts over the year 2009. My special thanks go to Gergana Arabadjieva and Kathinka Hewitt, who compiled the information and prepared and drafted the report.

# I. List of acronyms

**EULEX** - European Union Rule of Law Mission in Kosovo

**MMA** - mentoring, monitoring and advising

**SPRK** - Special Prosecution Office of Kosovo

**KTA** - Kosovo Trust Agency

**SCSC** - Special Chamber of the Supreme Court on KTA related matters

**KPA** - Kosovo Property Agency

**KJC** - Kosovo Judicial Council

**HPCC** - Housing and Property Claims Commission

**KPCC** - Kosovo Property Claims Commission

**ICTY** - International Criminal Tribunal for the former Yugoslavia

**CCK** - Criminal Code of Kosovo

**CPCK** - Criminal Procedure Code of Kosovo

**CCFRY** - Criminal Code of the Socialist Federal Republic of Yugoslavia

**CLK** - Criminal Law of the Socialist Autonomous Province of Kosovo

**LCP** - Law on Criminal Procedure

**ECHR** - European Convention on Human Rights

**KP** - Kosovo Police

**SC** - Supreme Court

**DC** - District Court

**MC** - Municipal Court

# II. Executive summary

This report is a compilation of information about the work of the EULEX judges in fulfilling their executive functions in Kosovo courts over the year 2009, the first year of the Mission's operations. EULEX judges represent an integral part of the Justice Component of the European Union Rule of Law Mission in Kosovo (EULEX). EULEX judges are citizens of European Union Member States or of contributing Third States (Norway, Switzerland, Turkey, Croatia, the USA and Canada), and are acting judges in their national capacity.

Currently, there are 31 EULEX judges and 25 EULEX international legal officers deployed with their local counterparts in all courts of Kosovo. In addition, there are local legal advisors, administrative/language assistants, and interpreters/translators for Albanian/English and Serbian/English. The support of the local staff is indispensable for the efficient exercise of the judicial functions of the EULEX judges. EULEX judges perform their duties throughout Kosovo. EULEX judges' teams are deployed in all 5 District Courts, the Supreme Court and the Special Chamber of the Supreme Court.

EULEX judges exercise judicial functions in Kosovo in accordance with the Law on Jurisdiction. The Law on Jurisdiction provides EULEX judges with primary/exclusive and secondary/subsidiary competences over a range of criminal proceedings. The extensive range of criminal offences includes *inter alia* terrorism; genocide; crimes against humanity; war crimes; organized crime; inciting national, racial, religious or ethnic hatred, discord or intolerance; murder and aggravated murder; economic crimes. These most serious crimes, also in the form of attempt, and the various forms of collaboration in the crime are within the investigation and prosecution competence of the Special Prosecution Office of Kosovo (SPRK) and hence fall under the jurisdiction of the EULEX judges.

Furthermore, EULEX judges exercise jurisdiction in civil cases. According to Article 5.1 of the Law on Jurisdiction, EULEX civil judges have the authority to select and take over responsibility for civil cases within the jurisdiction of the Special Chamber of the Supreme Court of Kosovo on KTA related matters, cases falling within the jurisdiction of any court of Kosovo concerning appeals against decisions of the Kosovo Property Claims Commission, and any new or pending property related civil case.

Between 18 December 2008 and 31 March 2009 EULEX judges received 185 criminal cases from UNMIK as it closed down its judicial activities. These complex criminal cases included criminal procedures in preliminary and pre-trial investigations, indictments, trials, appeals, extraordinary legal remedies and re-trials. The charges varied from war crimes against the civilian population and money laundering to organized crime and commission of terrorism. EULEX judges retained 120 cases from the UNMIK legacy. The remainder of the criminal cases, in which there were no grounds to establish primary or subsidiary competence of the EULEX Judges, were referred mainly to competent courts of Kosovo for further proceedings as necessary, or forwarded to the EULEX prosecutors for consideration.

Processing the case files inherited from UNMIK has been set as a priority for the EULEX judges since they began to exercise their judicial powers. Section 1 of Part IV of this report focuses on the two major categories of cases which were received by the EULEX judges - war crimes against the civilian population committed

during the 1998-1999 war in Kosovo, and crimes committed in the context of the unrest which took place in Kosovo in March 2004. Such cases have been transferred to the jurisdiction of EULEX Judges at both the Supreme Court and the District Courts of Kosovo. The report provides a summary of war crimes cases and March 2004 riots cases which have already been completed by the EULEX judges.

Section 2 of Part IV describes the secondary/subsidiary competence of the EULEX judges. Article 3.5 of the Law on Jurisdiction interprets the "need to ensure proper administration of justice". According to this article, the EULEX judges can step in "if there have been threats to the Kosovo judge, to the witnesses or to the parties to the proceeding in connection with the case, and this can reasonably lead to a belief that there would be a serious miscarriage of justice if the case is kept under the exclusive responsibility of Kosovo judges". According to the same provision of the Law on Jurisdiction, the second condition for assigning EULEX judges to criminal proceeding is "if it is reasonable to believe that that the activity of EULEX judges, due to the particular complexity or nature of the case, is necessary to avoid a miscarriage of justice."

Section 2 also deals with requests for EULEX to take over criminal cases, with statistics and analysis of such cases. From January 2009 to January 2010 a total of 89 requests to take over civil and criminal cases were received. Of these 53 requests related to criminal cases and 11 to civil cases. Of the 53 requests to take over criminal cases, 38 were accepted, 10 rejected and 5 were dismissed. A large number of criminal cases were accepted in Mitrovicë/a (of 21 requests, 19 for criminal cases of which 17 were approved). The large number of requests, mainly from the EULEX prosecutors in Mitrovicë/a, is explained by the complexity of the political and justice situation in this region, and the ongoing process of restoring the effective functioning of Mitrovicë/a District Court. In order to avoid further delay in the criminal proceedings EULEX Prosecutors ask to take over criminal cases and assign them to EULEX judges. Summaries of some of the criminal cases taken over and adjudicated by the EULEX judges are given in Section 3 of the report.

Section 4 describes the role of EULEX judges in civil cases, and provides examples of the adjudication of civil cases in the Municipal and District Courts of Kosovo. In 2009 the largest number of civil cases (21) was adjudicated in Pejë/Peć region. Of these cases one was adjudicated at district court level in a panel of two EULEX judges and one Kosovo judge. The other 20 cases were adjudicated at municipal court level by one EULEX judge. By December 2009 fourteen of the civil cases had been closed and judgment issued. All of them were appealed against by a party and are now pending at the district court level.

Part V focuses on the jurisdiction of the Supreme Court Appeals Panel on Kosovo Property Agency (KPA) related matters, and Part VI on the Special Chamber of the Supreme Court on KTA related matters. The report describes the legal basis of the mandate of the KPA Appeals Panel and the SCSC and the cases which fall under the KPA Appeals Panel's and SCSC's jurisdiction.

Part VII assesses the achievements so far, and remaining challenges. The UNMIK legacy has already been completed at the Supreme Court level and the district courts also made significant progress in achieving this goal. The EULEX judges in Mitrovicë/a region took over and completed a number of complex criminal cases, thus contributing to the efforts to restore the effective functioning of the Mitrovicë/a DC. Further work was done to support Kosovo judges in dealing with the backlog of the 22,000 "stayed cases" involving claims against KFOR, UNMIK and local municipalities. These priorities remain on the EULEX judges' agenda for 2010.

# III. Introduction

EULEX judges represent an integral part of the Justice Component of the European Union Rule of Law Mission in Kosovo (henceforth "EULEX"). EULEX is the largest civilian mission ever launched under the EU's Common Security and Defence Policy (CSDP). The central aim is to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas. The mission is not in Kosovo to govern or rule. It is a technical mission which monitors, mentors and advises, whilst retaining a number of limited executive powers. EULEX works under the general framework of United Nations Security Resolution 1244 and has a unified chain of command to Brussels. Its legal basis is the Joint Action of 4 February 2008[1].

This report covers the work of EULEX judges in the implementation of their executive mandate. EULEX judges are either citizens of the European Union Member States or of contributing Third States (Norway, Switzerland, Turkey, Croatia, the USA and Canada), and are acting judges in their national capacity. Due to the particular nature of their functions, along with mentoring, monitoring and advising (MMA) their national counterparts, EULEX judges exercise executive functions, in accordance with the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, Law No. 03/L-053 (hereafter "The Law on Jurisdiction").

This report has been prepared by the staff of the office of the President of the Assembly of the EULEX Judges with the aim of providing an overview exclusively of the executive/judicial functions of the EULEX judges in Kosovo courts; and it does not cover any of the work of the EULEX judges on monitoring, mentoring and advising. The period covered in the report starts with the declaration of Initial Operational Capability of EULEX on 9 December 2008, which also marked the beginning of the exercise of executive powers by the EULEX judges in the courts of Kosovo.

## 1. Legal basis for the EULEX judges' judicial functions

EULEX judges exercise judicial functions in Kosovo in accordance with the Law on Jurisdiction. The Law on Jurisdiction provides EULEX judges with primary/exclusive and secondary/subsidiary competences over a range of criminal proceedings.

Primary/exclusive competence of the EULEX judges is set out in Article 3.1 of the Law on Jurisdiction and follows the prosecution and investigation competences of the Special Prosecution Office of Kosovo (SPRK) envisaged in Law no. 03/L-052 on the Special Prosecution Office of Kosovo dated 13 March 2008 (hereafter "Law on SPRK"). Articles 5 and 9 of the Law on SPRK list those crimes under the Criminal Code of Kosovo (CCK), the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCFRY) and the Criminal Law

1 COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO; and COUNCIL JOINT ACTION 2009/445/CFSP of 9 June 2009 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo

of the Socialist Autonomous Province of Kosovo (CLK) which are to be investigated and prosecuted by the SPRK. The extensive range of criminal offences includes *inter alia* terrorism; genocide; crimes against humanity; war crimes; organized crime; inciting national, racial, religious or ethnic hatred, discord or intolerance; murder and aggravated murder; economic crimes. These most serious crimes, also in the form of attempt and the various forms of collaboration in the crime are within the investigation and prosecution competence of the SPRK and hence fall under the jurisdiction of the EULEX judges.

Subsidiary competence, which occurs only when the crime was not investigated or prosecuted by the SPRK, is delineated in Articles 3.3 and 3.4 of the *Law on Jurisdiction*. As stated in Article 3.3 of the *Law on Jurisdiction*, the subsidiary competence shall be exercised in case the proper administration of justice is doubted upon petition of the prosecutor, the President of the competent court or any other party to the proceedings. The President of the Assembly of the EULEX Judges will then, for any reason, when it is considered necessary to ensure the proper administration of justice, assign EULEX judges to the proceedings. Subsidiary competence can also be exercised under Article 4.1 of the *Law on Jurisdiction* when there is a request for disqualification of a Kosovo judge. In this case the President of the Assembly of the EULEX judges has the authority to assign EULEX judges to any stage of the relevant criminal proceedings. The request for disqualification should however establish that the assignment of another Kosovo judge to the proceedings does not remove the circumstances that render the impartiality of the Kosovo judge doubtful.

In addition, EULEX judges exercise jurisdiction in civil cases. According to Article 5.1 of the *Law on Jurisdiction*, EULEX civil judges have the authority to select and take over responsibility for civil cases within the jurisdiction of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters (henceforth "SCSC"), cases falling within the jurisdiction of any court of Kosovo concerning appeals against decisions of the Kosovo Property Claims Commission, and any new or pending property related civil case, including the execution procedures falling within the jurisdiction of any court in Kosovo under the conditions specified in Art. 5.1 (c) of the
*Law on Jurisdiction*.

Case allocation for EULEX judges is carried out in accordance with the above provisions of the *Law on Jurisdiction* and the modalities developed by the Assembly of the EULEX judges, as stated in Articles 3 to 5 of the *Law on Jurisdiction*. The guidelines for case allocation for EULEX judges in criminal and civil cases in the District Courts were concluded by the Assembly of the EULEX judges on 10 July 2008. On 23 October 2008, the Assembly of EULEX judges approved the guidelines for case allocation for EULEX judges in criminal cases at the Supreme Court of Kosovo. Taking into consideration the specificity of the jurisdiction of the SCSC, on 2 March 2009, the Assembly of EULEX Judges unanimously adopted rules for the establishment of a Trial Panel and an Appellate Panel of the SCSC, for case allocation and additional rules of procedure. The case allocation system developed by the Assembly of the EULEX judges is based on the principles of transparency, objectivity, flexibility, sustainability, and equality of the workload of judges.

## 2. EULEX Judges Unit

**Personnel**

The current composition of the Judges Unit includes 31 EULEX judges and 25 EULEX legal officers. The President of the Assembly of the EULEX judges is the Head of the Unit.

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

- 5 Supreme Court (SC) judges including the President of the Assembly of the EULEX judges;
- 2 KPA appeal panel judges;
- 8 (+ 3 to join) criminal judges at district court (DC) level;
- 8 (+ 4 to join) civil judges at DC level;
- 5 first instance judges for Kosovo Trust Agency related matters (SCSC), and
- 3 KTA appeal judges (SCSC);
- 16 legal officers at DC level;
- 2 legal officers at the Supreme Court;
- 1 legal officer for KPA appeals
- 6 legal officers at the SCSC;
- Chief Registrar for the SCSC.

In the Supreme Court, the SCSC as well as in each DC there are as well local legal advisors, administrative/ language assistants, and interpreters/translators for Albanian/English and Serbian/English. The support of the local staff is indispensable for the efficient exercise of the judicial functions of the EULEX judges.

**Deployment in the District Courts of Kosovo**

EULEX judges perform their duties throughout Kosovo. EULEX judges' teams are deployed in the SC and the SCSC. There are as well 5 EULEX judges teams deployed in each of the district courts (DCs) of Kosovo. At present, the composition of the DC teams is as follows:

**Pristina DC** – 3 criminal judges and 1 civil judge supported by 6 legal officers and 3 local legal advisors;

**Gjilan/Gnjilane DC** – 1 criminal judge and 2 civil judges supported by 3 legal officers, 2 legal advisors and 1 local legal assistant;

**Pejë/Peć DC** – 1 criminal judge and 1 civil judge supported by 3 legal officers and 2 local legal advisors;

**Prizren DC** – 1 criminal judge and 2 civil judges supported by 2 legal officers, 1 local legal advisor and 1 local legal assistant;

**Mitrovicë/Mitrovica DC** – 2 criminal judges and 2 civil judge supported by 2 legal officers, 2 local legal advisors.

# IV. Adjudication of criminal and civil cases – case studies and statistics

## 1. Cases inherited from UNMIK

The transfer of criminal cases which were handled by the International Judges of the Department of Justice of UNMIK to the EULEX judges took place between 18 December 2008 and 31 March 2009. EULEX judges received 185 criminal cases. These complex criminal cases included criminal procedures in preliminary and pre-trial investigations, indictments, trials, appeals, extraordinary legal remedies and re-trials. The charges varied from war crimes against the civilian population and money laundering to organized crime and commission of terrorism. EULEX Judges retained 120 cases from the UNMIK legacy. The remainder of the criminal cases, in which there were no grounds to establish primary/exclusive or secondary/subsidiary competence of the EULEX judges, were referred mainly to competent courts of Kosovo for further proceedings as necessary, or forwarded to the EULEX prosecutors for consideration.

The EULEX judges at the Supreme Court retained 20 cases, referred 51 cases to the jurisdiction of the EULEX judges in the District Court of Pristina, and one to the jurisdiction of the EULEX judges of the Municipal Court of Pristina. EULEX judges in the District Court of Pejë/Peć received 19 cases; ten cases were referred to the EULEX judges in the District Court of Mitrovicë/Mitrovica, 5 cases in the District Court of Gjilan/Gnjilane, and 2 cases in the Municipal Court of Gjilan/Gnjilane. EULEX judges in the District Court of Prizren received 12 criminal cases.

Processing the case files inherited from UNMIK has been set as a priority for the EULEX judges since they began to exercise their judicial powers. This chapter of the report focuses on the two major categories of cases which were received by the EULEX judges - war crimes against the civilian population committed during the 1998-1999 war in Kosovo, and crimes committed in the context of the unrest which took place in Kosovo in March 2004. Such cases have been transferred to the jurisdiction of EULEX judges at both the Supreme Court and the District Courts of Kosovo. The report provides a summary of war crimes and March 2004 riots cases which have already been completed by the EULEX judges. These cases have been found to be interesting from the factual point of view as well as from the procedural perspective. The cases involve grave criminal offences such as illegal arrest and detention of civilians (*Selim Krasnqi et alia*) and large scale destruction and theft of property, intimidation, and endangering lives through the use of explosives and firearms (*Miroslav Vuckovic*). The adjudication of these serious crimes required comprehensive examination of the applicable concepts of international humanitarian law, and criminal law and procedure. The Court has considered *inter alia* the temporal and geographical scope of the "armed conflict" under the international humanitarian law, the notion of a "cooperative witness" and the "rule of judgment" under the Criminal Procedure Code of Kosovo (CPCK). Among the cases summarized in the report is also a case (*Gezim Ferati*) in which the verdict of the Supreme Court was publicly announced for the first time at the Court session (the practice was introduced in the Supreme Court by the EULEX judges). Another criminal case selected for the report (*Gani Haziraj*) was adjudicated by EULEX judges both at the first and second instance.

## a) War Crimes against the Civilian Population, Terrorism, Multiple Aggravated murder

In January 2009, in the course of the transfer of cases, UNMIK international judges handed over to EULEX judges 3 criminal cases involving war crimes charges which were pending appeal of the first instance verdict before the Supreme Court of Kosovo. All three war crimes cases were selected for the jurisdiction of EULEX judges sitting at the Supreme Court as this offence is within their exclusive competence.

***Selim Krasniqi et alia***

The criminal case against Selim Krasniqi was completed on 10 April 2009: the appeals filed on behalf of the defendants were partially granted, and their sentences reduced. The case involved allegations of an unlawful detention centre run by the Kosovo Liberation Army (KLA) in Rahovec/Orahovac municipality. Between 1 May 1998 and 31 August 1998, Selim Krasniqi, in complicity with others, and in a criminal plot to unlawfully detain Kosovo Albanian civilians, participated in the illegal arrest and detention of Kosovo Albanian civilians suspected of collaboration with Serbs, and held them in Dranovc/Drenovac village in inhumane conditions, and subjected them to beatings. Among those civilians 12 individuals – who were arrested and illegally detained and beaten – were identified in the verdict.

On 10 August 2006 a panel of three international (UNMIK) judges in Prizren District Court found Selim Krasniqi and two other defendants guilty of the charges, which qualified as war crimes against the civilian population. All three defendants received seven years imprisonment.

The three defendants appealed against the verdict in the Supreme Court. On 10 April 2009, the appellate panel of the Supreme Court, composed of three EULEX judges and two Kosovo judges, rendered its judgment on the appeals. Below is one of the main points raised in the Appeal and the conclusions reached by the Supreme Court with regard to the applicability of the provisions of international humanitarian law in this case.
The **Appeal** pointed out that for there to be a violation of international humanitarian law, there must be an armed conflict. The appeal contended that the temporal and geographical scope of the "armed conflict" does not extend beyond the precise time and place of the hostilities.

The Supreme Court referred to the decision of the Appeals Chamber of the ICTY in the case of *Prosecutor vs. Dusco Tadic* in which ICTY found that "the definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated ..."[2]

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2 *See* ICTY, *Prosecutor vs. Dusco Tadic*, Decision on interlocutory appeal on jurisdiction of 2 October 1995, paragraph 67

The Supreme Court further cited the opinion of the ICTY Appeals Chamber in support of the concept of broad geographical and temporal frame of reference for armed conflicts which is "reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations."[3] The Supreme Court concluded that the temporal scope of the applicable rules clearly reached beyond the actual hostilities. "The nexus required is a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle."[4]

The appellate panel partially granted the appeal filed in favour of defendant Selim Krasniqi, and reduced his punishment to six years of imprisonment. By partly granting the appeals filed on behalf of the other two defendants, the panel modified the first instance verdict as to the timeframe when the criminal offence had been committed as well as the punishment, which was reduced to six (6) years of imprisonment for both defendants. The judgement of the first instance was confirmed in the remaining part.
The judgement of the Supreme Court was final and no appeal could be submitted against it. The defendant therefore sought extraordinary legal remedies and through his defence counsel filed a request for the protection of legality, which is now pending at the Supreme Court.

***Idriz Gashi***

The allegations against Idriz Gashi included that on 12 August 1998 he murdered a Kosovo Albanian civilian after she was stopped at a KLA checkpoint in the village of Baran/Barane, because she was perceived by the defendant to be a Serb collaborator. Her body was only identified in May 2007. The trial panel of the District Court of Pejë/Peć, composed of two UNMIK and one local judge, found Idriz Gashi guilty of war crimes against the civilian population and sentenced him to 15 years of imprisonment.

The defendant appealed the verdict before the Supreme Court. The Supreme Court panel composed of two EULEX judges and three local Supreme Court judges announced its decision on the appeal on 2 June 2009, partially granting the appeal, and the case was referred back to Pejë/Peć District Court for re-trial.

Below is an overview of the arguments of the Appeal and the SC reasoning:
The **Appeal** contended *inter alia* that the first instance verdict was based on the testimony of a witness who was initially questioned by the public prosecutor as a suspect, and against whom there was a ruling initiating investigation. This testimony was therefore to be considered inadmissible.

The **SC** observed that although there was an investigation initiated against the witness who was interviewed and questioned as a suspect, the six months term established by the CPCK for completing the investigation had lapsed. However, after examining the procedure set up by the CPCK for the duration and termination of an investigation the SC found out that the "assumption that an investigation is implicitly terminated after the 6-months term has expired (as submitted by the prosecutor and accepted by the first instance

3 *See* ICTY, *Prosecutor vs. Dusco Tadic*, Decision on interlocutory appeal on jurisdiction of 2 October 1995, paragraph 69
4 *See* Supreme Court Judgment, *Salim Krasniqi et al,* 10 April 2009

Court) is without legal basis."[5] On the contrary, it is "sure that the expiry of the 6-month term does not mark the termination of the investigation … the case remains pending and the Public prosecutor may file an indictment at any time (with the only limit of the statutory limitation)."[6] The SC therefore concluded that the first instance court "incurred a substantial violation of the provisions of criminal procedure when it declared there was 'no ongoing investigation'". The SC also established that the witness in question still had the status of suspect "as possible co-perpetrator" and therefore he should not have given evidence as an "ordinary witness" but should have been "heard under the formalities provided for the cooperative witness".[7] With regard to the "usability" of the testimony/statement of the witness in question the SC referred to the "rule of judgment" under Article 157, paragraph 4 of the CPCK which states that "[t]he court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness".

The SC concluded that "the first instance Court committed a substantial violation of the procedural rules by accepting the testimony of a suspect without the formality set forth for cooperative witness and leaving aside the rule of judgment" as established by the CPCK. The SC determined that as a result there was also an incomplete determination of the factual situation. The SC issued a Ruling on annulling the verdict of Pejë/Peć DC and sent the case back for re-trial to this DC. The summary of the re-trial proceedings in the District Court of Pejë/Peć is provided further in this report.

***Florim Ejupi***

On 6 June 2008, a trial panel in DC Pristina composed of three UNMIK judges found Florim Ejupi guilty of the criminal offences of aggravated murder, attempted aggravated murder, terrorism, causing general danger, racial and other discrimination, and unlawful possession of explosive substances, and sentenced him for forty years imprisonment.
The first instance court found that Florim Ejupi was responsible in co-perpetration with other unknown persons for planting and detonating an illegally possessed explosive device on 16 February 2001 near the village of Livadicë/Livadica, Podujevë/Podujevo municipality. The explosive was placed in a culvert located along the route of a convoy of buses that carried passengers from Niš in Serbia to Graçanicë/Gračanica in Kosovo. At around 11:15am the first bus of the convoy carrying fifty seven passengers was hit by a massive explosion that lifted the bus from the ground, destroyed its front end and instantly killed the driver and the passengers seated in that section. Other passengers were severely injured, some of them died later, while receiving medical attention. The act endangered human life at a place where a large number of persons gathered, resulting in the death of eleven persons and grave bodily injury of ten persons.

Defendant Florim Ejupi filed an appeal through his defence counsel against the verdict. The case files were handed over by UNMIK to EULEX judges on 20 January 2009 and selected for EULEX judges at the Supreme Court level by a decision of the President of the Assembly of EULEX Judges on 21 January 2009.

A five-judge panel of the Supreme Court of Kosovo, composed of three EULEX judges and two Supreme Court judges, held a session to hear the appeal and the arguments of the Office of the State Prosecutor/ Office of the Public Prosecutor on 10 March 2009. Following deliberations on 10 and 12 March 2009, the

5 *See* Supreme Court Judgment, *Idriz Gash* , 2 June 2009
6 ftn. 5
7 ftn. 5

Supreme Court granted the appeal of the defendant, modified the first instance verdict, and acquitted Florim Ejupi of all charges due to the insufficiency of evidence submitted during the criminal proceedings. More specifically, the panel found that the DNA traces found on a cigarette butt linking the defendant to the crime scene, due to improper handling and lack of information as to when the butt was placed at the scene, are insufficient to support Ejupi's guilt. In addition, the panel also found the testimony of Witness Alpha not credible; hence Ejupi's conviction remained without any evidentiary support.

The Special Prosecution Office of Kosovo (SPRK) within the legal timeframe filed extraordinary legal remedy, a request for protection of legality against the Supreme Court judgment, needless to say to the detriment of the accused, for essential violations of the provisions of the procedure code, the alleged disqualification of the presiding judge of the Supreme Court panel, the wrong interpretation of the status of Witness Alpha; and the evaluation of the corroborating DNA evidence.
The panel of the Supreme Court, comprised of one EULEX judge as presiding judge and four Supreme Court judges, one of them as reporting judge and the others as members of the panel, on 10 November 2009 rejected the request of SPRK as ungrounded.

***Miroslav Vucković***

The criminal case against Kosovo Serb defendant Miroslav Vucković involved allegations of large scale destruction and theft of Kosovo Albanian property, intimidation, and endangering lives through the use of explosives and firearms in the village of Gushavc/Guševać from March through May 1999. The panel of the District Court of Mitrovicë/Mitrovica, composed of two UNMIK judges and one local judge, in a verdict dated 25 October 2002, found Miroslav Vucković guilty of war crimes against the civilian population and sentenced him to 12 years of imprisonment. Deciding on the appeals filed by the defence counsels of the defendant, the Supreme Court, in a Ruling, dated 15 July 2004, annulled the first instance verdict and sent the case back to the first instance court for re-trial. The re-trial panel, composed of three UNMIK judges this time, on 23 May 2008 convicted Miroslav Vucković again for the war crimes and sentenced him to an aggregated punishment of 8 years of imprisonment; additionally Vucković was acquitted of three sub-counts of war crimes charges. At the same time a detention order was issued against the accused that had fled Kosovo during the main trial. The accused and his defence counsels appealed against the verdict and the detention order.

On 7 October 2009 a panel composed of five EULEX judges in the Supreme Court amended the verdict of the District Court of Mitrovicë/Mitrovica dated 23 May 2008, and acquitted the accused of all charges. The decision of the Supreme Court granting the appeals and acquitting the accused is based on the following briefly summarized reasons:
The criminal proceedings against the accused began in 1999. During the following years the first verdict of the District Court of Mitrovicë/Mitrovica was quashed by the Supreme Court and the case was sent back for re-trial. The same happened to the second verdict of the District Court of Mitrovicë/Mitrovica. With a decision issued in July 2004 the Supreme Court again quashed the verdict of the first instance Court and sent the case back for another re-trial. In that decision the Supreme Court gave the District Court of Mitrovicë/Mitrovica clear guidelines as to the scrutiny with which the evidence would have to be assessed during the second re-trial due to the particular circumstances of the case. The second re-trial – which was

the third trial at first instance - ended with the now appealed verdict, dated 23 May 2008.

In its decision of 7 October 2009 the appellate panel of the Supreme Court found that the first instance Court had failed to comply with the guidelines given by the Supreme Court in the previous decision (July 2004). The requirements for a proper and accurate assessment of the evidence, in particular witness statements, which were to a high degree affected by numerous contradictions, were not met. In addition the first instance Court failed to properly assess the alibi raised by the accused who claimed that due to his physical condition he would not have been able to commit the crimes. The Court of first instance did not accept this alibi without the proper assessment of two medical experts and the statements of a large number of witnesses, who confirmed the statement of the accused.

As a result the Supreme Court held that the Court of first instance had again failed to accurately establish the facts. In the light of the particular circumstances of the case, another re-trial would have been the fourth trial before the Court of first instance – and in the light of Article 6 of the European Convention on Human Rights (ECHR)[8], which entitles every defendant to a trial within a reasonable time, the Supreme Court decided not to order another retrial, but to amend the appealed verdict and to acquit the accused, based on the fact that during a period of ten years it had not been possible to establish the charges against him, and thus applying the principle *in dubio pro reo*.

## Pristina DC

***Latif Gashi et alia (Llapi Group)***

The verdict in the criminal case against Latif Gashi was announced on 2 October 2009 by a Pristina DC trial panel composed of two EULEX judges and one Kosovo judge. The three defendants were found guilty of the criminal offence of war crimes against the civilian population and sentenced to 6 years, 4 years, and 3 years of imprisonment respectively.
The significance of this war crimes case was further increased by the fact that all three defendants held posts in the Kosovo administration - Latif Gashi was legal adviser to the Ministry for the Environment, the second defendant was employed as Chief Executive of Credit Control at the Post and Telecom Kosovo (PTK), and the third defendant was a Member of the Kosovo Assembly.

**The First Instance decision:**

The case was investigated from 2001 to 2002. The original indictment was filed on 19 November 2002, and amended twice. The final version of the indictment charged the accused with the criminal offence of war crimes against the civilian population, in violation of Article 142 of the Criminal Code of the Federal Republic of Yugoslavia, read in conjunction with article 22, 24, 26, and 30 of the Criminal Code of the Federal Republic of Yugoslavia – the applicable law in the proceedings in accordance with UNMIK Regulation 1999/24 amended by Regulation 2000/59, and in violation of the provision of the Additional Protocol II to the Geneva Conventions of 12 August 1949.

8 Formally known as Convention for the Protection of Human Rights and Fundamental Freedoms

The indictment contained 14 different counts of war crimes, including unlawful detention and arrest, beating, torture, killings allegedly committed against Kosovo-Albanian civilians and one Kosovo Serb between August of 1998 until mid-June of 1999 in various detention centres used by the KLA command of the Llapi Zone to hold civilian detainees.
The first instance verdict, issued by DC Pristina on 16 July 2003, acquitted all the accused of some of the charges. However the three accused were convicted on the remaining counts/part of the counts and were sentenced to 10, 13 and 17 years of imprisonment.

**The Supreme Court decision**

The defence counsels of the three accused appealed against all the counts on which their clients had been found guilty, while the prosecutor did not appeal against any of the acquittals. Therefore the Supreme Court in its decision could not alter any of the counts, which were decided with an acquittal in the first instance decision (principle of *reformation in peius*) which had become *res judicata*.

The decision of the Supreme Court did not dispute any of the general elements required by international humanitarian law and domestic law for war crimes (i.e. status of armed conflict; nature of the conflict; nexus).

The Supreme Court, in a decision dated 21 July 2005, further reduced the extent of the indictment, 'cancelling in their entirety' four of the counts (all related to the charge of unlawful detention and arrest), and acquitting the accused of murder of civilians because the factual allegation had not been proven 'beyond reasonable doubt'.

The Supreme Court upheld the conclusion of the first instance panel and confirmed the liability of the accused for the crime of torture of Kosovo Albanian civilians in the detention Centre of Llapastica, but sent the count back for re-trial in the part related to the sentencing for the re-trial panel to determine an adequate jail term. Three more counts of the indictment were also sent back to the first instance court.

**Remaining counts before the District Court of Pristina**

On 7 July 2009, the re-trial of the three accused started at Pristina District Court before a panel of two EULEX judges and one Kosovo judge. On 8 July 2009 the panel issued a decision clarifying the remaining counts of the indictment, and these were read before the parties. No objection was raised by them.

The remaining counts were *inter alia*:

**COUNT 5**

*From October 1998 until late April 1999, the three defendants, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the establishment and perpetuation of the inhumane treatment of the Kosovo Albanian civilians detained in the detention centre located at Llapashtica, by housing those civilian detainees in inhumane conditions, depriving them of adequate sanitation, food and*

*water, and necessary medical treatment. The inhumane treatment of the civilian detainees caused immense suffering or was a violation of the bodily integrity and health of those detainees and constituted an application of measures of intimidation and terror.*

**COUNT 8**

*From October of 1998 until late April of 1999, the three accused, acting in concert with other unidentified individuals and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of Kosovo Albanian civilians detained in the detention centre located at Llapashtica, in an attempt to force those detainees to confess to acts of disloyalty to the KLA.*
*By ordering and participating in the beating and torture of Kosovo Albanian civilians [illegally] detained in the detention centres located at Llapashtica, Majac and Potok, the three defendants incurred personal and superior responsibility for the war crimes of inhumane treatment, immense suffering or violation of bodily integrity or health, application of measures of intimidation and terror and torture.*

**COUNT 14**

*From 2 August 1998 until late September 1998, the three accused, acting in concert with other unidentified individuals, and pursuant to a joint criminal enterprise, ordered and participated in the beating and torture of a Kosovo Serb whom they detained in detention centres located at Bare, Bajgora and other surrounding locations within the Llap Zone in an attempt to force him to confess to acts against the KLA or to provide intelligence information.*

The trial took place smoothly. The peak of interest was reached when the Kosovo Serb victim (*see* Count 14 above) appeared before the re-trial panel to give his testimony; because of the need for adequate security measures to protect the witness, and the content and length of the testimony of the witness.

As mentioned above, one of the accused was a member of the Kosovo Assembly and, therefore covered by immunity according to Article 75 of the Kosovo Constitution. The immunity of the accused was not opposed by the accused or his Defence counsel during the trial as a procedural limitation. It was nevertheless appropriate to clarify that, in the concrete case the Kosovo Constitution did not prevent a criminal prosecution for the specific allegation. Members of the Kosovo Assembly are granted functional immunity which, under paragraph 1 of art. 75, only covers them *for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly,* clearly excluding acts which are not a function of the mandate of the member and – *a fortiori* – prior to their assumption of office as member of the Assembly. The crimes alleged in the indictment against this defendant were committed in 1999, before he took office as member of the Kosovo Assembly and therefore certainly outside the scope of paragraph 1 of Article 75 of the Kosovo Constitution.

The verdict in the Lapi group case was announced on 2 October 2009: Latif Gashi was found guilty of the criminal offence of war crimes against the civilian population described in the above counts, as in the indictment of 30 June 2003. The court ordered that Latif Gashi remain in custody until the verdict becomes final, and he was immediately arrested. The order was appealed (*see below*).

The other two accused were found guilty of the criminal offence of war crimes against civilians described in counts 5 and 8, as in the indictment of 30 June 2003. The three accused were sentenced to 6, 4 and 3 years of imprisonment.

**Appeal against the arrest order in the Supreme Court:**

Latif Gashi appealed against the order of the trial panel through his Defence Counsels. The Supreme Court of Kosovo, in a ruling dated 7 October 2009, rejected the appeal as unfounded.

**Request for protection of legality in the Supreme Court:**

Latif Gashi then sought extraordinary legal remedies against the ruling of the Supreme Court. On 29 October 2009, Latif Gashi filed a request through his Defence Counsels for protection of legality against the ruling of the Supreme Court. The accused proposed the annulment of the ruling as well as the arrest order of Pristina District Court. The accused asserted *inter alia* essential violations of the provisions of the criminal proceedings and the European Convention on Human Rights.

On 19 November 2009 the Supreme Court, in a panel composed of three EULEX and two Kosovo Supreme Court judges dismissed as inadmissible a request by Gashi seeking extraordinary legal remedy against the ruling of the Supreme Court of 7 October 2009 rejecting his appeal against the order of the trial panel of Pristina DC of 2 October 2009 ordering his detention on remand. The Supreme Court determined that, in accordance with the SC ruling of 7 October 2009, based on Article 550 of the CPCK, the previous criminal procedure law (the Law on Criminal Procedure – LCP) is applicable in the present case until the proceeding is completed in final form. According to Article 416 of LCP, it is the unique responsibility of the competent public prosecutor to file a petition for protection of legality against effective court decisions. The LCP does not provide the defendants and defence counsels with the right to initiate protection of legality proceedings. In view of the fact that the request for protection of legality was submitted by defendant Latif Gashi through his defence counsels and not by the competent public prosecutor, the Supreme Court considered that it was not permitted by the applicable law; therefore it was inadmissible.

The appeal panel of the Supreme Court also ascertained that the principle of the "most favourable law" has relevance only in the substantive criminal law, and is not applicable in the procedural aspect.

Finally, by referring to Article 353, paragraph 1 of the LCP and Article 5 of the ECHR and its precedents, the Supreme Court concluded that Pristina District Court correctly ordered that Latif Gashi be held in custody.

***Besnik Hasani et al.***

The case summarized below is notable for the fact that the defendants were two police officers of the Special Units of the Kosovo Police (KP) and a former member of the Kosovo Protection Corps (TMK), and the charges included a multiple aggravated murder caused by explosion.

The accused were in pre-trial detention and their transport from the detention centre to the court was refused by the Commissioner of the Kosovo Correctional Services (KCS), on the grounds that the three accused were Category 'A' Prisoners (*i.e*. High Risk Category) and that, according to internal rules of the KCS, it was not possible to transfer/transport more than one Category 'A' prisoner a day. Based on this constraint as well as the overall risk assessment conducted by the KCS of the security situation if the trial were held in Pristina, the trial was eventually held in Dubravë/a Detention Centre, where the defendants were being held.

After the main trial, the Pristina District Court panel, composed of two EULEX judges and one Kosovo judge, found the two police officers guilty of aggravated murder, grievous bodily harm, and causing general danger**,** all the crimes being committed in co-perpetration (below described counts 2, 3 and 4 of the original indictment).

**COUNT 2**

On 24 September 2007, the two police officers acting in co-perpetration with each other and with individuals whose identities are still unknown, deprived other persons of their lives because of unscrupulous revenge and other base motives, by placing and detonating an improvised explosive device on the ground floor of a building at Bill Clinton Avenue, Pristina, resulting in the death of two people, and in doing so they intentionally endangered the life of more persons, thereby committing the criminal offence of *aggravated murder*.

**COUNT 3**

On 24 September 2007, acting in co-perpetration with each other and with individuals whose identities are still unknown, caused grievous bodily harm to nine people, by placing and detonating an improvised explosive device on the ground floor of a building at Bill Clinton Avenue, Pristina, thereby committing the criminal offence of *grievous bodily harm,*

**COUNT 4**

On 24 September 2007 two defendants (police officers) acting in co-perpetration with each other and with individuals whose identities are still unknown, by using explosives, namely an improvised explosive device placed and detonated on the ground floor of a building at Bill Clinton Avenue, Pristina, caused great danger to human life resulting in the deaths of two persons, and grievous bodily harm to nine persons, thereby committing the criminal offence of *causing general danger*.

The third defendant was found not guilty of the criminal acts listed above and was therefore acquitted.

The judgment was pronounced on 17 September 2009. The District Court of Pristina sentenced the two defendants found guilty to long-term imprisonment of 25 years each.

## Pejë/Peć DC

***Idriz Gashi***

**Summary of the criminal proceedings**

**Indictment, 2007:**

The indictment against Idriz Gashi was filed on 08.02.2007, charging the defendant with war crimes against the civilian population. According to the indictment, on the morning of 12 August 1998, a Kosovo Albanian woman, was questioned by members of the KLA controlling the Barane village area, and was then taken by Idriz Gashi and another KLA member to a wooded area in the vicinity of the village of Vranoc, Pejë/Peć Municipality, where Idriz Gashi shot her dead because he perceived her to be a Serb collaborator.

**Main Trial, 2007:**

The main trial was held in the premises of the District Court of Pejë/Peć by a panel of two international (UNMIK) judges and one local judge. The defendant was found guilty and was sentenced to fifteen (15) years of imprisonment.

**Appeal, 2009:**

On 2 June 2009, a Supreme Court panel composed of two EULEX and three Kosovo judges reversed the verdict of Pejë/Peć DC and sent the case back to the same court for re-trial. In a separate ruling, the detention on remand of Idriz Gashi was replaced by house arrest.

**Re-trial, 2009:**

The main trial was conducted in the District Court of Pejë/Peć at the end of October – beginning of November 2009. The trial panel was composed of two EULEX judges and one local DC judge.
As mentioned above, according to the indictment filed on 8 February 2007, the defendant was charged with war crimes against the civilian population contrary to Article 142 of the CCSFRY.

After public hearings on 21, 29 and 30 October 2009 and 12, 17 and 19 November 2009 in the presence of the accused, his defence counsel, the EULEX prosecutor and the injured party, and after the deliberations, the trial panel pronounced the verdict in public on 19 November 2009.

The defendant was found guilty of the criminal offence of war crimes against the civilian population contrary to Article 142 of the CCSFRY, Articles 3 and 147 of the 4th Geneva Convention, and Article 4 of the Additional Protocol II to the Geneva Conventions of 12 August 1949. The defendant was sentenced to 14 years of imprisonment. In a separate ruling, the defendant was ordered to be detained on remand.

**Appeal in the Supreme Court against the ruling on detention on remand**

Idriz Gashi filed an appeal against the DC Pejë/Peć ruling on detention on remand in the Supreme Court. On 26 November 2009, a panel composed of two EULEX judges and one Kosovo judge partially granted the appeal, imposing house detention instead of detention on remand until the judgment against him becomes final.

***Gjelosh Krasniqi***

Gjelosh Krasniqi was charged with war crimes against the civilian population contrary to Article 142 of the CCSFRY, Articles 3 and 147 of the 4th Geneva Convention, and Article 4 of the Additional Protocol II to the Geneva Conventions of 12 August 1949. The charges involved acts of illegal arrest, detention, taking as hostage, deprivation of right to fair and impartial trial, inhumane treatment and murder of a Kosovo Albanian civilian person; unlawful confiscation of property and pillaging of weapons from the victim and other Kosovo Albanian civilians. The offences were allegedly committed on 24 March 1999 in the village of Doblibarë/Doblibare, Gjakovë/Djakovica Municipality.
After the main trial hearings from 11 - 31 March 2009, and 23 -29 April 2009, the Pejë/Peć DC trial panel composed of two EULEX judges and one Kosovo judge pronounced the verdict on 29 April 2009.

By virtue of the panel's decision, the charge against Gjelosh Krashniqi of illegal arrest of the victim was reclassified as unlawful deprivation of liberty contrary to the Article 162 of the CCK and consequently rejected since the period of statutory limitation had expired.
The defendant was acquitted of the detention, deprivation of right to fair and impartial trial, inhumane treatment and murder of the victim, because it was not proven that the accused had committed the act with which he had been charged.

The defendant was found guilty of war crimes against the civilian population in the form of taking the victim hostage, and unlawful property confiscation and pillaging of weapons. Gjelosh Krasniqi was therefore sentenced to the term of seven years of imprisonment.

The verdict of the first instance court was appealed by the public prosecutor and the appeal is now pending at the Supreme Court.

## Prizren DC

***Andjelko Kolasinac***

On 4 November 2009 a panel of District Court of Prizren composed of two EULEX judges and one Kosovo judge pronounced the verdict in the case against Andjelko Kolasinac. This was the second re-trial of this Kosovo Serb defendant who had been tried and convicted twice before for war crimes against the civilian population.

The indictment against Andjelko Kolasinac was filed by the local public prosecutors on 7 August 2000. The indictment named Andjelko Kolasinac and seven others as defendants and alleged that each defendant had committed war crimes against the civilian population. On 2 September 2000, six of the indicted defendants other than Kolasinac and one other defendant escaped from the detention centre where they were being held. The Public prosecutor proposed separating the cases of Kolasinac and the other defendant from those of the escaped defendants, so the trial panel decided to try only Kolasinac and the other defendant who did not escape.

In May and June 2001, the case was held before a panel of international (UNMIK) judges. On 14 June 2001 the District Court found Kolasinac guilty of aiding a perpetrator after he has committed a criminal act", by arranging the concealment of traces of the war crime of expulsion of Kosovo Albanians by means of destruction and disposal of remains of their properties and personal belongings in Malishevë/Mališevo in April and May, 1999. The Court sentenced Kolasinac to five years of imprisonment.

In August 2001 the international public prosecutor and the defence counsels consecutively filed appeals against the verdict. On 2 November 2001, the Supreme Court overruled the verdict of the District Court of Prizren and remanded the case for re-trial.
On 31 January 2003 Prizren District Court found Andjelko Kolasinac guilty of war crimes against the civilian population by "displacement or forced de-patriation", "forced labour"; "pillaging and looting of the property of the population"[9]. The court sentenced him to eight years of imprisonment.

On 5 August 2004 the Supreme Court approved the appeals of the Defence counsel of Andjelko Kolasinac, overturned the previous verdict, and ordered a re-trial.

The re-trial of Kolasinac began in Prizren DC on 4 November 2009. The EULEX prosecutor delegated for the criminal proceedings submitted an amended indictment re-qualifying the offence still standing against the accused after the Supreme Court decision of 5 August 2004 as abuse of confidence committed in violation of Article 148 of the CLK - and punishable with three months to three years of imprisonment. The prosecutor further submitted that statutory limitation applies to the offence of abuse of confidence. The court rejected the charges against the accused because the crime of abuse of confidence in the amended indictment was covered by statutory limitation. None of the parties appealed against this decision.

## b) March 2004 riots cases

### Supreme Court

In six of the criminal cases related to the March 2004 riots the trials had been concluded and were therefore transferred to the EULEX judges at the Supreme Court. All six cases have been completed (in one the appeal was withdrawn). Below are summaries of the proceedings in four of these cases.

9 *See* Prizren District Court Judgment, *Andjelko Kolasinac* , 4 November 2009

***Skender Islami et alia***

The trial in this case was concluded on 25 January 2008 in Pristina District Court. The defendants were found guilty of criminal offences including participation in a group that commited a criminal act. This case is connected with the 17 March 2004 riots in Fushe Kosova/Kosovo Polje. Among the group of five defendants, Skender Islami (sentenced to eight years) and one other defendant (sentenced to seven years) were in detention in Dubravë/a Prison, while the other three defendants were free pending the appeal.

The case was transferred to the EULEX judges in the Supreme Court on 20 January 2009. The panel, composed of two EULEX judges and one Kosovo judge, announced the verdict on 20 October 2009, partially granting the appeals of four of the defendants including Skender Islami, and acquitting the fifth defendant of all charges against him. Skender Islami was sentenced to three years and six months of imprisonment. Two of the other three defendants were sentenced to one year and six months and the third to two years and six months in prison. The time spent in detention on remand was included in the term of the punishments. The court further decided that the four defendants must jointly reimburse the costs of the proceedings. The court also revoked the first instance decision on property claims, and instructed the injured parties to pursue their property claims in civil litigation.

The main arguments for the decision were summarized by the presiding EULEX judge as follows:

1) Statements on which the first instance verdict was based had been given by juveniles in the capacity of suspects without the assistance of a defence counsel, which was mandatory. Consequently, they were radically illegal and could not be used either for challenging the declarations of witnesses and defendants or for reconstituting the facts;

2) The criminal offence of participating in a crowd can not be concurrent with the graver offence of causing general danger, but is to be absorbed in it.

***Sadri Shabani et alia***

Sadri Shabani and five other defendants were charged with aggravated murder, causing general danger, participation in a group that commits a criminal act, illegal possession of weapons and ammunition and suppression of evidence. The allegations were related to the murder of a Kosovo Serb and the serious injury suffered by his mother during the March 2004 riots in Gjilan/Gnjilane.

The first instance Gjilan/Gnjilane District Court found the defendants guilty of participation in a group which took the victim's life, inflicted serious bodily injury on his mother, and considerably damaged the house of the victim and at least one car.

The punishments varied from 16 years to 2 years and 6 months of imprisonment. Apart from one, all defendants appealed against the verdict; their appeals were heard in the Supreme Court on 23 June 2009.

The Supreme Court panel composed of three EULEX judges and two Kosovo judges rejected the appeals of three of the defendants and partially granted the appeals of the other two defendants. One of the appeals was granted by legally qualifying the criminal offence as one of aggravated murder. The second appeal was partially granted, with the defendant acquitted of the criminal offence of assistance in aggravated murder, and his sentence was therefore reduced.

***Gezim Ferati***

On 8 September 2009, a Supreme Court panel of three EULEX judges and two Kosovo Supreme Court judges held a session to decide on the appeal filed by the public prosecutor against the verdict of Pristina District Court dated 11 May 2006, in the criminal case against Gezim Ferati. The appeal of the public prosecutor was rejected, and the first instance verdict was confirmed.

Gezim Ferati was charged with two counts of aggravated murder committed in complicity and four counts of attempted aggravated murder in complicity, in relation to events during the March 2004 riots in Drekoc/Drajkovce village, Shtërpcë/Štrpce Municipality. The allegations included that on March 17 2004, the defendant, motivated by ethnic hatred and prejudice, ruthless revenge and malice, in complicity with at least five unidentified persons, shot two Kosovo Serbs outside their house. One of the victims died at the scene while the second died while being taken to hospital. Gezim Ferati and his co-perpetrators shot at the victims only because they belonged to the Serbian community; and at the same time endangered the life of a third person in the house at the time of the shooting, who could have been hit by the bullets. On March 17 2004 Gezim Ferati, in complicity with at least five unidentified individuals, allegedly also shot at four Kosovo Serb police officers, who attended the crime scene in order to secure it. These officers were shot while performing their official duties.

An international panel of Pristina District Court composed of three UNMIK judges in accordance with UNMIK Regulation No. 2000/64, in a verdict issued on 11 May 2006 acquitted Gezim Ferati of all charges due to lack of evidence. The appealed against the verdict to the detriment of the defendant.

The case was transferred from UNMIK to EULEX judges on 6 January 2009, and after being assessed was selected for the jurisdiction of the EULEX judges at the Supreme Court.

As mentioned above, the Supreme Court held a session to decide on the appeal on 8 September 2009. The judgment was announced on 15 September 2009. The panel rejected as unfounded the appeal of the Public prosecutor against the decision of Pristina District Court, and therefore confirmed the verdict.

This case was the first in which the verdict of the Supreme Court was publicly announced during the court session. The practice of public announcement of the verdict in criminal cases was introduced in the Supreme Court by the EULEX judges after a thorough assessment of Kosovo legislation in the light of the ECHR and the continuous jurisprudence of the European Court of Human Rights. On the advice of the EULEX judges the President of the Supreme Court willingly adopted this practice.

***Mehmet Morina***

The Supreme Court announced the decision in the case of Mehmet Morina on 19 May 2009. The first instance verdict was modified by a Supreme Court panel composed of two EULEX and three Kosovo Supreme Court judges.

The District Court of Pristina on 2 July 2005 found Mehmet Morina guilty of attempted aggravated murder acting in complicity with other persons, and of aiding and abetting one another, in a brutal or insidious, wanton and violent manner, in connection with the March 2004 riots; and acquitted him of the charge of participation in a group that commits a criminal act. More specifically, Morina was charged with the attempted aggravated murder of a Kosovo Serb male on the first day of the March 2004 riots in Bresje area in Fushë Kosovë/Kosovo Polje, by hitting him with a metal bar held in both his hands and then swung down as one would use an axe to split wood with violent force. The victim did not die instantly but was set on fire by unidentified persons after being assaulted, and died subsequently. Mehmet Morina received a sentence of 18 years of imprisonment, in which the time spent in detention, since 19 April 2004, was included.

The Public prosecutor filed an appeal to the detriment of Mehmet Morina, asking the appeal panel to find him guilty of aggravated murder instead of attempted aggravated murder, and to modify the first instance judgment accordingly. The defendant also appealed against the verdict through his Defence counsel primarily aiming his acquittal or alternatively to impose a more lenient sentence on him.

The Supreme Court rejected the appeal of the Public prosecutor and partially granted the appeal of the defendant, modifying the verdict of Pristina District Court as follows:

- changing the criminal offence to attempted aggravated murder in complicity with other persons, carried out in a malicious way, and
- reducing the sentence from 18 years to 12 years of imprisonment.

The remaining part of the first instance verdict was confirmed by the Supreme Court.
One of the members of the appeal panel of the Supreme Court (a EULEX judge) submitted a partially dissenting opinion to the judgment, arguing that Mehmet Morina's offence should have been qualified **as,** and Mehmet Morina should have been found guilty **of,** murder instead of attempted murder.

The defendant submitted through his defence counsel a request for the protection of legality. The EULEX prosecutor also submitted request for the protection of legality to the detriment of the defendant. Supreme Court panel composed of two EULEX judges and three Kosovo judges rejected both requests and confirmed the verdict of the Supreme Court of 19 May 2009.

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Cases involving charges related to the March 2004 riots events were also received by the EULEX criminal judges at district court level. One case which, following its transfer to EULEX on 24 December 2008 was assigned to the EULEX judges in Prizren DC was the case against Gani Haziraj, the summary of which is given below.

***Gani Haziraj***

In the indictment filed on 14 July 2008 the defendant was charged with three offences: participating (as a leader) in a group that commits a criminal act, as defined in Article 200(2) of the CLK; participating in a group that commits a criminal act, as defined in Article 200 (1) of the CLK; and incitement (Article 23 of the CCSFRY).

The charges were related to offences allegedly committed in Prizren on 17 and 18 March 2004 in which residences of Kosovo Serbs and Orthodox churches were burned, and considerable damage was caused. A number of police officers were injured during these events. The substantive allegations asserted that on 17 and 18 March 2004 the defendant participated as a leader in the assembled crowd and through their joint actions caused damage to property on a large scale. During the confirmation of indictment proceedings the defendant denied having participated in the violent protest of 17 March 2004, claiming that he was somewhere else at that time. He admitted having been present in the protest of 18 March 2004, claiming however that he had not participated in a violent manner, as the allegations against him asserted.

There was overwhelming evidence in the court file, including photographs, witnesses' statements, and police reports, that allegedly proved the defendant's role as a leader in the protests. The defendant allegedly appeared in a number of photographs as leading the crowd while marching towards UNMIK institutions on 18 March 2004. He was also seen in several photographs to be apparently directing the crowd.  The prosecution evidence of the defendant's participation in the alleged offence was supported by the statements of four witnesses.

The trial panel of the District Court of Prizren was composed of two EULEX judges and one Kosovo judge. The public hearings were held in June and September 2009, in the presence of the EULEX prosecutor, the accused, Gani Hazeraj, and his defence counsel. The trial was completed on 28 September 2009 when the judgment was announced publicly. The defendant was convicted of the lesser offence of participating in a gathering that committed violence under Article 200(1) of the CLK. The court sentenced him to 6 months imprisonment, suspended for one year.

**Appeal against the verdict in the Supreme Court:**

The defendant appealed against the verdict in the Supreme Court. A panel of two EULEX judges and one Kosovo SC judge decided on the appeal on 19 January 2010.

In examining the claims in the appeal of violations of procedural and criminal law at the first instance, the SC found "no violations … as to the constitution of the First Instance Court and to the participation of the judges in the main trial and in rendering … the judgement …., as to the jurisdiction of the same Court…"[10] Furthermore, "the main trial was conducted in the presence of the accused and of his defence counsel" as required by the CPCK. The SC examined the defence counsel's contention that "due to an erroneous and incomplete corroboration of the factual situation, the material law was mistakenly approved…." and found

10 *See* Supreme Court Judgment, *Gani Hazeraj* , 19 January 2010

"no violation of criminal law … in the first judgement which affirmed the responsibility of the defendant for the crime charged …"[11] The Court concluded that the "concept of criminal responsibility [was] correctly applied in the challenged verdict."[12] The appeal panel concluded that the claims of the defence counsel concerning basic violation of criminal procedure; erroneous corroboration of factual situation and violation of criminal law were unfounded. The appeal panel therefore rejected the appeal and confirmed the first instance verdict in its entirety.

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The summaries above demonstrate the complexity of the criminal cases inherited from UNMIK. These cases involved multiple criminal charges including those of participating in a group that commits a criminal act; murder and aggravated murder in complicity with other persons, carried out in a malicious way, in brutal or insidious, wanton and violent manner; illegal possession of weapons and ammunitions; causing general danger; etc. The 20 criminal cases inherited from UNMIK at the Supreme Court level have already been concluded. The last verdict in such a case was rendered by the Supreme Court on 19 January 2010. The completion of the UNMIK legacy at the SC was achieved in close cooperation with the Kosovo Supreme Court judges. The EULEX judges at district court level and their local colleagues are also moving towards completing this goal, and it is expected that the UNMIK cases at all DCs will be completed in the first half of 2010.

The remaining sections of this chapter will provide an overview of cases which were not part of the UNMIK legacy but were nevertheless taken over and adjudicated by the EULEX judges in the exercise of their secondary/subsidiary competence in criminal proceedings in accordance with the *Law on Jurisdiction*.

## 2) Exercise of the powers of the President of the Assembly of the EULEX Judges under the Law on Jurisdiction – analysis of decisions and statistical data

### a ) Legal basis of the powers of the President of the Assembly of the EULEX Judges

As it has already been explained in this report, EULEX judges exercise judicial functions in Kosovo Courts in accordance with the Law on Jurisdiction ("LoJ") which provides EULEX judges with primary/exclusive competence and secondary/subsidiary competence. The subsidiary competence of the EULEX judges occurs only when the crime concerned has not been investigated or prosecuted by the SPRK.

Subsidiary competence can be exercised at the request of the EULEX prosecutor assigned to the case, or any of the parties to the proceeding, or at the written request of the President of the competent court "where the provisions related to the disqualification of a judge … are not applicable"[13]. In the case of a request, the President of the Assembly of the EULEX Judges is given the authority for any reason "when

11 *ftn. 9*
12 *ftn. 9*
13 *Art. 3.3, Law on Jurisdiction*

it is considered necessary to ensure the proper administration of justice" to assign EULEX judges to the criminal proceedings.[14] The President of the Assembly of the EULEX Judges can exercise the authority of assigning a EULEX judge for "any criminal offence".[15]

Article 3.5 of the *Law on Jurisdiction* interprets the "need to ensure proper administration of justice". According to this article, the EULEX judges can step in "if there have been threats to the Kosovo judge, to the witnesses or to the parties to the proceeding in connection with the case, and this can reasonably lead to a belief that there would be a serious miscarriage of justice if the case is kept under the exclusive responsibility of Kosovo judges". According to the same provision of the LoJ, the second condition for assigning EULEX judges to criminal proceeding is "if it is reasonable to believe that that the activity of EULEX judges, due to the particular complexity or nature of the case, is necessary to avoid a miscarriage of justice."

Article 5 of the LoJ provides for a primary/exclusive competence of the EULEX judges in (1) cases falling within the jurisdiction of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters and (2) cases falling within the jurisdiction of any court of Kosovo regarding appeals on decisions of the Kosovo Property Claims Commission. Secondary/subsidiary competence is restricted to property related cases if there is grounded suspicion that the local judiciary is not in a position to properly adjudicate a case. There is no provision as to who is entitled to file a request for a case being "taken over" by EULEX. In practice, it is a party to the proceedings, the presiding judge, the court president or a EULEX judge during his/her MMA activities who addresses the request to the President of the Assembly of EULEX Judges.

On 2 March 2009 the office of the President of the Assembly of the EULEX Judges issued standard operating procedures (SOPs) detailing the prerequisites and the procedure to be followed in the taking over of a civil or a criminal case in accordance with Articles 3 to 5 of the *Law on Jurisdiction*.

The procedures established by the SOPs provide that requests to assign a EULEX judge to criminal or civil proceedings are to be submitted to the President of the Assembly of the EULEX judges and to all district court teams. The procedures following the request cover the pre-trial and later stages of the criminal proceedings. The SOPs make reference to Article 3.6 of the *Law on Jurisdiction* which provides for the right of "the Kosovo judge who would otherwise be assigned to the case, the president of the competent or of the superior court and the parties to the proceeding" to be heard by the President of the Assembly of the EULEX Judges. As set out in the SOPs, a decision on scheduling a hearing is taken by the President of the Assembly of the EULEX Judges. The decision is communicated to the relevant EULEX DC team which then ensures its delivery to the parties without any delay and not later than four days before the scheduled hearing.

The SOPs on assigning EULEX judges to criminal and civil proceedings deal with publicity of the hearings for taking over cases, which is not regulated by the *Law on Jurisdiction*. The SOPs underline that publicity is the main principle applicable with regard to trials. However, taking into consideration the different nature

14 Art. 3.3, Law on Jurisdiction
15 Art. 3.6, *Law on Jurisdiction*

of the hearings under Article 3.6 of the *Law on Jurisdiction,* the SOPs conclude that such hearings do not require publicity, and therefore the hearings for taking over cases are not public.

It is for the President of the Assembly of the EULEX Judges to "provide the president of the territorial competent court and the parties to the proceeding with the grounds for the ruling accepting or refusing the request to assign a EULEX judge to the particular proceeding."[16] Article 3.6 of the *Law on Jurisdiction* provides that rulings of the President of the Assembly of the EULEX Judges can not be appealed.

### b) Requests to take over criminal and civil cases – statistics and analysis

From January 2009 to January 2010 89 requests to take over civil and criminal cases were received. Of these 53 requests related to criminal cases and 11 to civil cases. They belonged to the jurisdiction of district and municipal courts in all regions of Kosovo and the Supreme Court of Kosovo, allocated as follows:

- Pristina – 21 requests of which 15 related to criminal and 6 to civil cases;
- Pejë/Peć - 34 requests - 24 for civil and 10 for criminal cases;
- Prizren – 5 requests, all of them criminal;
- Mitrovicë/a - 21 requests: 19 criminal and 2 civil cases;
- Gjilan/Gnjilane - 4 requests, 3 related to civil cases and 1 to a criminal case;
- Supreme Court – 3 requests, all for criminal cases: the first and third were accepted, and the second - rejected. The first request was made by a EULEX prosecutor, the second by the defence counsel of the defendant, and the third by the defendant.

The 53 requests to take over criminal cases were made by the entire spectrum of requesters envisaged in the provisions of Article 3 of the *Law on Jurisdiction*:

- EULEX prosecutors - 25 requests;
- Presiding judge or the President of the respective court – 10 requests;
- Defendants – 4 requests;
- Defence counsel of defendants –7 requests;
- Injured party or Defence counsel of the injured party - 7 requests.

Of the 53 requests to take over criminal cases, 38 were accepted, 10 rejected and 5 were dismissed.

As demonstrated above, a large number of criminal cases were accepted in Mitrovicë/a (of 21 requests, 19 for criminal cases of which 17 were approved). The large number of requests, mainly from the EULEX prosecutors in Mitrovicë/a, is explained by the complexity of the political and justice situation in this region, and the ongoing process of restoring the effective functioning of Mitrovicë/a District Court. In order to avoid further delay in the criminal proceedings EULEX Prosecutors ask to take over criminal cases and assign them to EULEX judges.

16 Art. 3.6, *Law on Jurisdiction*

***Grounds for accepting criminal cases***

The main reasons given in decisions of the President of the Assembly of the EULEX Judges were the complexity of the case and unduly long criminal proceedings. In some instances the local judiciary was unwilling to try the case because of the defendant's influential position in the Kosovo government. There was also a case in which defendants were former KLA members and there had been threats to the presiding judge. Some of the cases were ethnically sensitive and were taken over based on Article 3.4 of the *Law on Jurisdiction*.

It is worth highlighting that among the cases requested to be taken over by the EULEX judges there were three cases - one in Pejë/Peć DC and two in Pristina DC - in which the requests by the defendant's defence counsel were based on the fact that the case was sent for re-trial to the presiding judge who had conducted the trial. Indeed, the CPCK does not envisage the disqualification of the presiding judge from the retrial. Nevertheless, to have the judge who was presiding in the trial panel and has already formed his/her opinion on the merits of the case to preside also over the re-trial was considered a violation of Article 6 of the ECHR. So the President of the Assembly of the EULEX Judges decided to assign two of the cases to EULEX judges. In the third case it was recommended to the President of the District Court concerned to change the presiding judge for the re-trial. As a result of the three requests, a modification was introduced into Kosovo judicial practice in line with European standards and best practices.

In another case which EULEX was asked to take over, the defendant was a high-ranking official in the Kosovo Police charged with sexual abuse of subordinates. In the criminal proceedings before the local judges, there was a violation of the rights of the victims whose request for a closed session for the confirmation of indictment was not granted, causing to them great discomfort and distress. The taking over of this case was also based on the findings of monitoring by EULEX judges, which had revealed the need to improve the capacity of the local judiciary to tackle sexual criminal offences while having full respect for the rights of the victims.

***Grounds for rejecting criminal cases takeover and dismissing the case***

As mentioned, 10 out of the 48 criminal case-related requests were rejected. The refusal was based on the fact that in most of these cases the criminal proceedings had reached an advanced stage where all the evidence has already been collected, and the parties could not support their requests with the arguments provided for in the LoJ. Under such conditions, the initiation of a takeover procedure would have only caused further unreasonable delay. Requests were also dismissed as ungrounded when they did not establish that there was "a need to ensure the proper administration of justice"[17] and did not provide reasons to believe there would have been a miscarriage of justice if the case remained under the responsibility of Kosovo judges, as required by Article 3.5 of the LoJ.
One such request was made with regard to a criminal case which was pending before the Municipal Court of Pejë/Peć. The injured party explained that the MC Pejë/Peć convicted the accused for grievous bodily harm and this judgment was later confirmed by Pejë/Peć DC. However, following a review of criminal procedure the case was sent back for a new decision. The injured party did not believe in the objectivity of

17 Art. 3.5, *Law on Jurisdiction*

the court and was alleging that the re-trial was the consequence of bribery and or interference. He claimed that the legal conditions for a review of criminal procedure did not exist.

Assessment of the compliance of the request with the requirements of Article 3 of the *Law on Jurisdiction*:

- Art. 3.3: the crime of grievous bodily harm was not listed as a crime under this Article;
- Art 3.4: no evidence for discriminatory background of the case;
- Art. 3.5: as to the need to ensure proper administration of Justice under Article 3.5

of the LoJ, the complainant did not specify any threats made to Kosovo judges, to witnesses or to parties to the proceedings which would lead to the belief that a serious miscarriage of justice would result if the case was kept under the exclusive responsibility of a Kosovo judge (Article 3.5.a), nor did the complainant explain that the particular complexity or the nature of the case warranted the activity of a EULEX judge in order to avoid a miscarriage of justice (Art.3.5.b). The claims presented by the defence counsel only referred to the belief that the decision of the DC of Pejë/Peć to send the case for re-trial was not objective and that the conditions for review were not met. However, there was no legal argument to substantiate these claims.

Based on the above assessment, it was concluded that there was no legal basis for taking over the case under the LoJ, and the request of the injured party was therefore rejected.

### c) Summaries of criminal cases taken over by the EULEX judges

Below are summaries of some of the criminal cases taken over by the EULEX judges following hearings and based on the decision of the President of the Assembly of the EULEX Judges.

## Mitrovicë/Mitrovica DC

On 14 October 2009, the President of the Assembly of the EULEX Judges held six takeover hearings in Mitrivicë/a DC. Below is a summary of one of the cases heard on that date and taken over by the EULEX judges.

*Facts of the case:* On the afternoon of 30.12.2008, two Kosovo Albanian males decided spontaneously to go to north Mitrovicë/a on foot over the main bridge. A group of Kosovo Serb males followed them and attacked them. The group began punching and kicking them. A witness heard the group yelling "They're Albanian!" One of the Kosovo Albanian males (the defendant) pulled out a knife and may have stabbed one of the assailants. They were then able to escape from the group, but as they were fleeing back towards South Mitrovicë/a, the defendant stabbed a bystander, a 15 year old Kosovo Serb male who suffered slight injury. No identification or arrest of any of the group of Kosovo Serb males has been made;

*Charges:* Slight Bodily Injury;

*Stage of criminal proceedings:* A EULEX prosecutor has taken over the case and filed a summary indictment with the Municipal Court of Mitrovicë/a. The suspect was free.

*Grounds for taking over the case:* This is an ethnically sensitive case. Although the stabbing of the Kosovo

Serb male was not ethnically motivated, it appeared that the initial attack or fight was. Due to the history of inter-ethnic attacks over the bridge and the specific circumstances of this case, there was a risk that local judges would not remain impartial. This is evidenced by the divergent views of the KP officers on the scene. It may be prudent for EULEX judges to take over this case to ensure an impartial trial and avoid a miscarriage of justice.

On 18 November 2009 another seven takeover hearings were held by the President of the Assembly of the EULEX Judges in Mitrovicë/a DC. The President of the Assembly of the EULEX Judges decided to assign all seven cases to the EULEX judges at Mitrovicë/a DC. The cases concerned 14 defendants from different communities (Albanian, Serbian and Roma), and a range of charges involving *inter alia* aggravated murder, murder, attempted murder, unauthorized ownership, possession, control or use of weapons, and rape. Some of these cases are summarized below.

**Case 1**

*Facts of the case:* The three Kosovo Albanian defendants, the victim, and the injured party were relatives and the criminal offences were committed as result of a serious family dispute.

*Charges:*

Defendant 1: Aggravated murder and attempted aggravated murder

Defendant 2: Incitement to commit aggravated murder and
Incitement to commit attempted aggravated murder

Defendant 3: Unauthorized ownership, possession or use of weapons

*Stage of criminal proceedings:* Indictment filed but not confirmed. One of the defendants was in detention and the other under house arrest.

**Case 2**

*Facts of the case:* The defendant (Kosovo Roma) entered the house of the injured party, and using force, raped her and threatened her. He was aware that the injured party was mentally handicapped;

*Charges:* Rape

*Stage of criminal proceedings:* Indictment filed but not confirmed.

**Case 3**

*Facts of the case:* The case involved three Kosovo Albanian defendants. There was an exchange of fire between the first and second defendants and the victim which resulted in the death of the victim and bodily injuries of the first and second defendants. The third defendant arrived with the victim knowing that the victim was carrying a weapon, and helped the victim to commit the criminal act of attempted murder at all times.

*Charges:*

Defendants 1 and 2: Murder and unauthorized ownership, control, possession, or use of weapons;

Defendant 3: Attempted murder;

*Stage of criminal proceedings:* Indictment filed, not confirmed. The first defendant was in detention, the second was in detention, later transferred into house arrest; the third defendant was never in detention.

In all of the above cases taken over by the EULEX in Mitrovicë/a DC, criminal proceedings were at the pre-trial stage, in which the indictments against the defendants were filed but have not yet been confirmed.

The cases involved defendants from different ethnic groups, and a variety of criminal acts and related criminal charges. All cases were initially taken over by a EULEX prosecutor who eventually made a request for assigning a EULEX judge to the case. However, as envisaged in the *Law on Jurisdiction*, a request to take over a case can also be made by the president of the competent court. One such example is given below regarding a case which was assigned to the EULEX judges in Pristina DC.

## Pristina DC

The request to take over the criminal case of *Agron Haradinaj et alia* pending in Pristina DC was made by the President of this district court. The defendants in the case were charged with the criminal offence of attempted aggravated murder.
In his written statement, the President of Pristina DC supported the request of the presiding (in this case) Kosovo judge for the handover of the case to the competence of EULEX judges due to threats he had received from the defendant. There were as well letters from the defence counsel calling for the main trial to be scheduled as soon as possible.

Assessment of the compliance of the request with the requirements of Article 3 of the *Law on Jurisdiction*:

It was found that in this case there was a need to "ensure the proper administration of justice"[18], determined by the following factors: the case had been prolonged for some time at the main trial stage, there was therefore a need to re-open the main hearing; the presiding Kosovo judge had received serious threats from the defendant; the defendants were former KLA members, which made the case politically sensitive; the defendants had been in pre-trial detention for more than two years. Based on these multiple grounds the President of the Assembly of the EULEX Judges decided that in order to ensure the proper administration of justice the case would be handed over to EULEX judges. Section 3 of this Chapter contains the summary of the criminal proceedings before the EULEX judges.

All of the cases in Mitrovicë/a DC and the case in Pristina DC, for which requests for take over were made, were assigned to EULEX judges. However, in some of the cases, there were not sufficient grounds for the assignment of EULEX judges under the Law on Jurisdiction and the requests were therefore rejected. An example of such a case is given below.

### d) Requests to take over civil cases – specific statistics and analysis

Of the 34 civil case related requests two were at the execution stage. Eleven of the 34 requests were made by the EULEX civil judge; 2 - by defence counsels of the claimants; 12 requests were made by the claimants; 2 by the respondents and 7 requests were made either by the presiding judge or by the president of the respective court.

The highest number of requests - 25 - came from **Pejë/Peć** region:

18 Art. 3.3 in conjunction with Art 3.5, *Law on Jurisdiction*

20 requests were accepted and 4 were dismissed, 1 request is awaiting hearing.
11 requests were made by a EULEX civil judge
2 were made by the president of one of the municipal courts
10 requests were made by the claimant
1 request was made by a creditor

No requests were received from **Prizren** region in 2009.

Of the 6 requests in **Pristina** 2 were accepted and 1 was rejected, while 3 more are awaiting hearing.

The 2 requests received in **Mitrovicë/a** are pending hearing and there have been no civil cases taken so far in this region.

In **Gjilan/Gnjilane** 3 requests were received – 2 were accepted (the same case in civil contested and execution procedure at the MC level) and 1 was rejected.

In total, Kosovo wide, 22 civil cases requests were accepted; 2 rejected and 4 dismissed; while 6 more are awaiting hearing.

The civil cases taken over by the EULEX judges were property-related cases with an inter-ethnic aspect. These cases have been endlessly and unreasonably prolonged, which was a clear indication of the unwillingness of the local judiciary to deal with them. Among the civil cases requested to be taken over were cases involving allegations of fraudulent property transactions; and cases in which it was asserted that the judges had been put under pressure by high ranking officials who sought to influence the outcome of the case. There were cases in which one of the parties was a Municipality this being a clear indication of the risk of the local judiciary being influenced in the proceedings.

## 3. Adjudication of criminal cases in the exercise of primary/exclusive and secondary/subsidiary competence of the EULEX judges

This section of the report provides examples of criminal cases investigated and prosecuted by the Special Prosecution Office of Kosovo (SPRK) and therefore falling within the EULEX judges' primary/exclusive competence. Moreover, the section presents criminal cases which EULEX judges adjudicated in the exercise of their secondary competence
The cases are interesting from the factual and juridical perspective. One of the cases *(Selman Bogiqi et al.)* involved as defendants a Kosovo judge and two other court officials. The report also provides summary of the first inter-ethnic criminal case adjudicated by the EULEX judges in Mitrovicë/a DC.

### Pristina DC

***Agron Haradinaj et alia*** (secondary/subsidiary competence)

This case involved four Kosovo Albanians charged with attempted aggravated murder. As described above, the trial was originally dealt with by a local panel. However, following a request from the local presiding judge, the President of the Assembly of EULEX Judges assigned two EULEX judges to the case.
On 20 November, a trial panel of Pristina DC composed of two EULEX judges and a Kosovo judge found two of the defendants guilty of attempted aggravated murder in co-perpetration and of unauthorized ownership, control, possession and use of weapons. In relation to the same criminal acts the fourth defendant was found not guilty and was therefore acquitted. The three defendants found guilty received prison sentences of 16 years, 20 years, and 15 years and 6 months.

## Prizren DC

***Selman Bogiqi et alia*** (primary/exclusive competence)

The case involved as defendants a Kosovo judge and two other court officials - one of the defendants was an accountant at Pristina DC, the second worked in the civil registry at the same DC, while the third was a judge in Pristina DC. The first and second defendants had been suspended and the third defendant resigned.

All three defendants were charged with disclosing official secrets between 13 August 2007 and 24 August 2007, on 3 September 2007 and on 7 April 2008 in Pristina Municipality, contrary to Article 347 par. 1 of the CCK.
By way of background, on 26 July 2007 the SPRK issued a ruling initiating investigations against three defendants for the criminal offences of abuse of official duty or position. The investigation was given a secret number ("SEC" number) as the data was assessed as highly sensitive and not to be publicly revealed.

The Prosecution alleged that Selman Bogiqi and the other two court officials had informed the suspects of the above investigation initiated on 26 July 2007. The prosecution case was that information contained in a file that had been designated a "SEC" case was an official secret within the meaning of Article 347 of the CCK. All three defendants were charged with one count of disclosing official secrets in the period 13 to 24 August 2007, on 3 September 2007 and on 7 April 2008 in Pristina Municipality under Article 347 par. 1 of the CCK, and punishable by imprisonment of up to three years.

The specific allegations against the DC judge were that in the capacity of an official person, acting as pre-trial judge of Pristina District Court in the above-mentioned criminal investigation intentionally and without authorization, through phone conversations with one of the defendants, communicated and made available to him detailed information about the investigation proceedings. This information constituted an official secret, disclosure of which caused or might have caused detrimental consequences. Thus, the defendant damaged the criminal proceedings against the defendants charged with receiving bribes.

The primary issue in this case was whether "SEC" cases were "official secrets" within the meaning of Article 347 of the CCK. The information or documentation to be included within the classification of an "official secret" must be proclaimed as such by law, or other provision, or deemed through a decision of a competent authority, itself issued on the basis of law, to be an official secret.

The prosecutor acknowledged that he was unaware of any law, other provision, or decision of a competent authority, itself issued on the basis of law that proclaimed that "SEC" cases were official secrets within the meaning of Article 347 of the CCK. Further, no evidence was put before the court that, at the time the first and/or third defendants disclosed information, they had formed the intention to obtain unlawful benefit for themselves, another person or a business organization, or that they intended to cause damage to another person or business organization.

Prior to the conclusion of the main trial, the prosecutor withdrew the prosecution against the second defendant (the clerk in the DC) and the charge against him was rejected. The first and third defendants were acquitted in accordance with Article 390 (1) of the CPCK.
The verdict was appealed by the SPRK prosecutor at the District Court level. The District Court panel composed of Kosovo judges confirmed the verdict of the first instance court.

## Mitrovicë/Mitrovica DC

***Daut Rrahmani*** (secondary/subsidiary competence)

The case against Daut Rrahmani was the first inter-ethnic case tried in the Courthouse in Mitrovicë/a north. The case, which fell within the jurisdiction of the Municipal Court of Mitrovicë/a, involved a Kosovo Albanian defendant, a Kosovo Serb injured party, Kosovo Serb and Kosovo Albanian witnesses.

The Kosovo Albanian defendant Daut Rrahmani was charged with participating in a group of persons who allegedly attacked the two Kosovo Serb injured parties with baseball bats and wooden sticks on the night of 4 January 2009. During the criminal proceedings, five witnesses were heard, including the Kosovo Serb injured parties, and the accused took the stand as well.

In light of the political and security situation in the North of Kosovo, it is noteworthy that the first inter-ethnic case was tried by the EULEX judges in Mitrovicë/a Courthouse without any external interference or public disruption of the trial. The proceedings ran smoothly and were concluded on 15 May. The unimpeded and prompt conduct of the trial was also due to the fact that the Kosovo Serb injured party (at his own initiative) gave his testimony in Albanian and the Kosovo Albanian defence counsel, with the consent of his client, questioned the Kosovo Serb witnesses in Serbian, thus the time spent on translation was much reduced.

On 15 May 2009 the EULEX Judge who presided over the main trial in the summary proceedings of Daut Rrahmani before the Municipal Court of Mitrovicë/a pronounced the verdict. The court found that on the evening of 4 January 2009 the defendant, together with a group of unknown persons, attacked two persons from the Serbian community who were sitting in a car with Serbian licence plates which had stalled in Mitrovicë/a town. The attackers assaulted the victims with baseball bats and wooden sticks, causing bodily

injury to one of the victims and causing damage to the car. The court found the defendant guilty of light bodily harm (CCK, Article 153, paragraph 1(4) and paragraph 2) and damaging movable property (CCK, Article 260, par. 2). The court further held that the crimes were ethnically motivated. Daut Rrahmani was sentenced to 6 months imprisonment. The execution of the sentence was suspended for two years, which meant that if the defendant behaved well during this period he would not have to serve the 6 months imprisonment. If he did not behave then he might have to serve, there would of course be another trial for the new crime in which the previous sentence was to be taken into account in determining the new punishment.

***Predrag Djordjevic*** (primary/exclusive competence)

The verdict in the trial against the Kosovo Serb defendant Predrag Djordjevic was pronounced in the District Court of Mitrovicë/a by a panel of three EULEX judges on 19 November 2009. The defendant had been in detention since 14 June 2008.

According to the indictment of the Special Prosecution Office filed with the Registry of the District Court of Mitrovicë/a on 2 July 2009, the defendant was charged with the following criminal offences: inciting national, racial, religious or ethnic hatred, discord or intolerance, contrary to Article 115, paragraph 3, read with paragraph 1 of the CCK commission of terrorism, contrary to Article 110 par. 2 and 1 read with Article 109 par.1, subparagraphs 2, 7 and 10 of the CCK; attempted aggravated murder, contrary to Articles 146 and 147 as read with Article 20 of the CCK. The terrorism charge was withdrawn by the SPRK during the trial proceedings.

After 15 hearings in public, all in the presence of the accused, his defence counsels and the EULEX prosecutor, during which 27 witnesses were examined, the verdict was pronounced in public on 19 November 2009. The panel found Djordjevic guilty of inciting national, racial, religious or ethnic hatred, discord or intolerance contrary to Article 115, paragraph 1 of the CCK, for the act of placing a flag symbolizing the Orthodox Christian religion on top of one of the cupolas of the Isa Beu Mosque in south Mitrovicë/a on 14 June 2008.

The panel also found the defendant guilty of attempted aggravated murder contrary to Article 147 (10) of the CCK, in conjunction with Article 20, paragraph 1 of the CCK with regard to his actions against Enver Pllana because on 14 June 2008, armed with a knife and a pistol, the defendant entered the fenced yard of the south Mitrovicë/a Police Station and with the intention to deprive his victim of life, he shot at close range at a police officer who was executing his duty to protect the legal order, causing grievous bodily injury.

The charge of commission of terrorism, contrary to Article 110, paragraphs 1 and 2 of the CCK as read with Article 109, paragraph 1 (2) (7) and (10) of the CCK was rejected under Article 389 (1) of the CPCK.

In determining the appropriate sentence, the panel took into account the unbalanced mental state, psychotic personality, and limited decision-making capacity of the accused, as described by a court-appointed psychiatrist. In light of this particularly mitigating circumstance, an aggregate sentence of six years and three months was imposed.

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The completion of the trials against Daut Rrahmani and Predrag Djordjevic conducted in the Courthouse of Mitrovicë/a North was another step towards restoring the rule of law and the effective execution of justice in the north of Kosovo.

As demonstrated in this chapter, EULEX judges exercise executive functions over a large range of criminal offences from war crimes against the civilian population to organized crime and economic and financial crimes.

It is worth mentioning that a number of judicial decisions have been included in the newly created EULEX judges Law Review (Themis). This Law Review will serve as a database of EULEX judges' jurisprudence in order to provide legal guidance and consistency in the Kosovo judiciary. The pilot edition of the Law Review was presented to the local counterparts in October 2009.

## 4. Adjudication of civil cases – main issues and statistics

In addition, the *Law on Jurisdiction* gives EULEX judges the authority "to select and take responsibility" for civil cases, including cases within the jurisdiction of the Special Chamber of the Supreme Court of Kosovo (SCSC) on Kosovo Trust Agency (KTA) related matters involving "any new or pending property related civil case, including the execution procedures, falling within the jurisdiction of any court in Kosovo"[19]. The subsequent chapter seeks to present an overview of the exercise of the authority given to the EULEX judges in the civil field. The chapter will focus on the jurisdiction of the Supreme Court Appeals Panel on Kosovo Property Agency (KPA) related matters, the SCSC, and will provide examples of the adjudication of civil cases in the municipal and district courts of Kosovo.

### Statistical data

During 2009 the largest number of civil cases (21) was adjudicated in Pejë/Peć region. Of these cases one was adjudicated at district court level in a panel of two EULEX judges and one Kosovo judge. The other 20 cases were adjudicated at the municipal court level by one EULEX judge. By December 2009 14 of the civil cases had been closed and judgment issued. All of them were appealed against by a party and are now pending at the district court level.

### Main issues – recurrent re-trials, prolonged proceedings and execution of decisions

A number of problems have been identified in the adjudication of civil cases in Kosovo courts. In particular, the EULEX judges observed that the proceedings in **interethnic property related disputes** are often unreasonably and continuously prolonged. Numerous such claims were filed in 2004 in the MCs of Pejë/Peć region. In 2009 the EULEX Civil Judge in Pejë/Peć selected and rendered judgment in 14 interethnic property dispute cases on the basis of Article 5.1 (c) of the *Law on Jurisdiction*. The cases were similar as all of them involved a fraudulent property transaction:

19 Art. 5.1, *Law on Jurisdiction*

In all the fraudulent transaction cases, the claimants left their property in Kosovo in 1999 after the NATO intervention and fled from Kosovo. At this stage the claimants' ownership of the claimed property was undisputed; the property was owned by the claimant or his/her close relatives. After the conflict the claimants returned to Kosovo but found their property occupied by the respective respondents, who produce transaction contracts with the claimants, based on which they claim their possession right. The claimants seek the annulment of the respective property transaction contracts, alleging that they had never sold their property to the respondents, and that the claimed transaction contracts were falsified.

In some of the cases the claimants even had a decision issued by the Housing and Property Claims Commission (HPCC) or the Kosovo Property Claims Commission (KPCC) in their favour, and the respondents had been evicted. However, the cadastral registers had not been corrected and therefore the respondents still appeared to be the owners of the contested property, so the claimants had a legal interest in initial court proceedings to change the title of ownership.

The main legal issue discussed in all cases was whether the claimant intentionally sold the property to the respondent or if the property was illegally transferred without their knowledge using falsified documents.

In order to decide whether or not the claimants gave their authorization to the sale by signing the disputed powers of attorney, the court has assessed the following types of evidence:

- Analysis of handwriting

The court, on the proposal of the claimant, ordered forensic examinations of the handwriting/fingerprints on the power of attorney to compare them with the handwriting samples/fingerprints of the claimant. The EULEX civil judge in Pejë/Peć has on several occasions asked the Kosovo Police forensic laboratory in Pristina (in the past only used for criminal cases) to do the analysis[20].

EULEX judges have also made use of analysis of handwriting previously obtained in the proceedings before the quasi judicial Housing and Property Claims Commission (HPCC). By using the legal techniques of *collateral estoppel* or issue preclusion, the court in several cases decided that the analysis performed in the HPCC proceedings should also be valid in the fraudulent transaction proceedings[21]. This technique has proven to be a very efficient way of speeding up the proceedings.

- Death certificate

In a number of cases the claimant contended that the person who owned the disputed property and appeared to have signed the power of attorney was in fact dead at the time of the sale. To check this, the court

20 *See* Municipal Court of Istog, *Milos Nedeljkovic vs. Besim Fetahu & Hekuran Blakaj*, C. No. 165/06, Judgment of 15 April 2009

21 *See* Municipal Court of Klina, *Zivan Mazic vs. Bardhil Azem Marmullaku*, C. No. 47/04, Judgment of 7 August 2009; and Vladimir Radosavljevic vs. Tahir Morina, C. No. 48/04, Judgment of 7 April 2009

has requested the death certificate from the competent local authorities[22]. This has succeeded in several cases, however, since following the war registration documents such as death certificates have frequently not been issued in Kosovo, and in some cases the relevant documents could not be discovered.

- Unique Master Citizen Number (UMCN)

In the SFRY all citizens were provided with a Unique Master Citizen Number (UMCN) containing a 13 digit code with the date and place of birth and the sex of the person. Through analysis of the ID-cards attached to the disputed power of attorney, checked against the official registries, it was concluded in many cases that the UMCN on the ID-cards attached to the disputed power of attorney did not match the personal data of the claimant[23]. For example, in some cases the ID-cards of male claimants attached to the disputed powers of attorney had the numbers corresponding to a female and the birth place and date was found to be inconsistent with the personal data of the claimant. On the basis of this information, the court was able to verify that the attached ID-cards were in fact forgeries.

- Verification in the Courts

Usually, the falsified powers of attorney in these cases were registered in the court. Yet, in some cases the court found that the documents had never been registered and the stamp of the court was falsified.

- Procedural issues

In some cases the EULEX judge noticed that the local court had suspended the proceedings because of an ongoing criminal case concerning falsification of the disputed documents. This has delayed the cases for several years, and often for no reason, as the indictment was eventually rejected. In these cases, the EULEX judge took over the case and finished it without waiting for the criminal case to be concluded. The rationale behind this action was that the claimant's interest, which is primarily to secure the return to his/her property, cannot be satisfied by the criminal procedure; even if the defendant is convicted of a criminal offence, the civil case must still be carried out to return the property to the claimant. Furthermore, the criminal cases are often long and unsuccessful. Therefore, suspending the civil case until the criminal proceedings are completed is often not in the interest of justice.

By using the legal methods displayed above, EULEX judges have thus tried to introduce new methods for the Kosovo judges to make use of in their daily work.

In the course of their MMA functions EULEX judges also observed a tendency for **repeated re-trials** in property cases, which means that in case of any irregularities in the judgment or the proceedings the second instance court usually sends the case back to the first instance instead of deciding it on its merits. The second instance court does not hold open sessions or collect new evidence. Instead, if the facts of the situation are unclear, the case is sent back to the MC for re-trial, which can happen several times.

22 *See* Municipal Court of Klina, *Milorad Mikic vs. Ali Morina*, C. No. 302/05, Judgment of 7 August 2009

23 *See* Municipal Court of Klina, *Rajko Dabizljevic vs. Limon Maloku & Mentor Maloku,* C. No. 196/06, Judgment of 22 October 2009; *Vlastimir Dabizljevic vs. Lemon Maloku & Mentor Maloku*, C. No. 197/06 Judgment of 22 October 2009; and *Slobodan Dabizljevic vs. Lemon Maloku & Mentor Maloku,* C. No. 198/06, Judgment of 22 October 2009.

The parties in the dispute are also negatively affected since their case can be sent back and forth between the two instances several times which results in unacceptable costs and lengthy proceedings.

After discovering the practice of repeated re-trials in property related cases, in March 2009 the EULEX civil judge in Pejë/Peć selected and took over responsibility for a second instance case pending at the District Court of Pejë/Peć. The case concerned verification of ownership of property and the parties belonged to different communities (a Kosovo Albanian claimant and four respondents – one Kosovo Albanian and three Kosovo Serbs). Among the reasons for selecting the case was the grounded suspicion of a serious violation of the fairness of the proceeding and the high possibility that the case would be sent back for re-trial by the local appeal panel. Below is the summary of this second instance civil case.

***Noz Berisha vs. Milivoje Vuckovic, Martin Krasniqi, Golib Vuckovic and Stojan Vuckovic***

The Municipal Court of Klina in its judgment of 23 June 2008 approved as grounded the claim of Noz Berisha against the respondents Martin Krasniqi, Milivoje Vuckovic, Golib Vuckovic and Stojan Vuckovic, and confirmed that Noz Berisha, based on a transaction contract concluded with Martin Krasniqi, was the owner of the disputed land parcel. Martin Krasniqi filed an appeal against the judgment of the first instance court in the District Court of Pejë/Peć. The appeal was based on the grounds of wrong conclusion of the facts and wrong application of substantial law.

The District Court panel was composed of two EULEX civil judges and one Kosovo civil judge; this was the first mixed panel of civil judges. In the course of the proceedings it became clear that the contract was in fact concluded between the respondents and the brother of the claimant; while the claimant himself was never involved. Furthermore, a second brother of the claimant testified that he was the actual owner of the land parcel and in possession of it since twenty years. The District Court therefore found that the claimant had not acquired the property and consequently could not claim ownership over it. The case was completed in one session and the judgment was rendered on 18 March 2009. The appeal of the respondent was approved and the judgment of the first instance court was altered. The adjudication of this second instance case demonstrated that the court of the second instance is in a position to decide a case on its merits instead of returning it to the municipal court for re-trial.

While conducting their MMA functions EULEX judges also observed that the local judges encounter difficulties in handling the **execution of the court decisions**. This deficiency leads to a serious backlog of execution cases in the municipal courts. Below is an example of a property related case pending at the MC Viti/Vitina which was taken over by EULEX in order to ensure the prompt and efficient enforcement of the court decision.

***"Drenusha" vs. Municipality of Viti/Vitina***

In autumn of 2008 the Municipality of Viti/Vitina occupied premises which were used by the association "Drenusha" (a hunting club). On 19 May 2009, following the request of the Presidents of the District Court of Gjilan/Gnjilane and the Municipal Court of Viti/Vitina, EULEX took over the case, which was already at the execution phase, meaning the court had already decided. The courts of first and second instance

established that the hunting club had the right to possess the claimed land parcel and premises. The case, at both levels, has been decided by local judges. Since all possible legal remedies in this case had been exhausted, the second instance decision was final and as such had to be enforced. The EULEX judge was assigned to the execution procedure. In order to ensure the execution of the decision of the local judges the EULEX judge issued an order to the Municipality of Viti/Vitina to vacate the building and not to obstruct its further use by "Drenusha".

*Claim of ownership*

In March 2009, the Municipality of Viti/Vitina filed a claim at the Municipal Court of Viti/Vitina to recognize its ownership over the land parcel and the building. While in the first trial the court declared the right of possession of the land parcel and the building in favour of "Drenusha", the subject of the second trial was the ownership of the property, meaning the legal right to control and dispose of the property, which also implies the right to possess. It remains uncontested that there is an agreement regarding the transfer of the property between the Municipality and the hunting club. However, the nature of the transfer is disputed. The Municipality of Viti/Vitina alleged that the right to use the property had been transferred. On the contrary, the hunting club "Drenusha" claims that the Municipality transferred the ownership of the property. The presidents of the DC Gjilan/Gnjilane and the MC Viti/Vitina asked EULEX to take over the case, and the parties expressed their agreement with the request.

# V. KPA Appeal panel of the Supreme Court of Kosovo

The KPA Appeals Panel is a part of the Supreme Court of Kosovo. Its function is to pass final judgments in appeals against the decisions of the Kosovo Property Claims Commission (KPCC). The mandate is limited to claims involving circumstances directly related to or resulting from the conflict concerning ownership and rights of property use in the case of private immovable property, including agricultural and commercial property, where the party has not been able to exercise such property rights. Most of the claimants belong to the Serbian community; they fled Kosovo due to the conflict. These claimants allege that their property has been illegally occupied by (mainly) Kosovo Albanians. Therefore adjudication on the merits of the case requires establishing the validity of the claimant's acquisition of the alleged property rights. The Panel has three members, two of which are EULEX judges. Additional staff include the Chief Registrar to the Assembly of EULEX Judges (part-time) and one EULEX Legal Officer; the positions of a local Legal Advisor and a local Administrative/Language Assistant are envisaged in deployment plans.

Up to the expiry of the deadline to submit a claim to the KPCC approximately 40,000 claims were registered. The great majority of those claims (38,000) are non-contested in the sense that no responding party is involved in the proceedings. It is currently estimated that, of the approximately 2,000 contested claims, 800-1000 will be appealed to the KPA Appeals Panel. The low number of contested claims so far decided by the KPCC, problems within the KPA claim notification procedure, and similar difficulties with some procedural issues in the KPA have greatly reduced the number of cases ready for the appeal process. Therefore the KPA Appeals Panel has so far received no more than 9 appeals from the KPCC. Since phase 1 of the Kosovo-wide

vetting process of all judges and prosecutors did not include the local Supreme Court Judge for the KPA Appeals Panel, she/he was not appointed in 2009. The absence of the local judge means that the panel is legally not in a position to render final judgements. However, in most of the appeals submitted court orders are necessary in order to establish the facts and/or grant the right to be heard. These court orders have been prepared by the two international panel members as reporting judges. In addition, other measures needed for the KPA Appeals Panel to be operational were taken: the Panel has set up its own registry, developed procedures for case-flow and case-handling methods in close co-operation with the KPA, and in general made preparations for an immediate decision making process following the appointment of the local Panel member. In view of the complicated and sometimes unclear civil legislation the task of locating and compiling the laws needed for its jurisdiction has also occupied the Panel members considerably all through the year 2009.
Other activities of the KPA Appeals Panel members in the year 2009 consisted of handling complaints made by individuals in Kosovo on various civil matters and forwarding them to the Panel members by the office of the Presidency of the EULEX Judges. Their number totalled 35 and all but two of them were completed during the year 2009. The Panel members also took part in the Supreme Court on-call system (as from spring 2009) as well as in various working groups and seminars. They arranged a training course on property issues for EULEX civil judges. Various legal assessments and propositions were delivered to the Head of the EULEX Justice Component, the President of the Assembly of EULEX Judges and the Assembly of EULEX Judges for decision. In numerous meetings contact was established and kept with both international and local counterparts in order to exchange information and to streamline efforts.

The KPA Appeals Panel EULEX judges are, respectively: a member of selection panels for new EULEX judges and legal staff, a substitute member of the EULEX Kosovo – Human Rights Review Panel, and a EULEX judge at Supreme Court level for general civil cases, as well as a member of the Kosovo Judicial Council (KJC) and its Committee on Judicial Disciplinary matters.

# VI. Special Chamber of the Supreme Court of Kosovo on KTA related matters

The Special Chamber of the Supreme Court of Kosovo on KTA Related Matters (SCSC) was founded by UNMIK in 2003 as an international court to provide for a strong, independent and unbiased control mechanism for the privatization process in Kosovo carried out by the Kosovo Trust Agency (KTA). In early 2009 it was redesigned and largely expanded, now involving a total of 43 EULEX judges and other international and local staff. On 28 January 2009, the President of the SCSC was appointed.

The continued weakness of the local judiciary, in particular its incapability to deal properly with conflict related cases, which many of the cases that fall in the scope of the SCSC's jurisdiction are, and the high probability of the involvement of organized crime in privatization related matters, often accompanied by pressure exerted on local judges, calls for continued international involvement in this area of the administration of justice in Kosovo.

## Legal basis of the SCSC, executive mandate

The legal basis for the establishment of the SCSC in its present form is UNMIK Regulation 2008/4 and UNMIK Administrative Direction 2008/6. EULEX judges in the SCSC have executive functions only; they are not engaged in MMA activities. The law provides for mixed panels in two instances, with a majority of EULEX judges on each panel.

## UNMIK legacy

The handover of 597 case files ("UNMIK legacy cases") from the "old" SCSC was carried out in accordance with an Agreement on the Transfer of Judges' Case Files between UNMIK and EULEX of 9 December 2008. At this point in time virtually all cases had been suspended by the "old" SCSC since 29 July 2008, following the Executive Decision of the Special Representative of the Secretary-General (SRSG) No 2008/34.

The "new" SCSC became operational in early 2009. On 13 February 2009, the SCSC started to lift the suspensions on a case-by-case basis. From the beginning, the SCSC has made every effort to bring the management of the court to European Standards and best European Practices. The first items on the agenda were the development and implementation of a modern system for the composition of panels of judges in first and second instance, and a predefined case allocation system among judges based on rotation, ensuring transparency, and the fair balance of workload, while retaining a certain flexibility in light of the regular influx and outflow of judges in the EULEX mission context. The same principles were applied to a corresponding system of case allocation among (international) legal officers and (local) legal advisors.

In addition, the SCSC implemented additional procedural rules for the organisation and workflow within the SCSC for the handling and tracking of case files, the integration of the translation pool with a required output of over 1,000 pages per month, rules on the proceedings before the SCSC, the preparation and conduct of deliberations and hearings, the unified format and layout of decisions, rules on access to case files by the public, and for the publication of decisions.

An electronic system for the automatic assignment of cases according to the rules, for registering the relevant data, and a keyword based system to keep records of the decisions of the court was introduced and repeatedly refined.

In addition the SCSC introduced a streamlined procedure through which parties can apply to be exempt from the payment of court fees and/or for assistance in translation of documents into English, the language of the SCSC. To that effect the SCSC uses an application form which is available in English, Serbian and Albanian, as hardcopies and for download. To date the SCSC has received 92 such applications.

In the reporting period the SCSC has taken 668 procedural decisions e.g. on admissibility, and issued 29 judgments in 2009. Since the beginning, 313 of the cases handed over by UNMIK have been decided. 964 orders have been issued to parties, reflecting the fact that a large portion of the submissions made to the

SCSC are of a poor standard, and frequently claims do not conform with the admissibility criteria as laid out in the applicable law. The large number of procedural decisions and clarification orders reflect insufficient knowledge of basic procedural rules among parties, and often even lawyers do not seem to have sufficient expertise on the applicable UNMIK legislation. In the vast majority of cases the SCSC has to give guidance on procedural matters by issuing orders for clarification on the admissibility criteria. For this reason the written proceedings usually take a long time and tie up considerable resources. On the other hand, this has to be seen as a form of capacity building for the local judiciary.

## Obstacles

From the very beginning, the SCSC faced significant obstacles to full functionality: the lack of a full complement of international and local judges, the unclear political situation in Kosovo, the complexity of the legal framework, insufficient resources (no proper premises to accommodate all staff, budget restrictions, poor infrastructure), and inappropriate practices which needed to be stopped (parties meeting judges on their cases, the registry refusing to accept certain claims, arbitrary case allocation, no sufficient secrecy of deliberations).

## Employee list cases

The Privatization Agency of Kosovo (PAK) has submitted to the SCSC 24 "employee lists" (lists of workers entitled to participate in the proceeds of a privatization), which in many cases have serious flaws and are not in accordance with the law. Nevertheless the PAK has blamed the SCSC repeatedly for being responsible for the situation, and protests by workers have been held in front of the SCSC premises. New protests by workers have been announced to add to the pressure built up by the previous protests.

After the PAK decided on the interim distribution of some of the proceeds, while waiting for the SCSC's final decisions, the situation eased.

According to Section 10 of UNMIK Regulation 2003/13 as amended by UNMIK Regulation 2004/45 the eligible employees of an enterprise undergoing privatization are entitled to a 20% share of the privatization and liquidation proceeds. The list of eligible employees is established by the representative body of the employees in co-operation with the Federation of Independent Trade Unions of Kosovo (BSPK) and reviewed by the Kosovo Trust Agency (KTA). Since the KTA has seized operations in 2008 the Privatisation Agency of Kosovo (PAK) has published such lists. The final list published by PAK can be challenged before the SCSC.

In the period 1 March 2010 to 31 May 2010, the SCSC has summoned all the complainants, approximately 1,400, in the SOE "Ramiz Sadiku" case, and is holding 32 full days of hearings to give every complainant the opportunity to present his case before the court. This requires considerable resources to be dedicated to the adjudication of the case.

While facing many problems of a legal, political and administrative nature, the SCSC has since early 2009

made substantial progress in bringing the court practices up to European standards and best European practices.

## VII. Conclusion: achievements and challenges ahead

As has been presented in this report, the year 2009, the first year of the exercise of judicial functions, was challenging and rewarding for the EULEX Judges. There are a number of achievements to be highlighted. The processing of the criminal cases taken over from UNMIK is continuing. The UNMIK legacy has already been completed at the Supreme Court level and the district courts also made significant progress in achieving this goal. The EULEX judges in Mitrovicë/a region took over and completed a number of complex criminal cases, thus contributing to the efforts to restore the effective functioning of the Mitrovicë/a DC. Further work was done to support Kosovo judges in dealing with the backlog of the 22,000 "stayed cases" involving claims against KFOR, UNMIK and local municipalities. The actions to this end included *inter alia* categorizing the claims and developing a general strategy for monitoring, mentoring and advising; finding solutions to the difficulties of notifying and summoning claimants; completing monthly monitoring checklists for each Kosovo region; and exploring the possibility of an alternative compensation scheme. These priorities remain on the EULEX judges' agenda for 2010.

The EULEX judges also face difficulties in fulfilling their mandate. The planned number of EULEX judges has not been reached yet, and at present there are courts in which there is only one EULEX criminal judge (Pejë/Peć, Prizren and Gjilan/Gnjilane district courts) and one EULEX civil judge (Pejë/Peć DC). The lack of an adequate number of criminal judges makes the establishment of trial panels difficult and requires the involvement of the EULEX civil judges at the pre-trial stage and as members of trial panels. There are also vacancies for first instance judges at the SCSC, where the appointment of local judges is also a problem (at the moment there is only one local judge at the SCSC and seven vacancies for the Appellate and Trial Panels have been announced). Difficulties of an administrative nature especially related to premises also arise. In most of the regions there is insufficient space in the district court buildings and some of the staff of the EULEX judges are therefore accommodated in former UNMIK log bases or other buildings, which hampers coordination within the team. The same problem exists with regard to the SCSC staff who are based in two separate buildings.

Even though there are obstacles, and staffing and administrative problems persist, the EULEX judges are determined to proceed with their work so as to ensure that cases of war crimes, terrorism, organised crime, corruption, financial/economic crimes and other serious crimes, as well as property related issues, are properly adjudicated. In the execution of these functions the EULEX judges will continue to collaborate with their local colleagues. Effective cooperation is already established between EULEX and Kosovo magistrates in all Kosovo Courts. In concluding this report, special gratitude is owed to Mr. Rexhep Haxhimusa, former President of the Supreme Court and Mr. Fejzullah Hasani, President of the Supreme Court, Mr. Salih Mekaj, President of the DC Pejë/Peć, Mr. Ymer Huruglica, former President of the DC Gjilan/Gnjilane, Mr. Ymer Hoxha, President of the DC Prizren; Mr. Kapllan Baruti, President of the DC Mitrovicë/a; and Mr. Anton Nokaj, President of the DC Pristina, as well as the Judges of the SC, DCs and MCs of Kosovo for their continuous cooperation in achieving the common goal of strengthening the judicial system in Kosovo.

# VIII. Charts representing the statistics in the annual report of the EULEX Judges Unit

**Fig.1.Requests to the President of the Assembly of Judges to take over cases**

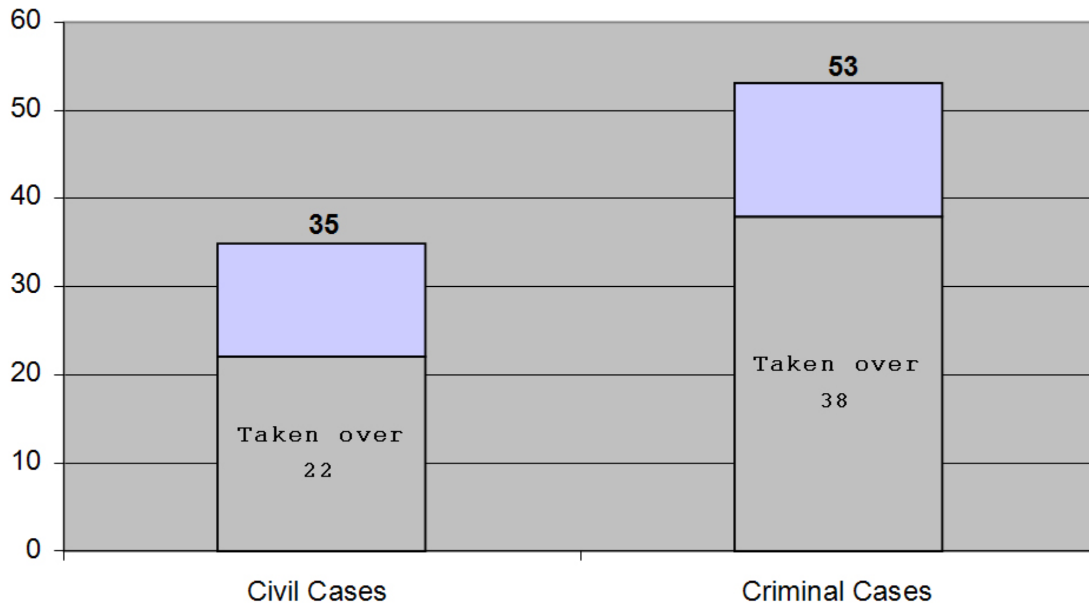


**Fig 2. Requests to take over cases by court**

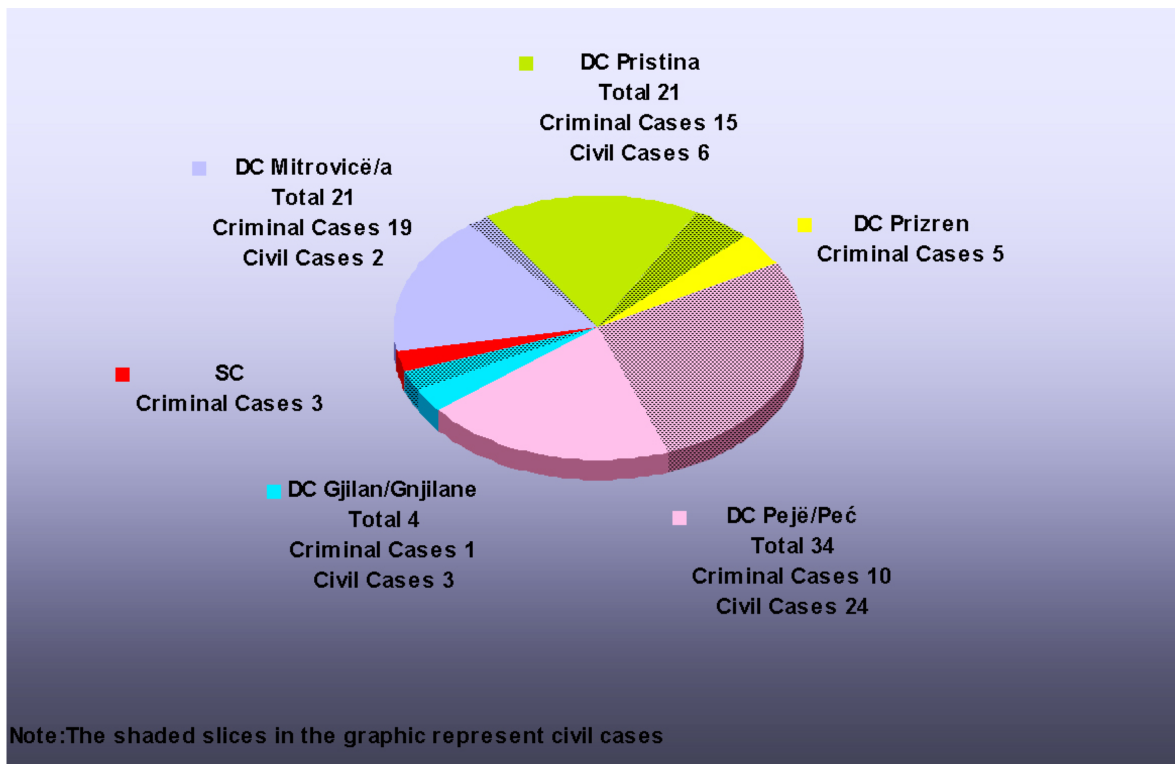

**Fig 3. Requests to take over criminal cases by requester**

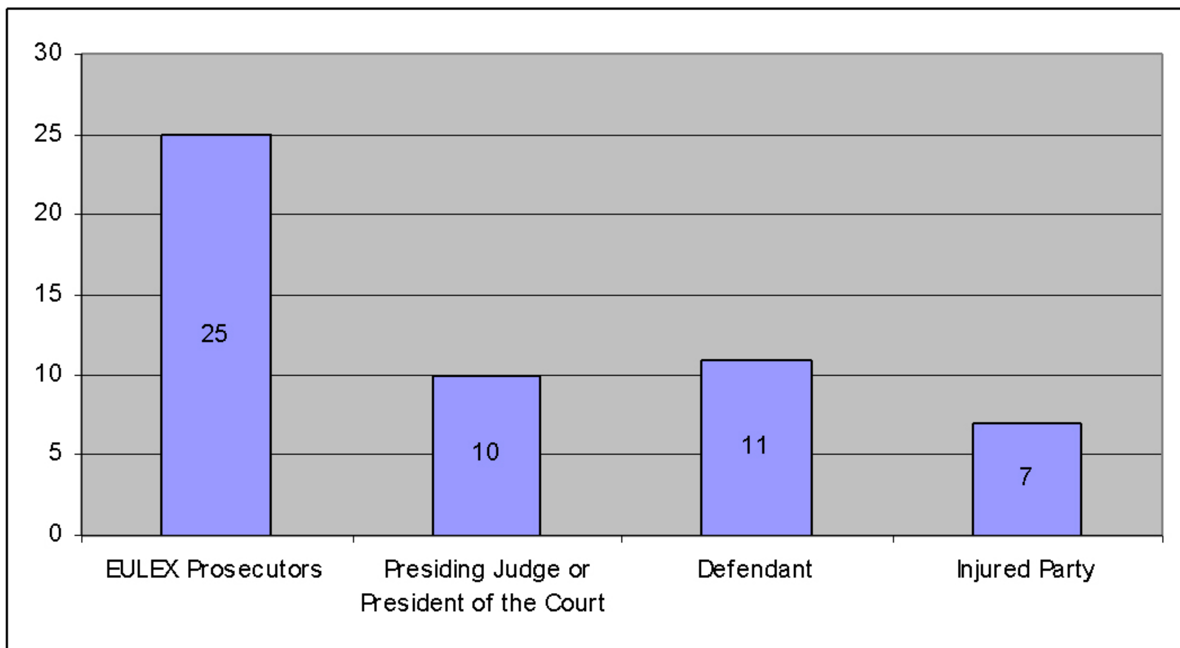


**Fig 4. Requests to take over civil cases by requester**

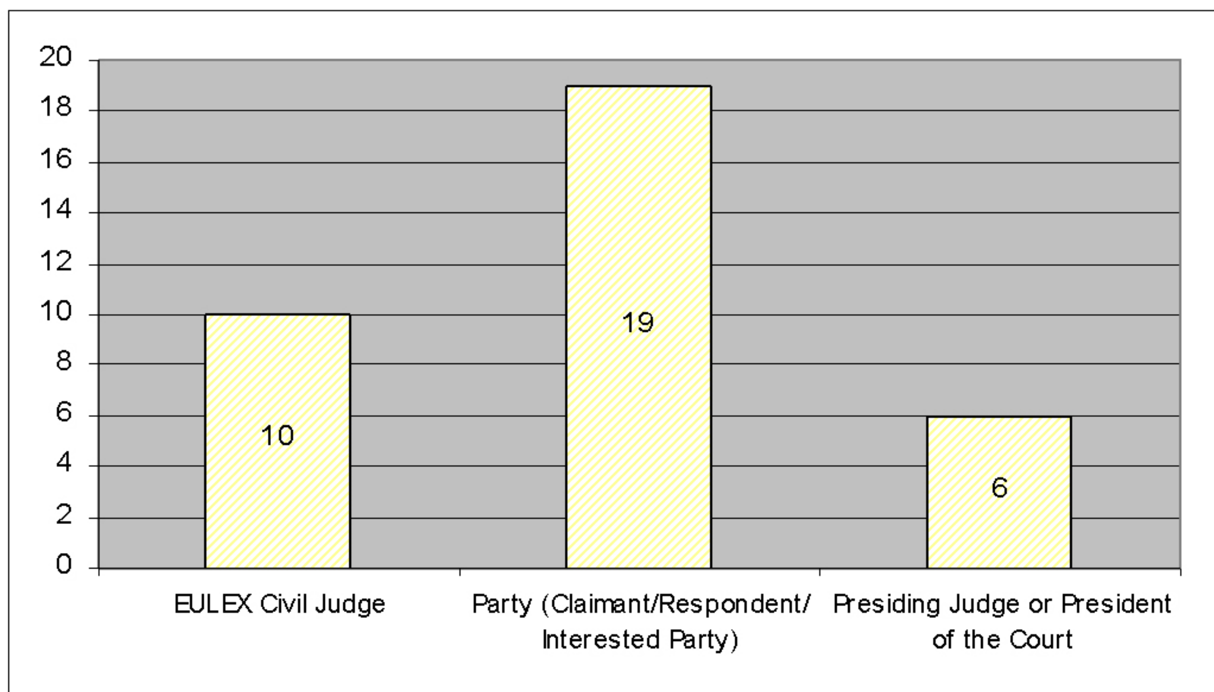

**Fig 5. Criminal cases by court at pre-trial stage**

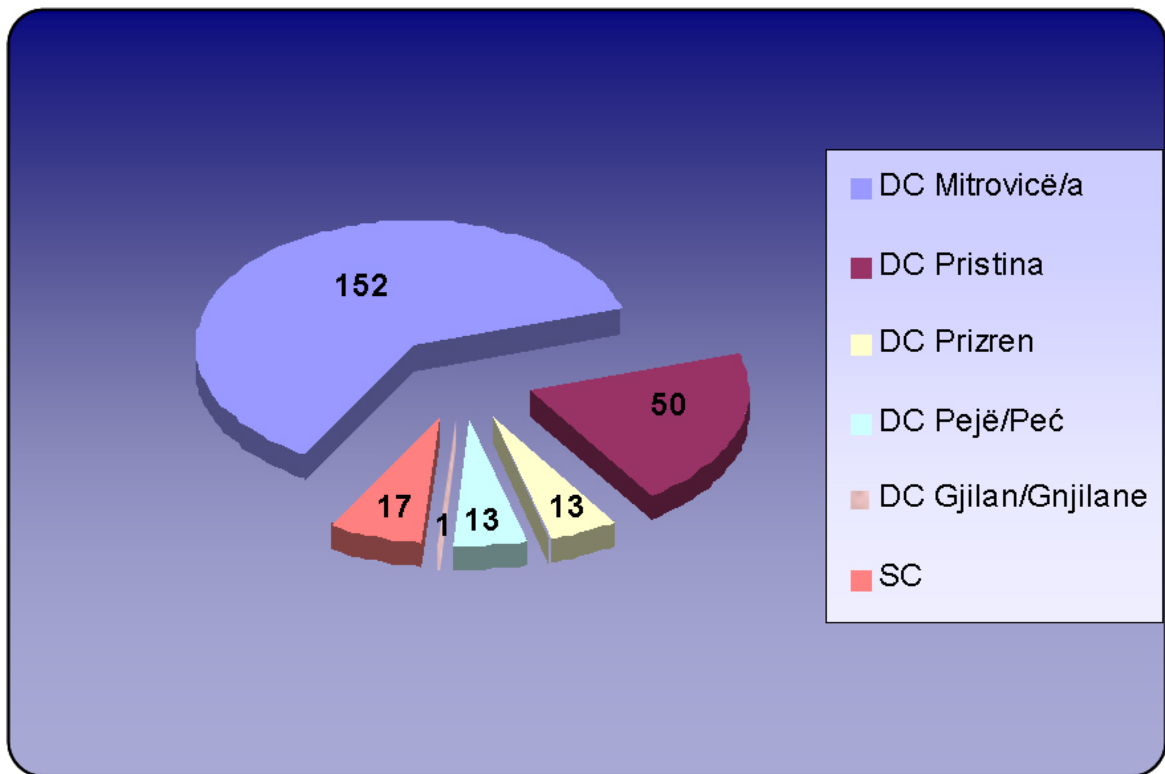


**Fig 6. Criminal cases by court at trial stage**

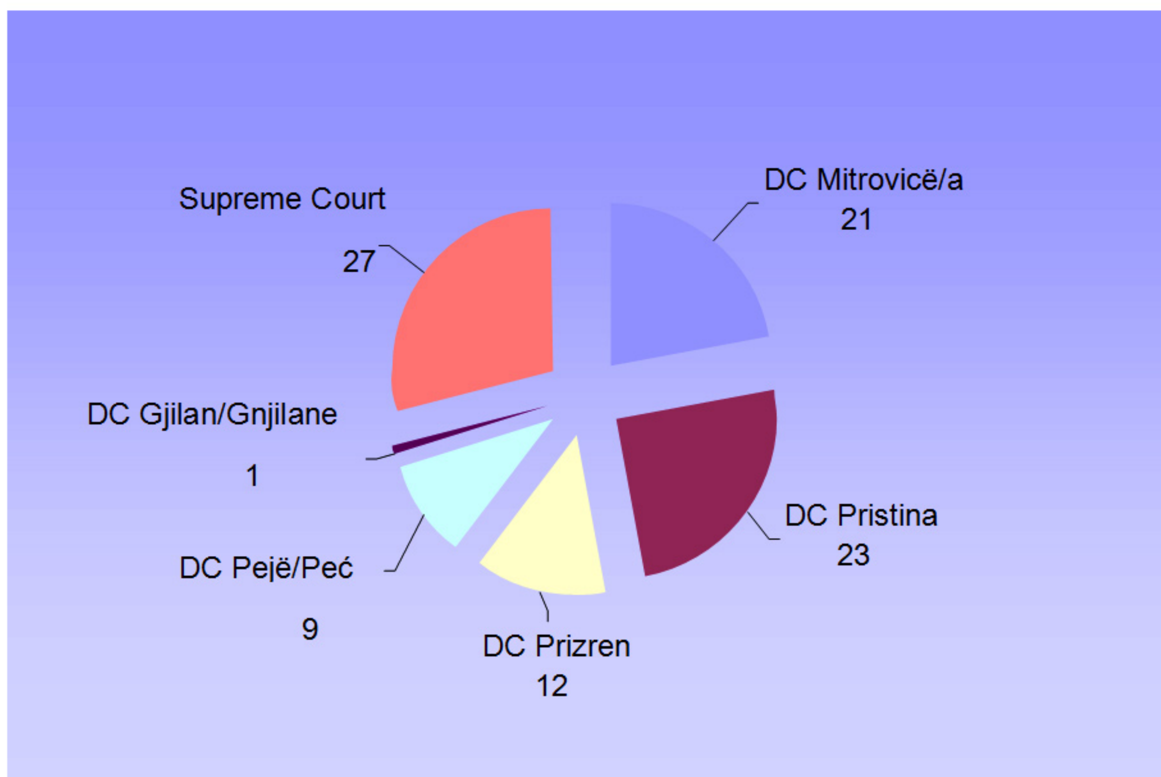

**Fig 7. Total criminal cases in pre-trial phase (all courts) by criminal offence**

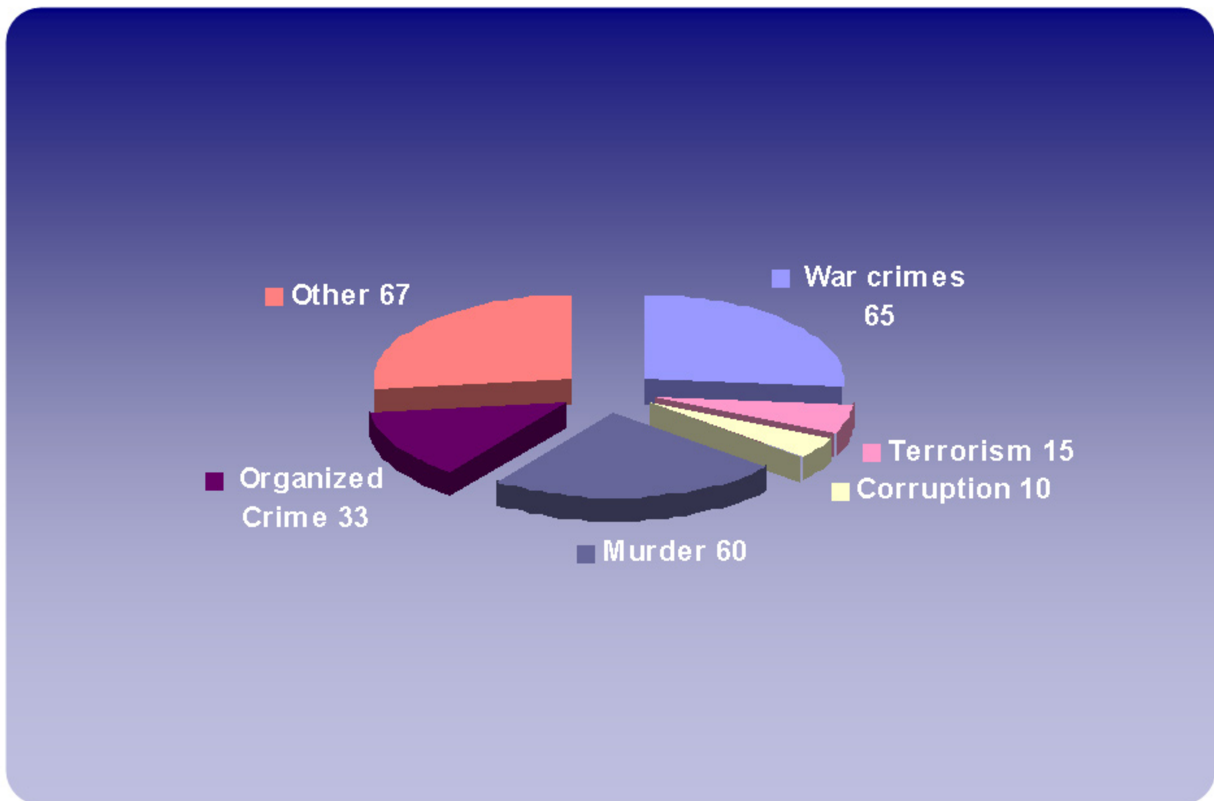


**Fig 8.Total criminal cases in trial phase (all courts) by criminal offence**

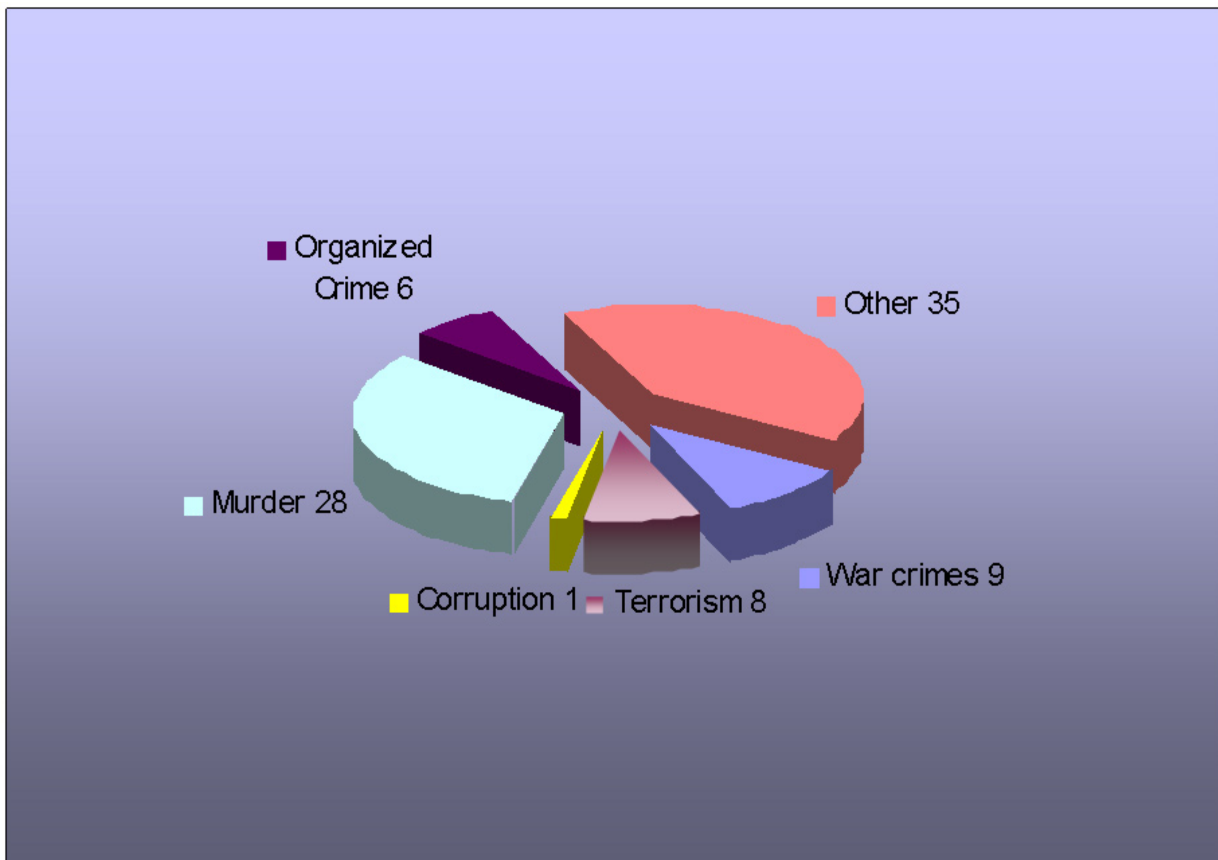

**Fig 9. Total judgments by court**

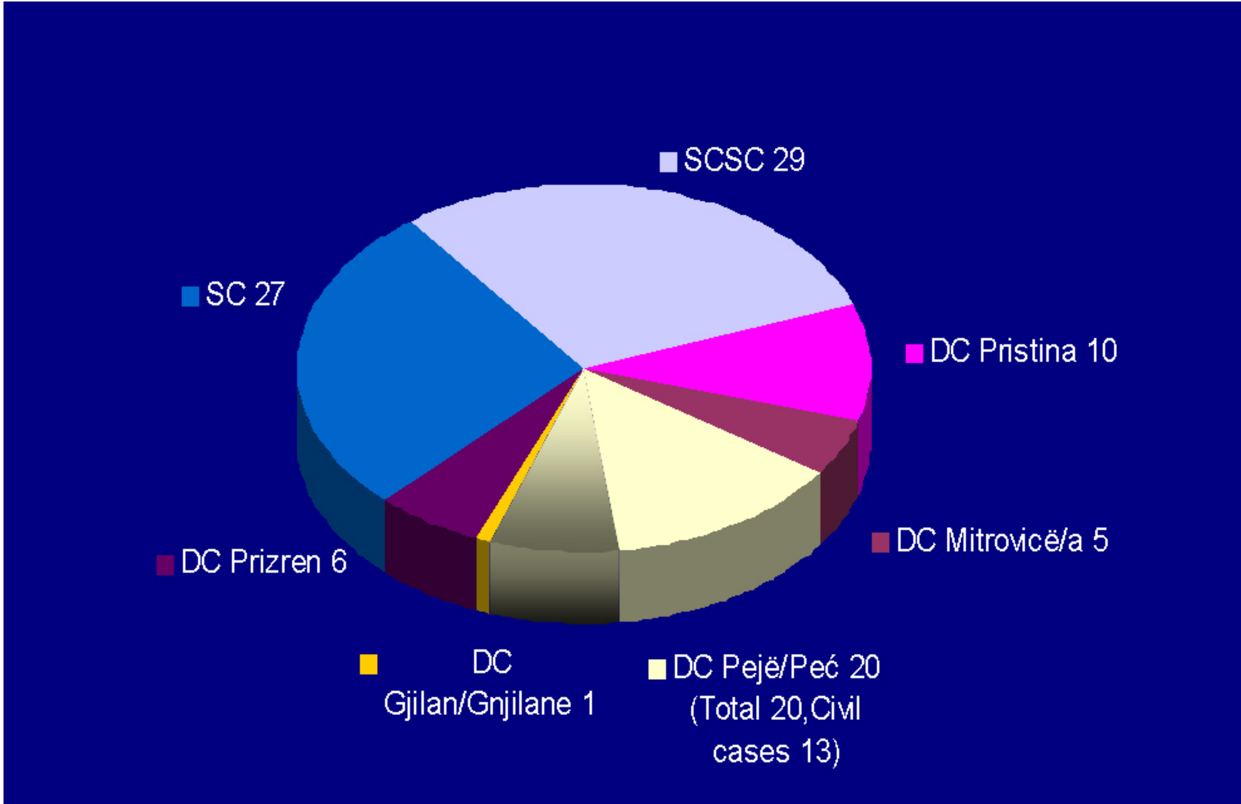


**Fig 10. Judgments by criminal offence**

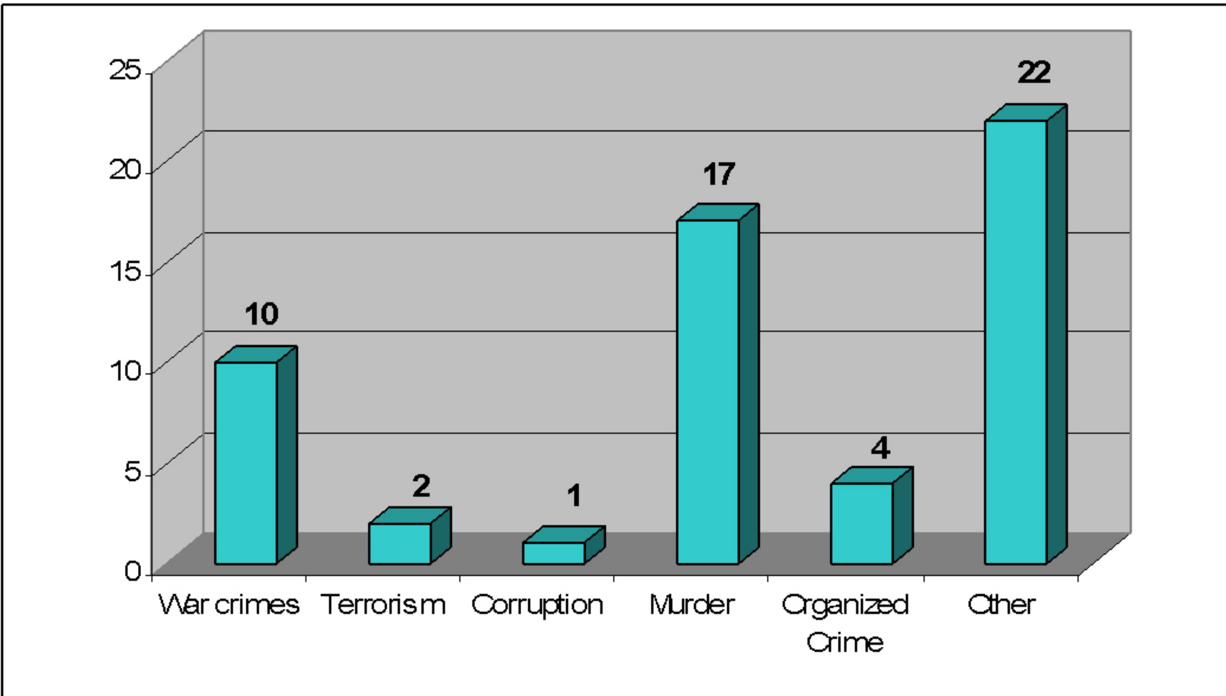

**Fig 11. SCSC Newly registered claims in 2009 by type of claim**

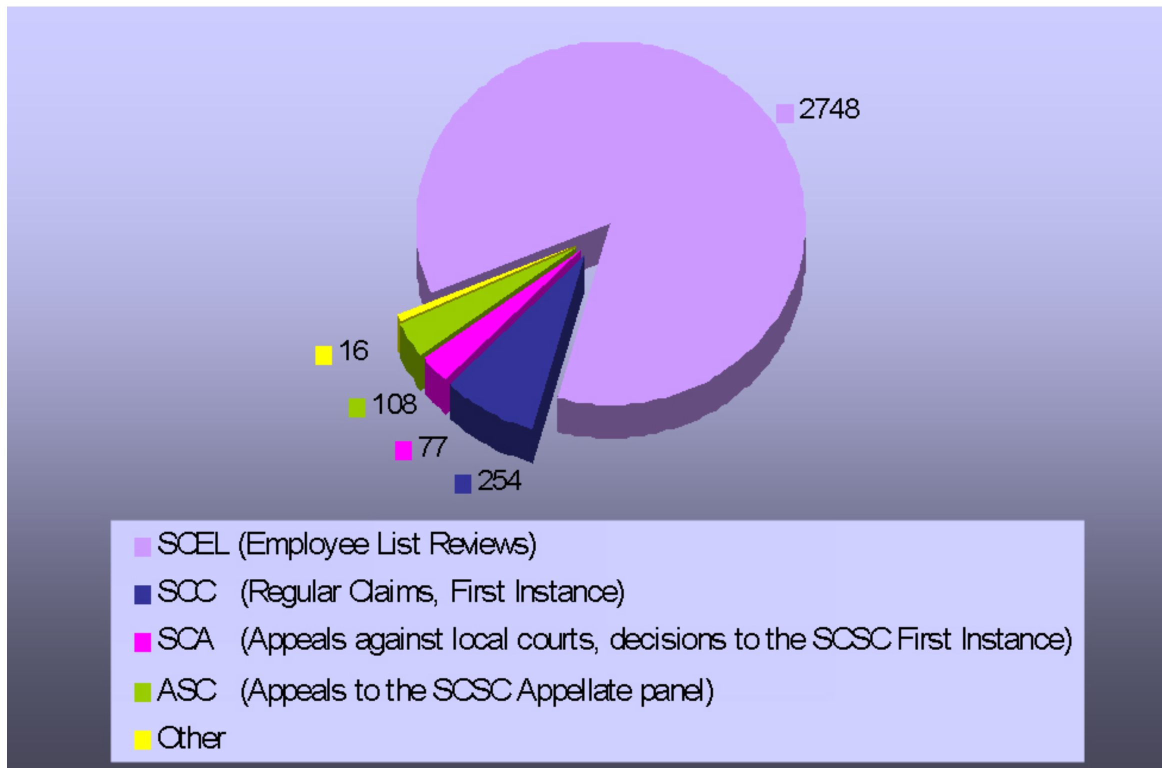


**Fig 12. SCSC procedural decisions (admissibility, referral,etc) / Judgements (final decisions on merits) by type of case**

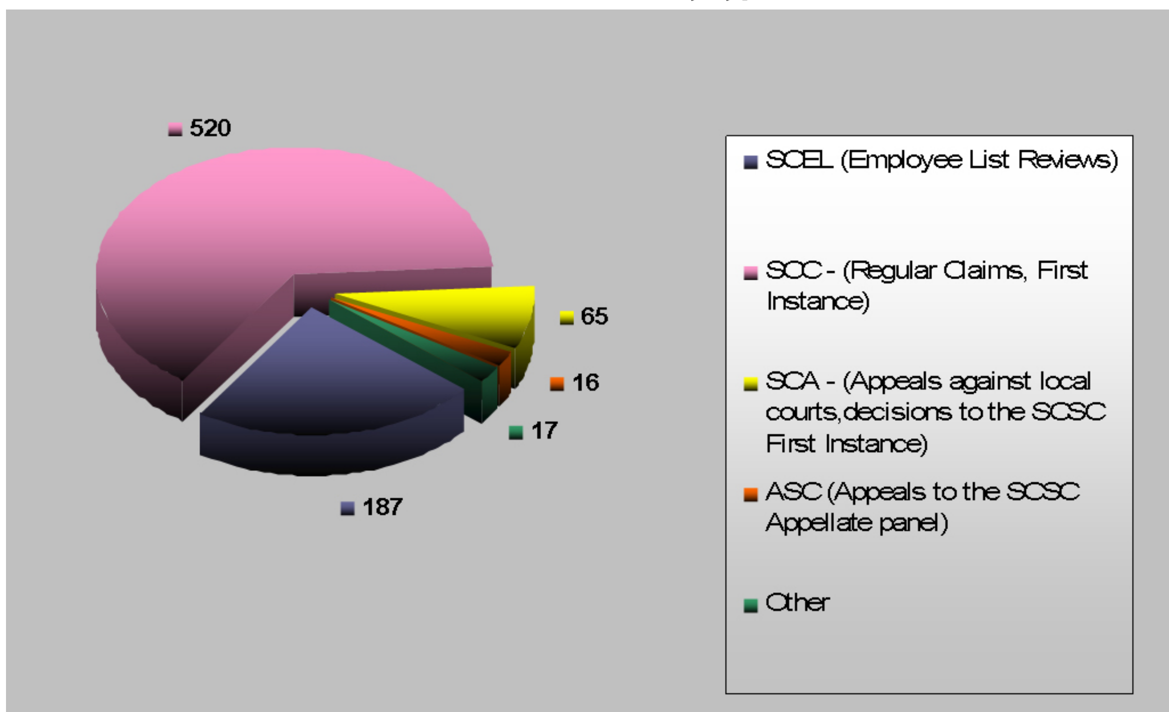

Fig 13. SCSC cases closed by type of cases