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MISSION IN KOSOVO

Department of Human Rights and Rule of Law

KOSOVO

REVIEW OF THE CRIMINAL JUSTICE SYSTEM (March 2002 - April 2003)

"PROTECTION OF WITNESSES IN THE CRIMINAL JUSTICE SYSTEM"

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GLOSSARY

ABA/CEELI	American Bar Association / Central and Eastern European Law Initiative
AKSH	Albanian National Army
DOJ	Department of Justice
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
COMKFOR	Commander of Nato-led Kosovo Force
CPU	Close Protection Unit
CSW	Centres for Social Work
CRC	Convention of the Rights of the Child
DCPC	Draft Criminal Procedure Code
DHSW	Department of Health and Social Welfare
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
fYROM	Former Yugoslav Republic of Macedonia
ICCPR	International Covenant on Civil and Political Rights
JIU	Judicial Inspection Unit
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
KPC	Kosovo Penal Code
KPS	Kosovo Police Service
LMO	Law on Minor Offences
LSMS	Legal Systems Monitoring Section
MOC	Municipal Minor Offences Court

NATO	North Atlantic Treaty Organisation
OHCHR	Office of The High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
SCR	United Nations Security Council Resolution
SRSG	Special Representative of the Secretary-General
SHAPE	Supreme Headquarters Allied Powers Europe
TPIU	Trafficking and Prostitution Investigating Unit
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo
VAAU	Victims Advocacy and Assistance Unit
WPU	Witness Protection Unit

SECTION 1:

BACKGROUND

This Review was prepared by the Legal Systems Monitoring Section (LSMS), which is part of the Department of Human Rights and Rule of Law (the Department) of the OSCE Mission in Kosovo. The OSCE functions under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK) as the Institution-building Pillar.

This section is intended to provide a brief background to the Review and to outline the institutional context of the LSMS and the Department.

1. The Mandate of the Legal System Monitoring Section

United Nations Security Council Resolution 1244 (SCR 1244) authorised the UN Secretary-General to establish an international civil presence in Kosovo that would provide an interim administration. One of the main responsibilities of the international presence was *"protecting and promoting human rights."*[1]

The UN Secretary-General, in his report to the UN Security Council of 12 July 1999, assigned the lead role of institution-building within UNMIK to the OSCE and indicated that one of the tasks of the Institution-building Pillar (Pillar III) should include human rights monitoring and capacity building. He also instructed UNMIK to develop co-ordinated mechanisms to facilitate human rights monitoring and the due functioning of the judicial system:

> "UNMIK will have a core of human rights monitors and advisors who will have unhindered access to all parts of Kosovo to investigate human rights abuses and to ensure that human rights protection and promotion concerns are addressed through the overall activities of the mission. Human rights monitors will, through the Deputy Special Representative for Institution-building, report their findings to the Special Representative. The findings of the human rights monitors will be made public regularly and will be shared, as appropriate, with United Nations human rights mechanisms, in consultation with the Office of the United Nations High Commissioner for Human Rights. UNMIK will provide co-ordinated reporting and response capacity." (Para. 87)

A Letter of Agreement, dated 19 July 1999, between the Under-Secretary-General for Peacekeeping Operations of the United Nations and the Representative of the Chairman-in-Office of the OSCE, stated that the OSCE should develop mechanisms to ensure that the courts, administrative tribunals and other judicial structures operate in accordance with international standards of criminal justice and human rights.[2] Within the OSCE, the Department has the responsibility to monitor and report upon the judicial system in terms of human rights and the rule of law. As a section of the Department, LSMS is

[1] United Nations Security Council Resolution 1244, 12 June 1999, para. 11/j.

[2] A Justice Circular (2001/15), issued on 6 June 2001, reaffirmed that the LSMS trial monitors with a few exceptions, have access to all court proceedings and documents. This Circular was intended to enhance the understanding of the judiciary with regard to the OSCE's mandate, and to ensure that the trial monitors maintain complete coverage at all stages of the criminal proceedings.

tasked with the role of monitoring cases in the criminal justice system, assessing their compliance with international standards, and reporting on matters of concern.

2. Monitoring the Criminal Justice System

International human rights standards[3] are part of the applicable law in Kosovo through, *inter alia*, UNMIK Regulation 1999/24 - which obliges those holding public office in Kosovo to uphold internationally recognised human rights standards - as well as through the Constitutional Framework.[4] Thus, in assessing compliance with international standards the OSCE uses as a basis for its analysis, international human rights conventions and jurisprudence.

Cases are monitored from the moment of arrest and/or detention, through the investigating stage, trial and appeal. The analysis and discussion in this Review are based on data and factual information collected during the reporting period by the LSMS monitors (monitors) and the LSMS headquarters in Prishtinë/Priština. The trial monitors predominantly cover criminal cases in the five district courts of Kosovo, and those cases on appeal in the Supreme Court. Certain cases before the municipal courts are also observed.

Information is gathered by attending court proceedings, reviewing court files and by conducting interviews with judges, justice officials, prosecutors, defence counsels, and law enforcement officers. During this reporting period, trial monitors observed over one hundred and fifty cases, including pre-trial investigations and trials. The LSMS gave priority to the following cases:

- War Crimes
- Organised crime
- Ethnically-motivated crime
- Politically-motivated crime
- Sexual Violence including victims of domestic violence and trafficked women
- Detention
- Treatment of Juveniles

3. The Relationship with other Pillars and Organizations

UNMIK Pillar I (Police and Justice) endeavors to consolidate "a law and order structure that is functionally logical, and in particular establish an unbiased judicial process through initial international participation and reform of the judicial system."[5] Similarly, the aim of the Department is to promote a society based on the rule of law, which guarantees full respect for human rights.

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[3] These international standards are detailed, *inter alia,* in Articles 9, 10, 14 of the International Convention on Civil and Political Rights (ICCPR) and Articles 5, 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Domestic law, primarily the FRY Code of Criminal Procedure (FRY CPC) and Kosovo Penal Code (KPC), form the basis for any analysis by the OSCE. 'Fair trial' analysis under international human rights law starts from the moment that a person is arrested and/or detained by the authorities, until the final disposition in the case.

[4] UNMIK Regulation 2001/9 On the Constitutional Framework for Provisional Self-Government, adopted 15 May 2001, Chapter 3, Section 3.3, states that "the provisions of rights and freedoms set forth in these instruments [international human rights instruments] shall be directly applicable in Kosovo."

[5] See PDSRSG's presentation of Pillar I in article "New Police and Justice Pillar established" in *UNMIK News* no. 93, 21 May 2001.

The Department works in close co-operation with UN bodies including OHCHR, UNHCR and UNICEF as well as with organisations such as the Council of Europe, the International Committee of the Red Cross, the International Organisation for Migration (IOM), and the American Bar Association's Central and Eastern European Law Initiative (ABA-CEELI). Since November 2001, the OSCE has co-operated with the International Criminal Tribunal for the former Yugoslavia through its Outreach office in Prishtinë/Priština. The OSCE provides regular updated information to the Outreach Co-ordinator for Kosovo in relation to on-going war crimes and politically/ethnically-motivated trials in domestic courts.

Accordingly, the LSMS, as part of the Department, maintains co-operative relationships with other Pillars and international agencies. Systematic violations, observed trends, individual problems and issues identified by the LSMS, within the broader mandate of the OSCE, are communicated to the UNMIK Department of Justice (DOJ) in the weekly reports of the Department. Moreover, the LSMS has expressed its willingness to work closely with DOJ to assist in addressing these systemic concerns.

4. The Scope of the Review

In its first two reviews of the criminal justice system,[6] the OSCE presented a broad and comprehensive overview of the justice system from a human rights law perspective. The concerns expressed in these reviews referred to specific cases where the activity of the judiciary, its administrators, and the law enforcement agencies, failed to comply with standards and guarantees of fair trial and due process. The third OSCE review[7] shifted its scope to identify concerns within the judicial system at a structural level. Specific areas of the criminal justice system, which were considered to raise the most pressing human rights issues, were addressed. Areas such as unlawful detention, inadequate defence representation, and trafficking cases were addressed to highlight non-conformity with international human rights standards. The fourth OSCE review reported on concerns regarding the independence of the judiciary, the detention authority exercised by executive or military organs and continuous arbitrary detention of the mentally ill in Kosovo.

The present Review focuses on the protection of witnesses in the criminal justice system in Kosovo. It also addresses a number of issues that were raised in prior reviews (termed "recurring issues") namely, independence of judiciary, detention, trafficking related criminality, access to effective defence counsel, and on treatment of the mentally ill. In each section, the Review puts forward corresponding recommendations to assist UNMIK Pillar I and other responsible authorities to develop their policies and practices.

Cases that support or illustrate the analysis and conclusions in this Review appear in separate indented paragraphs. This is to aid the reader in distinguishing case examples from the analytical paragraphs.

[6] OSCE Review of the Criminal Justice System, 1 February 2000 – 31 July 2000 (hereafter First Review); OSCE Review of the Criminal Justice System, 1 September 2000 – 28 February 2001 (hereafter Second Review).
[7] OSCE Review of the Criminal Justice System, October 2001 (hereafter Third Review).

SECTION 2:

EXECUTIVE SUMMARY

Recent incidents in Kosovo have given rise to concern that the level of intimidation of witnesses is on the increase. Further, there are signs that much of the public does not have faith in the ability of the authorities to provide reasonable protection, should they choose to testify against perpetrators in certain cases. This is a serious development considering that witnesses play a crucial part in prosecuting offenders; the successful conclusion of most trials being dependant on witnesses stating what they know, saw or heard. Recognising the importance of witness evidence to the functioning of the criminal justice system, and the duty of UNMIK to organise proceedings in such a way that the interests of witnesses are adequately protected, this Review emphasises the need to develop a more effective witness protection system in Kosovo.

The Review examines the current witness protection system in Kosovo and considers its effectiveness in the light of incidents of witness intimidation that had been monitored during the reporting period. The two main methods of providing protection for witnesses in criminal proceedings are examined in detail. Those are, the physical protection facilities provided by the Witness Protection Unit, and the measures aimed at concealing the identity of witnesses, which may be ordered by the court pursuant to UNMIK Regulation 2001/20.[8]

While welcoming the greater attention paid by the authorities to witness protection issues over the past two years, the Review finds many aspects of the system that should be developed and improved. In particular, it urges UNMIK to enhance public confidence in its ability to provide witnesses with adequate protection. To this end, the Review outlines a number of specific recommendations.

The OSCE is of the view that the issue of witness protection will become increasingly important in the coming months as the DOJ increases its focus on tackling organised crime.

[8] Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, dated September 2001.

SECTION 3:

PROTECTION OF WITNESSES IN THE CRIMINAL JUSTICE SYSTEM

A. Introduction

> *"A legal framework allowing for witness protection measures in a clearly regulated manner is necessary to guarantee both the rights of individuals to a fair trial under the European Convention of Human Rights, the appropriate outcome of trials where unlawful coercion is exerted against witnesses, the safety of witnesses under threat and the well-being of witnesses who, as a result of the crime and otherwise, are under harmful psychological pressure."*[9]

Witnesses, including 'victim witnesses', play a fundamental role in Kosovo's criminal justice system; from the initial reporting of a crime to the police, to the successful prosecution at the trial, witnesses are needed to say what they saw or heard. However, if witnesses believe that by assisting authorities they or their family will be endangered, they may remain silent for fear of reprisal. It is axiomatic that if witnesses cease to provide information to the police or evidence to the courts, prosecutions will be hindered and justice replaced by impunity. UNMIK has an obligation to provide an effective system to protect witnesses, to ensure both the personal safety of individuals and the proper functioning of the judicial system.

This Section will first examine witness protection measures in Kosovo, including the protection facilities provided by the Witness Protection Unit as well as the measures currently available under UNMIK Regulation 2001/20.[10] It will then outline the incidents of witness intimidation - before, during and after trial - which have been monitored by the OSCE during the reporting period. Finally it will consider the ways in which the effectiveness of the witness protection system may be enhanced through possible developments in the witness protection programme and the Regulation, and by an effort to increase public confidence.

i. The obligation of a State to provide a witness protection system

According to the ECHR case law, consideration must be given to the life, liberty or security of witnesses. Indeed, those interests must not be "unjustifiably imperilled."[11] While all persons have a civic duty to give sincere testimony as witnesses, the State has a duty to protect witnesses against interference or danger by providing them and their relatives with protection that effectively ensures

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[9] See, Decision Enacting the Law On Protection of Witnesses under Threat and Vulnerable Witnesses, the High-Representative for Bosnia and Herzegovina, 24 January 2003.

[10] UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, dated September 2001.

[11] "It is true that Article 6 […] does not explicitly require the interests of the witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention […]. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." European Court of Human Rights, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, para. 53; *Visser v. the Netherlands*, 14 February 2002, para. 43; *Doorson v. the Netherlands*, 26 March 1996, para. 70; *P.S. v. Germany*, 20 December 2001, para. 22. See also Appendix to the Committee of Ministers to Member States of the Council of Europe, Recommendation R (97)13, Article II(2).

their safety before, during and after trial. The protection of witnesses is, moreover, a necessity beyond the personal interests of individuals and is considered a duty upon public authorities to ensure the integrity and effectiveness of the legal system.[12] In this respect, the Committee of Ministers of the Council of Europe stated that "public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken."[13] These measures, however, must not infringe upon the fundamental principle of 'the equality of arms,' which is guaranteed by numerous international instruments.[14]

Thus, UNMIK Pillar I, as the public authority responsible for Kosovo's judicial system, has the duty to organise criminal proceedings in such a way that the interests of witnesses are adequately protected.

ii. An overview of the situation in Kosovo

Intimidation of witnesses has been a recurrent problem in Kosovo for a number of years, which has led to the introduction by UNMIK of witness protection measures. However, over the reporting period the OSCE has recorded a number of incidents that indicate a continuing or even growing trend in witness or victim intimidation (or the appearance thereof), and the related problem of threats to judicial officials. A few examples serve to illustrate the scale of the problem:

- The Kosovo media reported that the bomb, which exploded in Prishtinë/Priština in December 2002, was intended for a witness in the upcoming trial of former high ranking KLA members;[15]
- One witness in another trial involving other former high ranking KLA members, was murdered in Pejë/Peć in January 2003, soon after he had given evidence;
- Eight days after an appeal by the police for witnesses to come forward and give evidence in relation to this assassination, an anti-tank rocket attack was fired into the UNMIK regional police building;[16]

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[12] "It is unacceptable that the criminal justice system might fail to bring defendants to trial and obtain a judgement because witnesses are effectively discouraged from testifying freely and truthfully." Recommendation R (97)13 of the Committee of Ministers to Member States of the Council of Europe on Intimidation of Witnesses and the Rights of the Defence, adopted 10 September 1997.

[13] Recommendation R (2000)19 of the Committee of Ministers of the Members States of the Council of Europe, On the Role of Public Prosecution in the Criminal Justice System, adopted 6 October 2000.

[14] At first sight, the idea of a witness being able to testify anonymously in a criminal case appears to run contrary to the principles enshrined in the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court. Knowing the identity of the prosecution witnesses enables the accused and his counsel to properly investigate and challenge their allegations, particularly in relation to the issue of their credibility. However, courts in many jurisdictions have been faced with the problem of witnesses refusing to testify openly for fear of reprisal or changing their stories due to intimidation. In many cases the witnesses have been key to the prosecution case, which has led to the collapse of the trial after months of investigations. Therefore, in order to assist the administration of justice, legal systems have introduced measures to protect the identity of witnesses, including anonymous testimony. In doing so, the courts have sought to balance the rights of the accused to be able to test properly the evidence against him/her with the need to protect witnesses. Although there are no definitive set of rules to determine where the correct balance lies, it is understood that any compromise in relation to the accused right to examine witnesses must be consistent with the principle of *equality of arms.* The degree of reliance given to the anonymous testimony when evaluating the guilt or innocence of the accused has been a major factor in reaching the correct balance.

[15] "There are rumors that the motive for the attack is the testimony of the Enver Sekiraca [the supposed target of the car bomb] will give in the trial against Rrustem Mustafa - Remi. In the meantime, [Enver Sekiraca's brother] Sali says Enver was offered to testify against Remi by international judges. He did not do it. He has the same opinion now but I don't know what will happen later." Local newspaper 'Koha Ditore', 16 December 2002 (translation by OSCE Media Monitoring).

[16] Local media reported that UNMIK Police Commissioner told the media that the attack was designed to distract the police from ongoing investigations in the Pejë/Peć region. See RTK and Radio Kosova programmed on 24 January 2003.

- On 5 February 2003 the President of the District Court in Prizren was attacked and beaten outside his home, an event which led the local Kosovo judiciary to request the right to carry handguns.[17]

The public's perception that neither the police nor the courts are capable of providing protection against intimidation may easily be exacerbated by media reports and word of mouth rumour, particularly in a close knit society such as Kosovo. The above incidents, for example, have led to local media articles entitled, "*Witness – A disappearing race in Kosovo," "Local judges have started to worry about themselves"* and *"Mafia - type cases have created insecurity*,"[18] which may serve to entrench the public's fear and render witnesses hesitant to assist authorities.

In the coming months, as the DOJ focuses its attention on tackling organised crime, the issue of witness protection will become increasingly important.

B. Witness Protection Measures in Kosovo

In Kosovo, in an effort to assist in the administration of justice, two interrelated methods of providing protection for witnesses in criminal proceedings have been introduced. Firstly, the physical protection of witnesses is provided before, during and after trial by a specialised police unit known as the Witness Protection Unit (WPU or Unit). Secondly, measures to conceal the identity of witnesses while giving their evidence are administered by the courts pursuant to a statutory framework, namely, UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, dated September 2001 (the Regulation).[19] Together, these two main methods of providing protection may be termed the "witness protection system."

i. Protection facilities provided by the Witness Protection Unit

The WPU was set up in June 2001 under the authority of the UNMIK Police Commissioner to establish and administer a witness protection programme. Operations include the provision of secure shelter facilities in Kosovo until a witness has given testimony; the ultimate being to relocate them to another country following trial.[20]

The Unit does not operate on a statutory footing but was conceived together with UNMIK Regulation 2001/20. Both were considered to be necessary in the fight against witness intimidation; to provide protection for injured parties and witnesses so that they could participate in criminal proceedings without fear or risk to their personal security.

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[17] On 7 February 2003 the Kosovo Judges Association addressed a letter to the SRSG, which states that "we request to use your authority to influence the organs that are charged with security in order to ensure collective and personal security measures for the members of Kosovo judiciary. Hence, it is necessary to review the present attitude of the police not to allow the judges and prosecutors to carry pistols for self-defence and also to take other necessary actions according to the opinion of the organs in charge of security."

[18] Koha Ditore, 17 December 2002, Koha Ditore, 21 February 2003, and Kosova Live, 23 January 2003, respectively.

[19] See also, UNMIK Regulation No. 2002/1 Amending UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceeding', dated 24 January 2002, which extended the temporal applicability of Regulation 2001/20; and 'Administrative Direction No. 2002/25, Implementing UNMIK Regulation No. 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings,' dated 13 November 2002.

[20] See Memorandum dated 28 June, 2001 from the Police Commissioner to the Deputy Commissioners for Operations, Administration and Planning and Development approving the establishment of the WPU.

Applications to the WPU for physical protection come from a number of sources, such as investigators, prosecutors, judges, and NGOs. Applications are dealt with outside the court system and are assessed by a special panel composed of the Deputy UNMIK Police Commissioner of Operations, a Senior International Prosecutor and the Chief of the WPU. The procedure for dealing with such applications must be distinguished from applications for protective measures under the Regulation, which are within the jurisdiction of the courts and are determined by the court (including the investigating judge).

The WPU currently comprises twenty international police officers; KPS officers are undergoing training with a view to their being deployed in the Unit in the near future. The mandate of the Unit is restricted to protecting prosecution witnesses (along with their immediate family) in a limited category of cases, namely organised crime, war crimes, and high profile political cases. The current funding for the WPU is provided in part by the KPS budget.[21]

Initially, witnesses who request physical protection are referred to the WPU where they complete a threat assessment form. They are then transported to an intermediate protection site while their application is being processed. Those who are accepted into the programme are relocated with their immediate family members to a secure and safe location in Kosovo where they reside until they have given their evidence.[22] Where ongoing protection is necessary after a witness has given his/her testimony, the WPU has the mandate to arrange for that witness to be relocated outside of Kosovo.[23]

ii. Measures available pursuant to UNMIK Regulation 2001/20

The Regulation was enacted in September 2001 in an effort to assist in the effective investigation and prosecution of serious crime. The Regulation prescribes a number of measures that the court[24] may impose to protect potential witnesses from being identified. The means available include the following:

- Omitting or expunging names;
- Non-disclosure of records;
- Efforts to conceal features or physical description;
- Assignment of pseudonyms;
- Closed sessions of court proceedings to the public;
- Orders to defence counsel not to reveal the identity of the witness;
- Orders for the temporary removal of the accused from the courtroom;
- Anonymity.

These measures are available throughout the investigative/pre-trial phase and the trial. The court may make an order on the basis of an application by a public/private prosecutor, a defence counsel, an injured party or a witness. The protective measures are aimed at protecting the identity of the witness from the public and/or counsel. In exceptional circumstances, the court may order protective measures

[21] The KPS budget amounts to approximately 500,000 Euro per annum, 100,000 Euro being allocated to the relocation of witnesses. Contributions from States provide additional funding. Requests for further funding are ongoing.
[22] The facility is provided with 24-hour security. The average length of stay at this facility is 9-12 months.
[23] The WPU relocates witnesses outside Kosovo through the assistance of Heads of Country Liaison Offices in Kosovo, UNHCR and IOM. To date, however, it has been difficult to find countries willing to accept such witnesses. The relocation programme run by the WPU is not operated on an anonymous basis due to budgetary constraints and so relocated witnesses only receive a new address/residence as opposed to a new identity.
[24] 'Court' refers to the examining judge during the investigation or president of the district panel of judges. (UNMIK Regulation section 1(d)).

for complete anonymity where it finds that there exists a serious risk of danger to the witness (or his/her family) if such anonymity is not preserved. The Regulation includes the caveat that the trial panel should not find any person guilty solely or to a decisive extent upon the evidence given by a single witness whose identity is anonymous to defence counsel and the accused.

Also relevant is Administrative Direction 2002/25, Implementing UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, dated 13 November 2002, (Direction 2002/25). This Direction provides the courts with more detailed instruction on the procedures to follow for the examination of anonymous injured parties and witnesses.

C. Incidents of Witness Intimidation

Despite the fact that witness protection issues have assumed greater importance over the past two years in Kosovo, with the establishment of the WPU and the enactment of the Regulation, problems of witness intimidation still persist. It would appear that a significant section of the public still harbour fears about being subjected to intimidation or attacks should they come forward and make statements to the police or to testify at trial, because the system is not capable of protecting them. This fear may not be unfounded. The OSCE has recorded incidents of witnesses being assassinated or subjected to assassination attempts, intimidation or threats of reprisals, in many different types of cases and at all stages of the proceedings. A few examples are provided below:

i. Pre-trial and trial

In a case involving former high-ranking KLA members, convicted for unlawful detention resulting in death, numerous incidents of intimidation aimed at prosecution witnesses occurred. As a result of these incidents, five separate cases - with charges including murder, attempted murder, threats, and unlawful possession of weapons - have been brought against those allegedly responsible.[25]

Examples of these incidents of intimidation include:

- A main witness twice escaped assassination attempts (one involving also his wife and son) following the start of the investigation. The last attempt occurred about three weeks before the trial began;
- A second witness, soon after he had testified before the investigating judge, was allegedly told that if he did not withdraw his investigative statement, he and his family would be killed;
- A third witness succeeded in escaping an assassination attempt several weeks after having given a statement in front of the investigating judge;[26]
- The family of a fourth witness was attacked the night after he had testified in front of the investigating judge.[27]

Despite these incidents, according to officials involved in the proceedings, none of the witnesses in this case benefited from the WPU programme or from measures imposed pursuant to the Regulation.

- Upon request of the international prosecutor, the WPU was contacted at an early stage to assure the security of the main witness/injured party. The WPU offered to place him in a safe house and admit him into the witness protection programme, but he declined. No other steps were undertaken by the WPU.

[25] On 26 December 2002 two persons, initially charged for attempted murder and illegal possession of weapons, were convicted for unlawful possession of weapons and sentenced to two years imprisonment.
[26] A rocket was fired into the restaurant in which the witness was sitting. He and six other persons were injured.
[27] Guns were fired towards the house and a hand grenade was also thrown, but did not explode.

- No contact with the WPU was initiated for the protection of the two co-operative witnesses. One of them asked for a visa for the United States or Switzerland, but was informed that UNMIK could not grant one. He eventually managed to obtain by himself a visa for the United States and left Kosovo just a few days before he was due to testify at trial. As a result, the court never heard this co-operative witness and his investigative statement could not be considered as evidence since the defence had not cross-examined him.[28]
- Some form of protection was, however, provided on an *ad hoc* basis. When the safety of the main witness was in question, the investigating judge contacted the regional police in Pejë/Peć, who provided some protection. Additionally, the security of the relatives of other injured parties was handled for a time by KFOR and later by a private security firm. During the main trial, after some witnesses reported having been threatened by members of the public, and upon their express request, the Close Protection Unit (CPU)[29] escorted them from their residence to the court.

The extensive media-coverage of these incidents and of the trial is likely to have increased the feeling of insecurity surrounding this case.[30] It was noted that, in the courtroom, prosecution witnesses were intimidated by actions of the public (who appeared exclusively to be supporters of the accused). Indeed one witness during testimony stated that members of the public were swearing and threatening him. Although the presiding judge gave repeated warnings to the audience to be quiet, he did not order a non-public session, exclude the television media,[31] or impose protective measures of any kind under the Regulation.

By way of comparison, in a more recent case involving former high-ranking KLA members charged with war crimes, both the WPU and the Regulation have been employed to provide protection to prosecution witnesses. However, notwithstanding the greater use of protective measures, problems of intimidation still arose. The prosecutor applied for protective measures under the Regulation due to the risk of intimidation. According to the international prosecutor:

> "[T]he case file documents demonstrate that a number of witnesses have already been threatened, which required the expunging of their names from official records. Due to this level of intimidation, a number of witnesses have recanted the identification of the defendants and gave contradicting evidence. Continued police investigation and identification of additional witnesses was slowed, in large part, due to fear of the co-accused and their associates. In fact, a witness who had previously been involved in the case and who was approached by law enforcement authorities shortly after the arrest of [the accused] was shot and wounded in front of his home before a summons could be delivered for him to appear. Moreover, testimony heard since [the accused's] arrest has included one witness testifying that he was called on his phone by an unknown person and offered a sum of money in exchange for not testifying. Additionally, evidence continues to be developed, which could implicate several of the accused and their

[28] According to the written verdict of the District Court of Pejë/Peć, dated 17 December 2002, the summons could not be delivered.
[29] This Unit is normally responsible for the personal and close security of international judges and prosecutors.
[30] Most notably through the television, who filmed the prosecution witnesses full-face, at the beginning of each of their testimonies. Even though the identities of the witnesses was already known to the accused by the time they testified, the beaming of their faces via television throughout Kosovo, ensured that much of the population thus became similarly aware.
[31] The decision to allow television recording is of the competence of the president of the Supreme Court. The trial panel may, however, order "for justifiable reasons that certain parts of the main trial not be filmed," see Article 294(3) FRY CPC. Additionally, although Article 10 ECHR prescribes that the right to freedom of expression includes freedom to "impart information and ideas without interference by public authority" it further states that, "the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of […] public safety, for the prevention of disorder or crime, […], for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

> associates in additional criminal acts after the Kosovo conflict, including murder, witness intimidation, bribery and judicial corruption."[32]

The court ordered that the identity of fifteen witnesses would be protected from disclosure to the public,[33] and five would remain anonymous, even to the accused and defence counsel.[34] It is pertinent to note the prosecutor's observation prior to the start of trial that, "[d]ue to this level of intimidation a number of witnesses have recanted the identification of the defendants and gave contradicting evidence" because similar scenarios have also occurred during the trial, in relation to witnesses who were either anonymous or had their identity concealed:

> The first anonymous witness gave his/her evidence during a closed (non-public) session from a separate room, from where neither the court nor the parties could see him/her, but were able to ask him/her questions. The witness's statement to the investigating judge had been highly incriminating to the accused. However, at trial the witness completely changed his/her evidence and asserted that his/her statement to the investigating judge was false. Immediately following this closed session, two-defence counsel gave a summary of the non-public session testimony to the press, where it was published.[35]

> The second prosecution witness, whose identity was protected pursuant to an order by the court under the Regulation, gave his/her evidence during a closed (non-public) session. Again, this witness, who gave an incriminating statement to the investigating judge, completely changed his or her evidence when testifying at the trial and asserted that his/her evidence to the investigating judge was false.[36]

Furthermore, it is of concern that, despite the court order for anonymity under the Regulation and the non-public nature of the hearing, defence counsel still chose to inform the media (and thus the public) of what they heard.[37] The OSCE has monitored other incidents of a similar nature; this suggests a lack of respect for witness protection issues.[38]

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[32] See Prosecutor's proposal for detention attached to the Amended Indictment, dated 4 February 2003.

[33] Article 3.1 of UNMIK Regulation 2001/20.

[34] Article 4.2 of UNMIK Regulation 2001/20 reads: "Where measures provided in section 3.1 are insufficient to guarantee the protection of an injured party or of a witness (not being a witness proposed by the defence), the Court may in exceptional circumstances order that the injured party or witness shall remain anonymous to the accused and the defence counsel."

[35] "Witness no. 4 denied everything he said during the investigation saying that he was pressured by the UNMIK police and that he was promised a big amount of money […]" from article '*Was the Protected Witness Number Four Threatened by the UNMIK Police*' Kosova Sot, 21 March 2003 (unofficial translation). The OSCE has chosen to publish this information even though it is from a non-public session, since the information has already entered public domain via the media and, therefore, can no longer be considered as confidential.

[36] The following day, it was reported in the local media thus: "Also the second witness, according to the poor information available at our disposal, spoke about the scandals in investigations, because he told the court that he was not maltreated at all by UCK, in contrast from what is written in the statement from investigations. […] The second secret witness against the UCK leaders of Llapi Zone, according to the 'Epoka e re' sources, withdrew from his statement given in investigations. He said that he was not maltreated by UCK." (Unofficial translation). Epoka e Re, 1 April 2003, "*The Second Witness Also Speaks About Gross Scandals in Investigations*."(front page article).

[37] As well as breaching the court order for protective measures under the Regulation, defence counsel may also have violated the law on disclosure of information from non-public hearings. The applicable domestic law prescribes that when part or the whole trial is held, from which the public has been excluded, the persons attending the main session, including the parties, "must maintain the secrecy of everything they learn in the trial." (Article 289(3) FRY CPC).

[38] During an investigation against a former KLA commander charged with kidnapping and attempted murder, one of the defence counsel stated to the international investigating judge and to the international prosecutor that "it is too late to hide the identity of the witness because the defence counsel himself gave a statement to the newspaper Zeri.[…] it was an obligation for […] defence counsels to give the correct information for the public opinion since there was no decision made by the investigating judge." Following this incident the witness was threatened with death and refused to testify. His/her

As well as the above high profile trials, the OSCE has also monitored numerous trafficking cases where it may be inferred that intimidation of witnesses/victims occurred (such as where the witness/victim retracts her/his initial incriminating statement).[39] In other instances, witnesses have explicitly mentioned threats or intimidation.

> One example is a trafficking case that occurred in the District Court of Prishtine/Pristina. At the investigative hearing a witness declared that he saw the owner of the bar forcing girls into prostitution. The investigating judge informed the OSCE that the witness returned to her office a few days after giving his statement. He told her that he has received threats and, therefore, requested to change his statement. The investigating judge refused the witness's request, but failed to take any action to assure his safety. At the trial the witness completely denied his statement given to the investigating judge.

In almost all the trafficking cases where witnesses have retracted their earlier statements, the authorities had not offered any protective measures.

The above examples demonstrate the level of witness interference in organised crime, trafficking, war crimes and politically related cases. But intimidation is not peculiar to such trials, it may occur in any type of criminal case, even in internal family disputes, which may invoke relatively minor charges.

> For example, on 27 January 2003 a Kosovo Albanian accused was convicted by the District Court of Prishtinë / Priština of violent behaviour for repeated acts of violence against his wife in common law and sentenced to two and a half years imprisonment. Due to threats, KPS officers, from the day that she reported to the police until the accused was imprisoned, provided protection for the victim. The WPU was not involved.

ii. Post trial

The responsibility of the State to ensure adequate protection for the witnesses/injured parties does not terminate with the end of the main trial or after the witnesses have been heard, but continues thereafter.[40]

In the case mentioned above involving former high-ranking KLA members, the regional police of Pejë/Peć have continued to provide protection (outside of the WPU framework) to the main witness/injured party and to the co-operative witness for around one month after the end of the trial. The OSCE welcomes these measures. However, the OSCE also noted that some witnesses who did not receive protection were subject to attack after they had testified at trial.

> A well-known witness who had given evidence in the above-mentioned high profile trial, along with his son and cousin, were gunned down at the main junction in Pejë/Peć. Even though he had received threats and had survived one recent assassination attempt before the trial, he was not provided with any protection after the trial.

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name had been stated in the initial request to conduct an investigation and no protective measures has been imposed. It may be noted that the secrecy of the investigation is protected under Article 178 FRYCPC.

[39] Although it is impossible to be certain that witnesses retracting their statements have been intimidated (either prior to trial or at trial), it is reasonable to assume that many of them were. This assumption is widely shared the by judges and prosecutors interviewed by the OSCE.

[40] See above at page 9.

The effect of this assassination on the psyche of the population should not be underestimated. Indeed, the difficulties that the police encountered during their investigations illustrate the level of fear in Kosovo's society when it comes to assisting the police or the courts in such cases. According to the Chief of the Serious Crimes Squad in Pejë/Peć, the incident occurred in full view of at least 40 witnesses. However, initially no one was willing to assist the police. After 10 days of silence, the Chief of the Serious Crimes Squad issued a public appeal for witnesses to come forward, the tone of which illustrates the level of police frustration due to witness intimidation:

> "This killing is not the first of its kind in the Pejë / Peć area and it will not be the last. [...] The criminals can kill freely because they know the citizens will not tell the police what they have heard or observed. Fear and intimidation rule Kosovos' citizens, who prefer to live with the criminal element *[sic]* everywhere in their society rather than to make a stand against crime. Kosovo has become a breeding ground for organised crime because of the silence of the citizens. During the past year I have personally interviewed numerous witnesses to new and old murders. The same response is consistently given by the witnesses; I did not see anything, hear anything and I do not know anything about what happened. This response is given even if a person is standing 10 metres away from a murder or crime that has just occurred. […] Criminals live successfully with fear and intimidation being their main weapon."[41]

One week after this appeal, on 21 January 2003, an anti-tank rocket was fired into the UNMIK regional police building in Pejë/Peć. Although no one has yet claimed responsibility for this attack, it is assumed by many that it was related to the ongoing investigations by the police of the above-mentioned triple murder. Whatever the reason, the incident is likely to further undermine public confidence in the ability of the justice system and the police to halt those who threaten or attack witnesses.

Despite the heightened awareness that former witnesses in this high profile trial may be subject to attacks, on 14 April 2003 a second former witness was murdered:

> A second witness who had given evidence was assassinated on 14 April 2003 in an ambush. The attack left two dead and three seriously wounded, including a four years old boy. The police confirmed that one of the murdered victims was a former prosecution witness in a trial against the former KLA fighters and stated "[t]he motive of the attack in Peja could be revenge, because one of the killed persons was a prosecution's witness in a trial held some time ago."[42]

The United States Office in Prishtine/Pristina, condemning the murder, emphasised that "[s]uch killings do not simply eliminate witnesses and intimidate others from testifying against Kosovo's criminal elements, but they also prevent Kosovo from meeting the standards it must achieve before final status can be discussed."[43]

It should be noted that the incidents of witness intimidation monitored by the OSCE are likely to represent only a fraction of the actual cases. Witnesses who have been threatened are often too scared to report the matter to the police. Further, by its very nature, the full effect of the public's *fear of possible intimidation* can not be measured; it is impossible to know how many potential witnesses choose not to report what they knew to the police at the outset for fear of reprisal. Certainly, the Chief

[41] UNMIK Press Release, "Duties of Citizens in a Free Society", dated 14 January 2003.
[42] Press briefing by UNMIK Police Spokesperson, 15 April 2003. It should be noted that this witness voluntarily withdrew from the witness protection programme before he was killed.
[43] Press Release United States Office Pristina, "U.S. Office Condemns the Pre-Meditated Double Murder of Ilir Selimaj and Feride Selimaj", April 15 2003.

of the Serious Crimes Squad in Pejë/Peć believes that this problem is endemic. Whatever the true figures may be, that witness intimidation is a major hurdle is not in doubt, all the judges interviewed by the OSCE confirmed this to be one of the key problems facing Kosovo's criminal justice system.

D. Improving Kosovo's Witness Protection System

Witness intimidation will continue to hinder the ability of the police and the courts to function successfully until the public gains confidence in their capacity to protect witnesses. Public perception will not change overnight, no matter what developments are introduced, for it requires a considerable amount of confidence building. But in order to start this process the authorities should immediately address a number of shortcomings in the system of witness protection in Kosovo.

i. Improving Kosovo's witness protection programme

An effective witness protection programme must operate in Kosovo in conjunction with the legal measures provided for in the Regulation. In some cases, such as where the public (or the accused) already know the witness's identity - and thus concealing it under the Regulation is pointless – an effective witness protection programme provides the only realistic means of protection. However, the current witness protection programme in Kosovo is too basic to deal with the scale of the problem, and is severely hampered by the number of limitations under which the WPU is forced to operate.

The major constraint is a want of resources, which has meant that the WPU can only consider giving protection to witnesses involved in high profile political, organised crime and war crimes cases. Even for those witnesses who are involved in these types of cases, the facilities are limited - according to a member of the Unit, temporary safe housing facilities are few in number and the existing facility does not have the capacity to house more than five families at any one time.[44] Admittedly, even with a doubling or tripling of resources, the WPU would need to be selective in terms of to whom it offers protection. However, at the current level, many witnesses who are obvious targets of intimidation do not qualify for protection, even when the cases involve grave charges. This is true even in cases where relatively low level, temporary protection would be sufficient; for example, a simple shelter facility until the end of the trial.

This resource restriction affects, in particular, victim/witnesses in trafficking cases who are often vulnerable to intimidation from their former associates and, in the vast majority of cases, fall outside the WPU's priorities.[45] The OSCE has monitored numerous cases in which victim/witnesses admitted to having been intimidated or, due to the sudden change of their evidence from incriminating to exculpatory, are suspected of having been intimidated.[46] IOM and a number of international and local NGOs provide shelter facilities for victims of international trafficking who fall within their repatriation scheme. However, victims who do not qualify for this scheme cannot benefit from its shelter facilities

[44] Maximum capacity is eighteen persons at any one time.

[45] Essentially, current limitations in funding have resulted in the Unit not being able to provide protection for victim witnesses in trafficking cases. The nature and very special measures that such victims require has posed logistical and operational challenges for the Unit's current resources and as a result the Unit has been unable to assist them.

[46] Research carried out by Anti-Slavery International on victim protection has illustrated that countries with more comprehensive victim protection measures also fared better in the prosecution of traffickers, see Anti-Slavery's Report entitled 'Trafficking in Human Beings: Assistance and Protection of Victims' – Paper for the Stability Pact Task Force Meeting, Slovenia, March 2003.

and are left without protection.[47] Although, UNMIK Regulation 2001/4 On the Prohibition of Trafficking in Persons in Kosovo provides that, "[a]ppropriate measures shall be taken for witness protection during any investigation and/or court proceedings arising under the present regulation,"[48] rarely has protection been offered either in the form of safe housing or otherwise.

To help alleviate this problem, it was proposed in early 2002 that the WPU, the Trafficking and Prostitution Investigation Unit (TPIU), and the DOJ's Victims' Advocacy and Assistance Unit (VAAU) establish an interim and secure transit facility designed to protect all victims of trafficking. In this regard the OSCE welcomes the Memorandum of Understanding (MOU) between itself and the United Nations, dated 28 March 2003, which establishes the proposed interim transit facility. The OSCE has pledged to provide 159,300 Euro to UNMIK Pillar I for this facility, out of voluntary contributions provided by the United States Government.[49]

According to a member of the WPU, many witnesses who fear intimidation and are informed of the measures available do not wish to enter the programme.[50] This is in accord with what the OSCE has observed in some high profile cases. The OSCE was informed that many witnesses are of the view that once UNMIK Police hand-over the operation of the Unit to their KPS counterparts, confidentiality surrounding their protection/relocation may be compromised. In order to address this concern, a thorough screening procedure should be established for the selection of KPS officers; only those officers with a trusted track record of handling sensitive cases should be admitted to the Unit. Further, the Unit should provide guarantees to witnesses that confidential information will be protected in the long-term. These measures are necessary to promote confidence in the programme.

As well as an increase in available resources, a better co-ordination between the police, the WPU, the prosecutors and the courts would enhance the system. Notwithstanding that both the witness protection programme and the measures under the Regulation may need to be applied coherently so as to provide adequate protection for a given witness, as it stands now the legal and institutional relationship between these organs is not certain. It appears that judges and prosecutors often lack information and, in some cases, a clear understanding of the type of facilities offered by the WPU, how it operates and who

[47] For example, victims of 'internal trafficking' within the definition of UNMIK Regulation 2001/4 and foreign trafficked victims who do not wish to be repatriated.

[48] See, UNMIK Regulation 2001/4 Section 5.2. Additionally, Section 10(c) places an obligation to provide "temporary safe housing, psychological, medical and social welfare assistance as may be necessary to provide for their needs." However, the assistance under Section 10 is subject to the availability of funds by donor contributions made specifically for that purpose (section 9.2). Failure to establish shelter facilities for victims of trafficking is not only contrary to domestic law but also to the directions set out in UN instruments, namely UN General Assembly Resolution 53/116 of 1 February 1999 recognises trafficking as a serious violation of human rights and invites Governments to "take steps, including witness protection measures/programmes, to enable women who are victims of trafficking to make complaints to the police and to be available when required by the criminal justice system, and to ensure that during this time women have access to social, medical, financial, and legal assistance and protection as appropriate"; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime, A/55/383; United Nations Economic and Social Council, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1; and the United Nations Code of Conduct for Law Enforcement Officials, UN GA Res. 34/169.

[49] The object of the MOU is to support the establishment and operation of an Interim Secure Facility (ISF) for victims of trafficking for a period of one year. The purpose of the ISF is to protect and support victims of trafficking while at the same time creating an opportunity to advise the victim regarding options and lifestyles in a secure environment. It will be designed to be accessible on a twenty-four hour basis to victims of trafficking or individuals reasonably believed to be victims of trafficking.

[50] Additionally, some witnesses voluntarily pull out of the protection arranged by the WPU, e.g. the witness mentioned on pages 17-18 of this Review, who was subsequently assassinated.

manages it.[51] Many do not fully understand the interrelationship between the witness protection programme and the measures available under the Regulation. Therefore, the police, prosecutors and judges should be given detailed training on how the witness protection programme functions and how it may be utilised in the context of the justice system as a whole.

The OSCE acknowledges that to administer a protection programme in the context of Kosovo is particularly problematic. Kosovo's society is extremely 'close-knit' and it boasts a relatively small population and landmass.[52] The consequences for the protective programme are twofold: Firstly, because a relatively high number of witnesses are 'known' to the alleged perpetrators and / or to the public, they are more likely to suffer intimidation and thus require protection. Secondly, it is very difficult to relocate witnesses internally without them being noticed. Thus the Unit must relocate witnesses (and their families) abroad, which is both costly and requires the co-operation of foreign States. Notwithstanding the contextual difficulties, the OSCE is of the view that the service provided by the WPU could be greatly improved, both quantitatively and qualitatively, if it were allocated more resources, and better co-ordinated within the structure of the judicial system.

ii. Developing the witness protection measures available to the court

> "When designing a framework of measures to combat organised crime, specific rules of procedure should be adopted to cope with intimidation. These measures may also be applicable to other serious offences. Such rules shall ensure the necessary balance in a democratic society between the prevention of disorder or crime and the safeguarding of the right of the accused to a fair trial."[53]

The Regulation and the subsequent Direction No. 2002/25 provide a reasonable tool by which judges may order protective measures for witnesses who may be vulnerable to intimidation. However, certain additional measures and clarifications may assist the courts to better protect witnesses and enhance public confidence in the system. At this stage, it should be noted that whenever a court applies such measures, it must be careful not to breach the accused's right to a fair trial.[54] With this in mind, the OSCE will consider possible developments.

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[51] One judge who, at the time of this Review, was involved in a high profile case involving anonymous witnesses, admitted that the information that he had received concerning the operation of the WPU had been scant. He recalled that its existence had been mentioned only "in general terms at DOJ meetings."

[52] Kosovo's population is estimated to be around 2.3 million, in an area of 10,887 sq. kilometers (HCIC, Prishtinë / Priština)

[53] Council of Europe's Committee of Ministers Recommendation No. R (97) 13 (Adopted by the Committee of Ministers on 10 September 1997, at the 600th Meeting of the Ministers' Deputies).

[54] With regards to anonymous witnesses, the European Court has stated that, "the use of anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention. […] However, if the anonymity of the prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the court has recognised that in such cases Article 6 para. 1 taken together with Article 6 para. 3(d) of the Convention […] requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities. Finally, it should be recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements." (*Van Mechelen and Others v. the Netherlands*, *op. cit*., para. 52, 53, 54 & 55; *Visser v. the Netherlands, op. cit*., para. 43; See also *Birutis and Others v. Luthuania*, 28 June 2002, para. 29; *Doorson v. the Netherlands*, 26 March 1996, para. 70, 72, 76; *P.S. v. Germany, op. cit*., para. 22, 23, 24.) As to disclosure of evidence to the defence, the European Court considered that "Article 6(1) requires […] that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused. […] However […] the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competitive interests, such as […] the need to protect witnesses at risks of reprisals […] which must be weighed against the rights of the accused. […] In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual […]. However, only such measures restricting the rights of the defence, which are strictly necessary are permissible under Article 6(1). […] Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities." (*Rowe and Davis v. U.K.*, Grand Chamber, 16

Firstly, the court or the prosecutor should, at the first available opportunity, inform any witness who *may* be under threat, of the witness protection measures available under the Regulation (at the investigative stage of the proceedings and at the trial). This should be a mandatory obligation. As it stands now, the law does not even encourage judicial officials to inform witnesses. Such an obligation would ensure that the witnesses (as well as the courts and prosecutors) are fully aware of the available provisions under the Regulation.[55] Additionally, courts should be obliged to provide a properly reasoned decision when ruling on an application for protective measures.[56]

Secondly, the lack of statutory direction and technological equipment has meant that the courts have had to establish novel procedures for conducting protective hearings if and when they arise, particularly where anonymous witness hearings are concerned.[57] Consequently, in the few instances when the courts have ordered that witnesses may testify anonymously, differing procedures have been applied.[58] Although any statutory directions in this regard must be sufficiently flexible to account for individual circumstances, there should be some level of certainty in terms of the procedures that will be followed. The application of different procedures for the same purpose may lead to confusion amongst the practitioners and inconsistency in the jurisprudence. Further, without statutory guidance there is a greater possibility that procedures will be applied, which violate the rights of the accused. Thus, more specific statutory direction should be provided.

February 2000, para. 60, 61; *Jasper v. U.K.*, Grand Chamber, 16 February 2000, para. 51 & 52; *Fitt v. U.K.*, Grand Chamber, 16 February 2000, para. 44 & 45; I.J.L. and *Others v. U.K.*, 19 September 2000, para. 112; *Atlan v. U.K.*, 19 June 2001, para. 40; *P.G. and J.H. v. U.K.*, 25 September 2001 para. 67 & 68). The Scottish Executive Central Research Unit, in its recent study on protective measures, concluded that, "the overriding general principle demonstrated by ECHR case law is that the accused should have the right to confrontation subject to the premise that such right is subject to some modification in certain circumstances, in particular, certain categories of witnesses who may attract anonymity or other protective legal measures". The study found that, according to the case law of the European Court of Human Rights, evidence of an anonymous witness is admissible provided that the following conditions are met:

- That the defence has the opportunity to test the witness's reliability;
- That the triers of fact have the opportunity to access the witness's credibility;
- That the protective measures are only used when *"strictly necessary"*; and,
- That the accused should not be convicted solely or to a decisive extent on the evidence of an anonymous witness.

(See, Briefing Paper on Legal Issues on Witness Protection in Criminal Cases, The Scottish Executive Central Research Unit 2001 as researched by the University of Dundee).

[55] See for example the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, dated 1 March 2003, Bosnia and Herzegovina, where such an obligation is enshrined in the law:
"(1) The Court, the Prosecutor and other bodies participating in the proceedings **shall**, *ex officio*, advise a witness who may be under threat or a vulnerable witness of the witness protection measures available under this Law." (Article 5) (Emphasis added).

[56] One decision for anonymity provides very little information and simply states that: "This order has been passed because the court is convinced that there is a serious risk to the witness. In order to protect the identity of the witness, it is not advisable to give more concrete reasons for this conviction of the court (Sec. 4.2(a) in conjunction with 4.3)."

[57] The Direction simply states that anonymous witnesses "shall be examined in accordance with procedures ordered by the court" (section 1.1). The courts do not appear to have been supplied with the equipment that the Regulation entitles them to use, such as voice-altering devices, closed circuit television or video facilities.

[58] In one case held in Prizren, the judges, prosecutor, and essential staff heard the protected witness's evidence in a separate room, read the record of that testimony in open court, and went back in the separate room to ask the witness additional questions, which had been proposed by the defence. Thus, the defence teams were completely excluded from the proceedings - physically and technologically - during the testimony of the anonymous witness. In a different case held in Pristina, the judges and parties remained in the courtroom while the witness was placed in a separate room out of view; the witness could follow the proceedings through headphones and respond to questions by the judges and the counsel via microphone: applying this method the judges were unable to see the demeanor of the anonymous witness when they gave evidence.

Thirdly, the law should explicitly provide for an exceptional 'witness protection hearing' to be conducted outside the courtroom setting and solely in the presence of the panel of judges. Further, it should provide clear directions as to the procedures to be applied. Although the Regulation empowers a court to hear witnesses who remain concealed and anonymous, it does not specifically provide for a procedure where witnesses may be *heard by the judges*, to the exclusion of all others.[59] By contrast, the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, dated 1 March 2003, in Bosnia and Herzegovina ("Bosnia law") establishes such a procedure - termed a 'witness protection hearing' - to which it dedicates nine articles directing the courts in its application. Article 19 of the Bosnia law states;

> (1) A witness protection hearing is conducted by the Panel [of three judges …]
> (2) The witness shall be informed that
> a) he will be heard as a protected witness;
> b) his identity shall not be revealed to any person other than the members of the Panel and the minute taker of the Panel;
> c) he shall not appear in person before the Panel at any hearing other than the witness protection hearing; and
> d) he is not obliged to answer questions that would indicate his identity or the identity of the members of his family.
> (3) The Panel shall hear a witness in detail on the circumstances suggested by the party making the motion and on all other circumstances the Panel considers necessary.[60]

The Bosnia law's witness protection hearing goes further than simply permitting a witness to testify anonymously during a court session, by means of an opaque shield, voice-altering device or via close circuit televisions *et cetera*. It envisages a special hearing that may be conducted completely outside the courtroom setting, without the presence of the prosecutor, defence counsel, accused, injured party, courtroom staff, security personnel, public or indeed anyone else (except perhaps a minute taker and translator). The record of the hearing, employing a pseudonym for the witness, is disclosed to the parties. The panel may hold another hearing of the witness to ask additional questions (*ex officio* or upon a motion by the prosecution or defence) to clarify previously given testimony or to obtain information that was not covered. The Bosnia law also establishes detailed procedures that are intended to guarantee the confidentiality of the witness' identity during and up to thirty years after trial.[61] Further it seeks to ensure that the procedure, which may only be used in exceptional circumstances,[62] does not affect the accused's right to a fair trial. In all areas, it provides specific direction to the courts. The OSCE is of the view that the availability of a witness protection hearing outlined in a similar

[59] Even if the Regulation may be interpreted to permit such a hearing, it does not provide any direction as to how it should be conducted.
[60] The Bosnia law may be accessed on the OHR website.
[61] For example, in relation to the record of the witness testimony the Bosnia law provides that:
The Court shall take measures to ensure the confidentiality of the record by:
keeping the record separate from all other documentation of the criminal case in a secure place;
returning the record to the secure place after its use at the appropriate hearing in the criminal procedure and when the decision has become final; and providing for long-term archiving of the record in a manner that limits access to the document only to the President of the Criminal Division for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final. (Article 20).
[62] **"**In exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony, the Court may conduct a witness protection hearing in accordance with Articles 15 through 23 of this Law." (Bosnia law, Article 14).

manner to that in the Bosnia law would help reassure witnesses that the courts have the means to protect their identity, both in the short and long term.

Fourthly, the law should explicitly provide for a criminal sanction where any person breaches an order for protective measures, or where officials who perform duties in connection with protective measures reveal confidential information.[63] The court should be obliged to warn any effected persons of this sanction. The body of the current Regulation does not state explicitly that revealing protected information is a criminal offence. This may explain, at least in part, why defence counsel in the recent war crimes trial in Pristinë/Priština gave a summary of a protected witness's evidence to the media the day after the witness had testified (the protected witness was heard anonymously in a non-public session).[64] Although a court could interpret Kosovo's current applicable law in a manner that would enable it to sanction a breach of a protective order, the law is ambiguous at best.[65]

Finally, judges, prosecutors and defence counsel must be willing and able to use the Regulation where appropriate. While applications for witness protective measures and anonymity were made in a few high profile cases, in the vast majority of cases in which witnesses were intimidated, the prosecutors had not applied for, and the judges had not ordered, protective measures. Since September 2001, when the Regulation was promulgated, it has only been used in four cases, or thereabouts. This is striking considering the number of incidents involving witness intimidation. But it should not be surprising – it would appear that neither local nor (as a rule) international judges or prosecutors have significant experience in cases involving witness protective orders. This underlines the need for training in the use of Regulation 2001/20 [66] for the legal profession.

iii. Building public confidence

In addition to developing the witness protection system, the authorities should also seek to build public confidence therein. In order to do so, UNMIK authorities should target two groups: Firstly, potential witnesses who, because of their entrenched fear and distrust in the system, choose not report to the police in the first place. To address this problem, a public information campaign should be launched to provide clear and precise information concerning the measures available for witnesses who qualify for protection, either through the WPU or the courts. Secondly, witnesses who choose to come forward and report to the police, but may subsequently change their statement due to intimidation by those against whom they have reported. To ensure that these witnesses continue to assist authorities, those who may

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[63] See for example the Bosnia law which, in the body of the law, states that revealing information obtained in connection with protective measures is a criminal offence:
Information that a person who performs official duties in connection with witness protection measures acquires in the course of those duties relating to witness protection measures, constitutes an official secret.
The Court or the Prosecutor **shall warn** persons who are present at hearings, or who are otherwise given possession of such secret information in the exercise of their official or professional duties, that the unauthorised disclosure of such information **is a criminal offence**. (Emphasis added)
A person who performs official duties in connection with witness protection measures and who acquires information referred to in paragraph 1 of this Article cannot be required in any proceeding in any court, tribunal, or commission of inquiry, however described, to produce any document or divulge or communicate any matter relating to that information. (Article 24).

[64] Published in Kosovo Sot , 21 March 2003.

[65] See e.g. Kosovo Criminal Code, Article 50 (unauthorised disclosure of a secret) and Article 178 (violation of the confidentiality of proceedings).

[66] "Criminal justice personnel should have adequate training to deal with cases where witnesses might be at risk of intimidation." General Principle No. 7, the Council of Europe's Committee of Ministers Recommendation No. R (97) 13 (Adopted by the Committee of Ministers on 10 September 1997, at the 600th Meeting of the Ministers' Deputies).

be subject to intimidation should be provided with information on the witness protection system in Kosovo, in realistic and honest terms, as soon as they report to the police.[67]

By targeting these groups, UNMIK will encourage witnesses to assist the police with their inquiries and to provide evidence to the courts.

E. Conclusion

The intimidation of witnesses in Kosovo's criminal justice system is an issue of grave concern. The OSCE has recorded numerous incidents of intimidation or threats in different regions of the province, involving a range of cases, most notably in high profile political trials. There is a growing unease that witnesses may become too fearful to assist authorities in their fight against crime - particularly organised crime – because they do not have faith in the system of witness protection. This could seriously undermine the ability of the authorities to promote human rights and the rule of law. In this regard, it is worth recalling the statement by the US office in Pristina following the assassination of the second former prosecution witness from a high profile KLA trial:

> "Once again, a witness in a murder trial has been gunned down in cold blood in Kosovo. Whether this killing is connected to the trial in which Mr. Selimaj testified has not yet been proven, but the fact remains that this is the second time in only four months that witnesses in murder trials have been murdered in cold blood in carefully planned ambushes in the Peja region. The sheer brutality of these killings - which also targeted children in their callous disregard of human life - appears to be aimed at terrorizing the larger Kosovo community and at undermining the rule of law. Let us be clear about this. Such killings do not simply eliminate witnesses and intimidate others from testifying against Kosovo's criminal elements, but they also prevent Kosovo from meeting the standards it must achieve before final status can be discussed."[68]

The authorities should give priority to developing a witness protection system that is effective for Kosovo. The measures that have been introduced by UNMIK over the last couple of years suffer from a number of infirmities, as well as a lack of coordination in their application. These shortfalls should be remedied. Further, specific training for judges, prosecutors and lawyers should be provided on how to use the witness protection system, and the authorities should endeavor to build public confidence in their ability to protect witnesses.

Although the intimidation of witnesses may never disappear completely - particularly in a close knit society such as Kosovo – developing the system in the manner outlined in this Review should help to ensure that these incidents are significantly reduced.

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[67] At present, there would appear to be very little information in the public arena about the WPU or its programme. Furthermore, according to a member of the Unit, some witnesses when they initially agree to make a statement to the police are given unrealistic promises about the nature and extent of the protection that may be afforded to them. By contrast, in the US federal system, once a witness has been admitted into the programme, the witness and his/her family members enter into a Memorandum of Understanding which details the expectations and obligations expected of all the parties. The US Marshalls Service is then obliged to satisfy each commitment documented as long as the witness remains 'in good standing' in the programme. In this way the expectations of the parties can be realistically addressed before any serious programme of protection is commenced. Where a case requires a particular measure and where the witness fulfills the criteria required, the measure is guaranteed.

[68] Press Release United States Office Pristina, April 15 2003.

F. Recommendations

RE: The Witness Protection Programme:

* UNMIK Pillar I should provide the Witness Protection Unit ("WPU") with more financial resources, in order to establish a more expansive witness protection programme to a greater number or witnesses. It should also ensure that the necessary level of technical expertise is available to the WPU.

* Pillar I should undertake all necessary steps to identify countries willing to receive protected witnesses who need to be relocated outside of Kosovo.

* The WPU must be able to guarantee that sensitive information will remain confidential in the long term, even after the administration of the WPU is handed over to the Kosovo Police Service.

* A thorough screening procedure should be established for the selection of KPS officers for deployment in the WPU.

* A more formal and structured relationship should be established to promote co-ordination between the WPU, the prosecutors and the courts, and to ensure that witness protective measures are employed in a comprehensive and complimentary manner.

* Training for judges, prosecutors and lawyers, on the role and operation of the WPU and its witness protection programme, should be provided by the Kosovo Judicial Institute and the Criminal Defence Resource Centre.

* The DOJ should issue a Justice Circular to all judges and prosecutors setting out the role of the WPU and the facilities available under the witness protection programme.

RE: UNMIK Regulation 2001/20:

* The SRSG should issue an administrative direction to introduce a mandatory obligation on the court or the prosecutor, at the first available opportunity, to inform any witness who may be under threat, of the witness protection measures available under the Regulation.

* The SRSG should issue an administrative direction to provide greater direction to the courts in relation to the procedures that should be applied in court hearings that involve anonymous witnesses. Further, each district court should be supplied with the practical or technological means to facilitate the concealment of witnesses, such as screens, voice-altering devices, closed circuit television or video facilities. This will help to ensure that such procedures are reasonably certain and consistent.

* The Regulation should be amended to provide for a 'witness protection hearing' to be conducted outside the courtroom setting and solely in the presence of the panel of judges. The amendment should include direction as to the justification for such a hearing, the procedure to be employed, the form and use of the record, and the right of appeal.

* The Regulation should be amended to make explicit that it is a criminal offence to breach an order for protective measures, or for an official who performs duties in connection with protective measures to reveal confidential information.

RE: Building Public Confidence:

* A public information campaign should be launched by Pillar I to reassure the public that there are means by which the authorities can protect witnesses in Kosovo.

* The police should start to provide information to witnesses on the witness protection system in Kosovo, where appropriate, in realistic and honest terms, as soon they report a crime to the police.

SECTION 4:

RECURRING ISSUES FROM THE PREVIOUS REVIEWS

A: Independence of the Judiciary

Issues

- Concerns about the lack of judicial independence;
- The executive is improperly interfering with the work of the judiciary; it is feared that the separation of powers is not absolute.

Introduction

The independence of the judiciary is an integral part of a democracy; safeguarding the judicial process from illegitimate state intervention. It also gives individuals the guarantee that the judicial system possesses the mechanisms to provide legal protection, when necessary, from actions or decisions of state authorities. The last Review[69] analysed the extent of judicial independence existing within the UNMIK structure from two perspectives, namely institutional independence and functional independence.

Institutional Independence:

With regard to institutional independence, the OSCE recommended that UNMIK Regulation 2000/64[70] be amended in order to address concerns relating to the appearance of a lack of judicial independence.[71] On the basis of these recommendations the then Director of the DOJ initiated consultations with the OSCE and reviewed all UNMIK Regulations relating to the appointment of international judicial officials.[72] In order to address the concerns, the DOJ drafted a new Regulation, which was intended to replace all the existing legislation on the issue. The OSCE welcomes the level of consultation

[69] Fourth Review, September 2001 – February 2002, at page 25.

[70] UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors And/Or Change of Venue, enacted on 15 December 2000.

[71] Independence of the judiciary in its institutional sense is mainly intended to secure the appearance of independence against any doubts of extraneous influence. It requires that the judiciary be composed of officials who enjoy well-defined guarantees concerning appointment to and removal from office, disciplinary accountability and rules of case assignment. With respect to international judges, the OSCE is concerned, *inter alia*, that there is an appearance of executive control due to their status as UNMIK civil employees, the procedure and the term of their appointment, and the fact that it is the executive who ultimately decides whether to extend their contracts. Due to the absence of disciplinary procedures for international judges, the only option for the executive to hold a judge accountable for his/her performance is when renewing the contracts. Such option is, however, not consistent with the guarantees of functional independence. Further, international judges assigned to cases under the provisions of UNMIK Regulation 2000/64 are not assigned to cases through a random mechanism – as they should be - but are designated by the DOJ, upon approval of the SRSG. For further detail see previous Review, September 2001 – February 2002, at page 25.

[72] UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors, as amended by UNMIK Regulations 2000/34 and 2001/2, and, UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, as amended by UNMIK Regulation 2001/34.

undertaken by the DOJ as well as the substance of the draft Regulation, which addressed most of the concerns. However, to date the Regulation has not been signed into law. On the contrary, in December 2002, UNMIK Regulation 2000/64 was extended until 15 December 2003.[73] Consequently, despite efforts on behalf of both the DOJ and the OSCE to introduce a new procedure, the concerns relating to the appearance of a lack of judicial independence still exist.

Functional Independence:

The judiciary must also enjoy functional independence, namely, freedom from interference by the executive in the performance of judicial work.[74] The OSCE has monitored cases in which the executive has improperly interfered in judicial decision making:

> In one such case, an UNMIK Police officer was placed under investigation in the District Court of Prizren for allegedly mistreating a suspect during questioning. On 5 June 2002, the international presiding judge in charge of the case determined that the file did not contain sufficient evidence to show that the officer's immunity had been waived. Consequently, the judge returned the indictment to the prosecutor with an order to correct this shortcoming.[75] According to information received by the OSCE,[76] the Director of the DOJ visited the international judge in Prizren on 28 June 2002. The then Director urged the judge not to persist with his order requiring evidence of waiver, and stated, *inter alia*, that "*after being here just for four weeks, it would be too early to overturn an established practice regarding the form of the waiver of immunity"*. On the following day at a meeting of the International Judicial Support Division/international judges and prosecutors, according to the international judge, The Legal Advisor of the SRSG raised this particular case and directed every judge to accept the established practice rather than ordering additional evidence in such cases. Thus, it would appear that two senior members of the executive put pressure on a judge to alter his decision in an ongoing case.[77]

Without going into the merits or the necessity of the judge's order, the OSCE is of the view that the exertion of such pressure on judges by the executive authorities is unacceptable. Training on "*established practices*" may be validly provided to judges, but the factual or legal determinations in a particular case are matters solely for the judge.

Executive interference is particularly worrying given that decisions on the extension of judge's contracts are taken by the executive branch of UNMIK (DOJ and, ultimately, the SRSG).

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[73] UNMIK Regulation 2002/20 amending UNMIK Regulation 2000/64, as amended, On Assignment of International Judges/Prosecutors and/or Change of Venue.

[74] See *Beaumartin v. France,* ECHR, 24 November, 1994.

[75] Article 263 (2) FRY CPC prescribes that "Immediately upon receipt of the indictment, the presiding judge of the panel which try the case shall examine the indictment for formal correctness (Article 262), if he finds that it has not been properly drawn up, he shall return it to the prosecutor for correction of the shortcomings within three days."

[76] Note To File, dated 3 July 2002, by the International Presiding Judge.

[77] The Note on file, dated 3 July 2002, by the International Presiding Judge reads, "After trying to convince the International Judge […] - as a possible member of the future panel - on phone the Director […] and his assistant […] came by helicopter to the German KFOR Camp just in order to talk to the undersigned about the "waiver problem in the […] case." [The Director] told the undersigned "after being here just for four weeks, it would be too early to overturn an established practice regarding the form of the waiver of immunity". Although the undersigned explained to them that he will not accept any pressure and will act in strict accordance to the law as he understand it, the subject was again discussed on the monthly International Judges and Prosecutors' meeting in Priština on the following day – 29 June 2002 – in which The Legal Advisor […] took part. He discussed in front of all participants the waiver problem in the […] case and ordered everyone to accept the established practice. He presented a new document, dated 27 June 2002 prepared by himself and addressed to […] in which he personally confirms that the Secretary-General waived immunity on 1 March 2002."

For the above reasons, the OSCE reiterates its recommendations:

- Precise and transparent criteria should be officially adopted, in an administrative instruction, to define and assess the applicability of the Regulation 2000/64 to a particular case. These criteria should be followed strictly. To enhance accountability, the decisions of the SRSG to apply the Regulation should be legally and factually reasoned.

- A mechanism should be established for randomly selecting which judges are assigned to a specific case; the assignment of judges to cases should not be left to the discretion of the Director of the DOJ and the SRSG. Judges assigned under UNMIK Regulation 2000/64 should abide by all the procedural guarantees provided by domestic law, including the provisions on disqualification on the grounds of partiality.

- International judges should be subject to the same mechanism of disciplinary accountability as any other member of the Kosovo judiciary.[78]

- Considering that the contracts for international judges and prosecutors are relatively short, decisions on their extension should be taken outside the authority of the DOJ and the SRSG, as a guarantee of effective institutional independence. Such decisions should be taken by the Kosovo Judicial and Prosecutorial Council or at least on the basis of a recommendation made by the Kosovo Judicial and Prosecutorial Council

- The OSCE further recommends that the UN Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers visit Kosovo.

[78] The draft UNMIK Regulation On International Judges and International Prosecutors contains a provision which prescribes disciplinary sanctions for alleged misconduct by international judges and prosecutors.

B: Detention

Issues

- Absence of a *habeas corpus* mechanism;
- Preservation of SRSG's power to detain is unlawful;
- KFOR detentions are still illegal and unjustified;
- Detention of the mentally ill.

Introduction

The right to challenge detention before a judicial body *(habeas corpus)* is a fundamental principle of international law.[79] International law guarantees this right to all people deprived of their liberty, not just those detained in connection with a criminal offence.[80] Arrested and detained persons also have a right to a speedy judicial decision concerning the lawfulness of detention and where the latter proves unlawful its termination should be ordered.[81] In such proceedings, guarantees of a judicial procedure must be provided and the proceedings must be adversarial and must ensure the "equality of arms"

[79] Article 9(4) ICCPR; Principle 31 of the Body of Principles, Article 5 (4) ECHR prescribes: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[80] The ECHR has held that "everyone who is deprived of his liberty is entitled to a supervision of the detention's lawfulness by a court. The Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals and their personal security", see *Kurt v. Turkey*, 25 May 1998; *Varbanov v. Bulgaria*, 5 October 2000. Such review has to bear upon "the procedural and substantive conditions which are essential for the lawfulness, in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention", see *Brogan and Others v. U.K.*, plenary session, 28 November 1988; *Nikolova v. Bulgaria*, Grand Chamber, 25 March 1999; *Chahal v. U.K.*, Grand Chamber, 15 November 1996.

[81] See *Baranowski v. Poland*, 28 March 2000; *G.B. v. Switzerland*, 1 march 2001; *Sabeur Ben Ali v. Malta*, 29 September 2000. The ECHR has considered, for example, that a period of approximately eight weeks from the lodging of an application to judgement appears *prima facie* difficult to reconcile with the notion of "speedily" (*E. v. Norway*, 29 August 1990).

between the parties, the prosecutor and the detained person.[82] Domestic remedies must also be sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled.[83] The fundamental right to be able to challenge any detention before a judicial body with the power to order release is applicable even in times of public emergency.[84] In this respect, the ECHR has stated, on a number of occasions, that the authorities do not have *carte blanche* under Article 5 to arrest suspects and detain them, free from effective control by the domestic courts whenever they choose to assert that there is a threat to national security.[85]

Although international human rights standards are directly applicable in Kosovo,[86] a *habeas corpus* mechanism to cover all detentions carried out by authorities in Kosovo, has still not been implemented.[87] While cases of unlawful detention in UNMIK detention facilities are today the exception, cases still exist and a remedy should therefore be available. Despite a decrease in the number of cases where the SRSG or KFOR have ordered detentions, the fact that the right to use extra judicial powers of detention has not been abandoned remains a concern in itself, especially given that the security situation in Kosovo is much improved.[88]

Unlawful detention in UNMIK detention facilities

The serious consequences of not having a *habeas corpus* mechanism in place became evident in a case monitored by the OSCE in the District Court of Prishtinë/Priština in April 2002. It involved a Kosovo Albanian charged with the murder of a FRY citizen in Germany and detained for a period of almost five and a half months in UNMIK detention facilities without any judicial decision on his detention.

> The accused was arrested in Kosovo on 13 December 1997 by the FRY authorities, detained and eventually transferred to Serbia proper. The District Court in Niš, acting as Prishtinë/Priština District Court, continually extended his detention because it could not access the case files (due to the NATO bombing campaign). On 25 March 2002 his trial started in Serbia proper. It was, however, immediately suspended as the accused was one of the 146 Kosovo Albanians, detained in Serbia proper since the 1999 conflict, and transferred on 27 March 2002 to detention facilities in Kosovo, following the Joint UNMIK-Yugoslav Document of 5 November 2001.[89] On 11 April 2002, the DOJ received a request from the German Federal Ministry of Justice to accept the transfer of proceedings from Germany in a murder case in which the accused was a defendant. This case appeared to be the same as the one for

[82] See *Nikolova v. Bulgaria*, *op. cit*.; *Sanchez-Reisse v. Switzerland*, 21 October 1986; *Toth v. Austria*, 12 December 1991; *Kampanis v. Greece*, 13 July 1995.

[83] See *Sakik and Others v. Turkey*, 26 November 1997; *Sabeur Ben Ali v. Malta*, *op. cit*. Note also that the ECHR has held that it is the duty of the State "to organise its judicial system in such a way as to enable its courts to comply with the requirements of Article 5(4), see *G.B. v. Switzerland, op. cit.; R.M.D. v. Switzerland*, 26 September 1997.

[84] *Brannigan and McBride v. U.K*., 26 May 1993; *Chahal v. U.K., op. cit*.; *Aksoy v. Turkey*, 18 December 1996; *Sakik and others, op. cit.; Demir and Others v. Turkey*, 23 September 1998; For further analysis, see Third Review, at pages 34 & 36.

[85] *Sakik and others, op. cit*.; *Demir and Others v. Turkey*, *op. cit.; Chahal v. U.K., op. cit.; Murray v. U.K*., 28 October 1994.

[86] See notably, UNMIK Regulation 2001/9 On the Constitutional Framework for Provisional Self-Government, adopted 15 May 2001, Chapter 3, Section 3.3, states that "the provisions of rights and freedoms set forth in these [international human rights] instruments shall be directly applicable in Kosovo."

[87] The draft Criminal Procedure Code of Kosovo contains a *habeas corpus* provision.

[88] For an in-depth analysis on detention issues, see Second Review at page 24, Third Review at page 16 and Fourth Review at page 45.

[89] Concerning this point the joint Document "confirms that the Kosovo Albanian detainees within the prisons and detention centres of the Republic of Serbia for offences that they are alleged to have committed in Kosovo should, after a review of their cases according to international standards, be transferred to Kosovo and the authority of UNMIK prison system as soon as possible."

which he was detained and prosecuted in Serbia proper. On 10 June, the Supreme Court of Serbia provided the DOJ with a copy of the accused's court file. On 22 July, the accused, relying on Article 6 ECHR, protested against his ongoing detention and notified the director of the detention centre that he was going on hunger strike.[90] On 6 September, the District Court in Prishtinë/Priština extended the detention of the accused for one month because of risk of flight and risk of tampering with the evidence. The lawyer for the accused filed an appeal against this decision, alleging that the accused's right to trial within a reasonable time had been breached and requesting his immediate release from detention. On 3 October, while the Supreme Court of Kosovo affirmed the decision of the first instance court, it held that the detention of the accused from 27 March to 9 September 2002 constituted a violation of domestic criminal procedural law as well as Article 5 of the ECHR and therefore that the first instance court should consider the possibility of compensating the accused for the violation of his right under Article 5 of the ECHR.

Detention by executive orders of the SRSG

The OSCE welcomes the fact that the executive powers of the SRSG have not been exercised in detention matters since 19 December 2001. However, the OSCE does not agree with the preservation of this power since it has no basis in law.

Detention by KFOR

The human rights aspects of KFOR's authority to detain people outside the judicial process have been addressed at length in previous Reviews.[91] In the last Review, the OSCE reiterated its concerns about the lack of judicial review of KFOR detentions and a want of formal charging, but also noted positive developments relating to KFOR's policies on detention. This positive note pertained specifically to the adoption of KFOR Directive 42,[92] which was intended to regulate KFOR's procedures on apprehension and detention, while also guaranteeing a set of basic rights for the individuals detained. Nevertheless the OSCE has consistently held the view that, under the circumstances existing in Kosovo, KFOR detentions are both illegal and unjustified; there is no longer a state of emergency in Kosovo and during the past four years great progress has been made in redeveloping the criminal justice system. Criminal incidents that were previously of military concern can now be satisfactorily dealt with in civil, as opposed to military, criminal proceedings.

The OSCE welcomes the general decrease in the number of persons held by KFOR in US KFOR's Bondsteel camp (BDF), during the reporting period. It is accepted that this decrease is due largely to the end of the conflicts in the fYROM and in southern Serbia, which gave rise to the large number of detainees held by KFOR over the summer of 2001.[93]

However, the arrests carried out by KFOR during August and September 2002, and again in March 2003, are of concern. The OSCE has noted that some of these detentions not only breached international human rights standards but also disregarded the guarantees set out in KFOR Directive 42. The OSCE has been particularly concerned about the treatment of five Algerian nationals, three of whom were detained for more than 30 days:

[90] At this stage the accused had been in custody some 4 years and 7 months without any order from the court.
[91] See notably Third and Fourth Reviews, respectively at pages 37 and 46.
[92] COMKFOR Detention Directive 42 (hereafter KFOR Directive 42), dated 9 October 2001, replaced a classified detention directive known as FRAGO 997.
[93] Sometimes almost reaching two hundred.

In the interviews with the OSCE, the Algerian detainees complained of being denied the right to consult with a lawyer, despite several requests. If this was the case, the refusal of access to a lawyer would have violated KFOR Directive 42, [94] which provides that the detainees held under KFOR authority "*will have access to a legal advisor or a representative at their own expense . . . .*[95] Further, they were held with no access to judicial review and, according to the detainees, with no clear explanation of the grounds for their detention.[96] Indeed, OSCE was informed that the line of interrogation had little to do with security issues in Kosovo and was more related to their possible connections to Islamic activists in Bosnia-Herzegovina, Algeria or the Al Qaida terrorist network. If true, this could be contrary to KFOR's own Directive 42, which states that "*the fact that a person may have information of intelligence value by itself is not a basis for detention.*"[97]

More recently, on 4 April 2003, the OSCE conducted interviews with four detainees. According to their charge sheets, all were detained under suspicion of endangering the safety of the region (in terms of 1244). In all cases, the Commander of the Nato-led Kosovo Force (COMKFOR) authorised detention beyond the 2-hour initial limit, to thirty days detention. Three of the detainees stated that they had been informed that they had been detained on suspicion of being involved in Albanian National Army (AKSH) activities. One claimed not to have been informed of any specific reason for detention. Although KFOR's own internal procedure may, in large part, have been followed, the OSCE remains of the opinion that the detention itself was unjustified and unlawful.

The OSCE recalls that, although the procedures set out in KFOR Directive 42 represent a step forward in providing a framework for ordering, reviewing, and terminating detention, those procedures do not render KFOR detentions lawful. Therefore the OSCE reiterates its recommendation that KFOR cease detentions forthwith and officially renounce its authority in this area.

To date 3563 persons have been detained at BDF.

Detention of the Mentally Ill

Another area in which progress has been disappointing is the detention of the mentally ill. The OSCE has persistently pointed out in its Reviews of the judicial system that the largest number of illegally detained persons in Kosovo is within the mental health system.[98] Persons detained for mental health reasons should, under international instruments and ECHR case law, only be detained as a last resort and when treatment is available.[99]

Since the last OSCE Review, progress has been made in shifting from an institution-based mental health system to a community-based system. The Ministry of Health, with assistance from the World Health Organisation (WHO), have opened Community Based Mental Health Centres [100] for out-patients and Protected Apartments Based in the Community (PABC) have begun to be established

[94] Section 7(1) of KFOR Directive 42.
[95] See *Aksoy v. Turkey and Demir and others*, *op. cit at note 80*.
[96] While the assertion that the detainees received no clear explanation of the grounds for their detention and that they were refused access to a lawyer is based solely on the detainees own account of events, this is due to the absence of any other means by which the OSCE can verfiy their claims. Further, the documentation provided by KFOR to OSCE did not indicate otherwise.
[97] Section 4 (b) of KFOR Directive 42.
[98] See Fourth Review, Section 5, page 52-62 and Third Review, Section 4, page 41-42.
[99] See Principle 16 of the UN Principles For The Protection Of Persons With Mental Illness And The Improvement Of Mental Health Care; *Winterwerp v Netherlands,* ECHR, 24 October 1979.
[100] Six (6) Community-based Mental Health Centres have been opened in Gjakovë/Đakovica, Ferizaj/Uroševac, Mitrovicë/Mitrovica, Prizren, Pejë/Peć and Gjilan/Gnjilane, and one is due to be opened in Prishtinë/Priština.

within three locations.[101] In addition, at all general hospitals the neuro-psychiatry departments are being separated into neurology wards and psychiatry wards.[102]

Despite question marks surrounding the legal status of persons now being transferred to protected apartment accommodation, the largest number of illegally detained persons in Kosovo remains in the social institute: the Shtimë/Stimlje Special Institution for Mentally Retarded Persons (hereafter the Shtimë/Stimlje Institute) and at Prishtinë/Priština University Clinic.[103] According to the Ministry of Labour and Social Welfare (MLSW), which is responsible for the Shtimë/Stimlje Institute, as of 14 March 2002, the OSCE was informed that there were 222 residents in the Institute, of which 111 male and 111 female. The majority of inmates originate from outside of Kosovo.[104]

The previous OSCE Reviews also mentioned the reluctance of the courts to address these issues. The OSCE concluded that this derived from a lack of clear and workable applicable law, from the lack of experience of judges to deal with mental health issues,[105] as well as due to the reluctance of the courts to apply directly the basic provision of human rights law which states that every person detained has the right to have his/her case reviewed by a court with power to order his/her release.[106] In its last Review the OSCE compiled the concerns regarding persons with mental disabilities and the justice system into three main areas: the use of detention; mental health treatment for prisoners; and the use of mental health expertise within the criminal justice system.

Detention

With regard to the detention of the mentally ill, the OSCE recommended that the draft "*Regulation on the Deprivation of Liberty and Forced Treatment of the Mentally Ill*" be adopted.[107] In March 2002, the OLA informed the OSCE that this draft would be dealt with as a matter of priority. On 5 September 2002, in view of the urgency and special situation in the Shtimë/Stimlje Institution, the OLA submitted two draft laws to the Working Group: the *Draft Law on Review of Persons Held in Shtimë/Stimlje Special Institute for Mentally Retarded Persons* (Shtimë/Stimlje Law), and the *Draft Law on Protection of Persons Suffering from Mental Disorder* (hereafter the General Mental Health Law).

The OSCE welcomes the establishment in September 2002 of the *Mental Health and Mental Disability Policy Implementation Task Force* (the Task Force),[108] which brings together all relevant actors. The

[101] Two PABC have opened in Gjakovë/Đakovica and Gjilan/Gnjilane, while construction is under way in Prizren.
[102] Although a physical and organisational separation has taken place, there remain legal and administrative hurdles to overcome.
[103] See Fourth Review, Section 5, page 52-55 for further details.
[104] These figures were provided in meetings the OSCE had on 14 March and 16 April with the MLSW, Shtimë/Stimlje Institute Officials and WHO. According to the information that OSCE gathered in these meetings, pursuant to agreement reached between the MLSW and Ministry of Health (MH), four (4) inmates were sent to the PABC in Gjakovë/Đakovica, two (2) inmates were sent to the PABC in Gjilan/Gnjilane (PABC are joint projects of the MH and WHO), and two (2) inmates were sent to Serbia-pProper.
[105] There are no specialist mental health judges, or lawyers, in Kosovo, despite the large number of persons with mental health problems, as it appears that the laws were rarely, if ever used in the past.
[106] Article 5(4) ECHR, Article 9 ICCPR.
[107] The Regulation was drafted by the Working Group on Mental Health Legal Reform (Working Group), established in April 2000 and comprised of representatives from the DOJ, the OSCE, the WHO, the Kosovo Bar, the Kosovo psychiatric profession, the Ministry of Health and the MLSW.
[108] The Task Force is comprised of representatives from the DOJ, the MLSW, the Ministry of Health, the Office of the DSRSG-Civil Administration, the Office of the Prime Minister, the Prishtinë/Priština University Clinic, the District Mental

objective of the Task Force is to coordinate, facilitate and monitor implementation of the policy decisions on mental disability and mental health in Kosovo. Nevertheless, the OSCE maintains that the promulgation of the draft laws is a necessary first step towards regulating mental health detention. In addition the OSCE considers that these laws, once promulgated, will encourage the development of appropriate actions by all parties towards the effective implementation of a human rights compliant system.[109]

Use of "security measures" within the criminal justice system

As of April 2003, there are 19 persons detained in the prison system on the basis of "security measures." The OSCE's previous Review pointed out the problems caused by the use in the criminal justice system of "security measures" to order the detention of persons for treatment.[110] The OSCE recommended that the use of "security measures" by the criminal courts should cease and that the draft Regulation (now the draft General Mental Health Law) and the draft Provisional Criminal Code and Provisional Procedure Codes should be promulgated. These new laws would resolve the problem by abolishing the power of criminal courts to order detention for treatment purposes (not criminal purposes) and transferring this power to the Mental Health Panel, which will have civil jurisdiction.

Treatment of prisoners with mental health needs

A separate concern raised in the previous Review from that of detention and/or compulsory treatment is the treatment of prisoners detained under the criminal justice system, who need mental health treatment. The prison and health authorities are under a duty to ensure that such prisoners receive the highest available level of health care.[111] For severely ill persons, this should either be in the therapeutic environment of a hospital or specialised facility, with adequate security provisions, or in a fully equipped and staffed unit within the prison system.[112] The OSCE recommended that the Ministry of Health and the Penal Management Division of the DOJ should agree on a comprehensive document on the need for health care in prisons and appropriate security for prisoners in hospitals (recognising that hospitals are therapeutic environments, and need to have ultimate control over their buildings and care). The OSCE welcomes the Memoranda of Understanding (MoU) that have been reached between the DOJ and relevant district health authorities, ensuring that prisoners receive regular visits from psychiatrists.[113]

Health Director and the Director of the Regional Health Authority of Prishtinë/Priština. The technical advisors to the Task Force are the OSCE, the WHO and the United Nations High Commissioner for Human Rights.

[109] The OSCE recognizes that the necessary resources, capacities and facilities do not yet exist to implement these draft laws. However the OSCE considers that the existence of the laws will drive the necessary actions for their implementation.

[110] The OSCE noted that most orders for "security measures" were made either when the prosecution had been dropped, or when a person had been found not criminally responsible. In both cases, the court is in effect ordering detention for psychiatric treatment, which is an area where the courts have no expertise. Such persons need treatment in a hospital and not in a detention centre.

[111] See Principle 24, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[112] See UN Standard Minimum Rules for the Treatment of Prisoners, Article 22(2).

[113] An MoU has been signed between PMD and district health authorities in Pejë/Pec and Prishtinë/Pristina to cover the PMD facilities in Pejë/Pec, Dubravë/Dubrava, Prishtinë/Pristina and Lipjan/Lipljane. Another MOU is also being negotiated between PMD and the district health officials in Prizren.

In addition the Lipjan/Lipljan Prison has been designated for the care of prisoners requiring mental health care and treatment, which cannot be provided at other facilities. Significant resources have been invested for this purpose. An entire block at Lipjan/Lipljan Prison has been refurbished and is fully operational to provide care and treatment to mentally ill prisoners. Lipjan/Lipljan Prison is currently staffed with one (1) international psychiatrist, one (1) local psychiatrist, two (2)

The last OSCE Review expressed deep concern over the effective seizure by UNMIK Police of two rooms at the Prishtinë/Priština University Clinic, Psychiatry Ward, for use by "prisoners." The OSCE recommended that the two secure rooms in the hospital should be immediately opened and the armed, uniformed police removed. Furthermore the OSCE recommended that a clear legislative and operational framework be adopted allowing for these cases of mentally ill persons to be properly handled within the penal and correctional system.[114] On 17 April 2003, the OSCE visited the Prishtinë/Priština University Clinic, Psychiatry Ward, and observed that to date the situation has not changed.

Mental health expertise within the criminal justice system

The final major area of the OSCE's concern raised in the previous Review was the poor use of psychiatric expertise in criminal cases.[115] The OSCE recommended that urgent training of more psychiatrists in forensic evidence is needed and that a Forensic Psychiatric Unit should be created, able to provide medical expertise and treatment to prisoners within the criminal justice system. The OSCE notes that to date no progress has been made.

For the above mentioned reasons the OSCE reiterates its recommendations in relation to the detention of the mentally ill;

Laws

- The Draft Law on Protection of Persons Suffering From A Mental Illness and the Draft Law on Review of Persons Held in Shtimë/Stimlje Special Institute should be promulgated as a matter of priority. This will set clear legal grounds for detention and forced treatment by all authorities, a workable procedure for judicial review and limited periods of detention between reviews.
- The Provisional Criminal Code and Provisional Criminal Procedure Code should also be promulgated immediately[116], on the understanding that these Codes provide for the removal of "security measures", for clear procedures for assessing someone's capacity to stand trial or degree of mental responsibility, and for remedies when evidence is late or inadequate.

Detention

- The courts shall review the legality of the detention of patients immediately. Failure to do so should result in a complaint to the JIU.
- Any hospital wishing to hold persons against their will or forcibly treat them should submit the case to appropriate court for judgement.

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international psychiatric nurses, six (6) local nurses, one (1) social worker and one (1) medical technician. Correctional officers assigned to the block also receive ongoing training by the psychiatrists and nurses on the care of mentally ill prisoners.

[114] See the Fourth Review, Section 5, page 56, for further details.

[115] The Fourth Review noted the need for psychiatric expertise in (1) assessing a person's degree of mental responsibility at the time of an alleged offence; (2) determining a person's capacity to receive a fair trial; (3) whether a person is in need of compulsory psychiatric treatment. The Fourth Review also noted the very limited availability of forensic psychiatric expertise and that psychiatric evaluation reports generally consist of a few simple lines that cannot be challenged by the defence or the court.

[116] See page 53 of this Review for current status of the Codes.

- Medical staff and legal professionals should receive a series of combined training sessions (the KJI agreed to provide for the training once the law is promulgated) on law and mental health issues.
- A secure acute psychiatric ward, with staff with specialist training, should be created immediately in Prishtinë/Priština University Hospital, and in other Regional Hospitals.
- The use of "security measures" by the criminal courts should cease.

Treatment of Prisoners

- All prisoners should be informed of their right to go to court to order adequate treatment.
- The Ministry of Health and the Penal Management Division of the DOJ should agree on a comprehensive document on the need for health care in prisons and appropriate security for prisoners in hospitals for those cases where adequate treatment can not be provided in the prison system (recognising that hospitals are therapeutic environments, and need to have ultimate control over their buildings and care).
- The two secure rooms in the hospital should be immediately opened and the armed, uniformed police removed. Furthermore this measure should be immediately followed by a clear regulated framework, legislative and operational allowing for these cases of mentally ill persons to be properly handled within the penal and correctional system.

Expert evidence

- Urgent training of more psychiatrists in forensic evidence is needed.
- A Forensic Psychiatric Unit should be created, able to provide medical expertise and treatment to prisoners lawfully within the criminal justice system. These two roles should be clearly separated. Persons not within the criminal justice system (including those found not responsible) should not be held inside a prison.

C: Trafficking-related Criminality and the Response of UNMIK Authorities

Issues

- Translation and interpretation facilities in courts in trafficking cases continue to be inadequate;
- Judges continue to admit evidence in trafficking cases in circumstances where they disregard procedural guarantees intended to protect the alleged offenders at both investigative hearings and during trials;
- Sentencing in trafficking cases: Courts fail to impose sentences, which comply with the minimum statutory provisions on sentencing.

Introduction

Trafficking in persons, especially in women and girls continues to be an ongoing phenomenon in Kosovo. A host of measures designed to combat trafficking have been implemented, ranging from legislative reform to initiatives designed to afford protection and assistance to witnesses in trafficking cases, as follows:

- UNMIK Regulation 2001/4 On the Prohibition of Trafficking in Persons in Kosovo was enacted on 12 January 2001 and provides for the prosecution and punishment of perpetrators of the crime of trafficking in persons and for the assistance and protection of victims of trafficking

- A special police unit, the Trafficking and Prostitution Investigation Unit (TPIU) was established in October, 2000, to investigate trafficking and prostitution related offences;

- Witness protection measures have been introduced through the promulgation of UNMIK Regulation 2001/20[117] On the Protection of Injured Parties and Witnesses in Criminal Proceedings and through the establishment of a Witness Protection Unit (WPU);[118]

- The Victims Advocacy and Assistance Unit has been set up under the auspices of the DOJ and is mandated to provide various forms of assistance to victims of trafficking.[119]

While these measures represent a positive development in the area, the issues outlined above still give cause for concern. Some of these issues were highlighted in previous OSCE reports[120] but progress in addressing them has been slow.

[117] Enacted on 19 September 2001.
[118] Note also that Administrative Direction 2002/25, which implements Regulation 2001/20, was enacted in June, 2001.
[119] The VAAU was set up in January 2002 to ensure a coordinated and multi-faceted support service for all victims of crime, including victims of trafficking.
[120] Second Review, at page 55, Third Review, at page 47; Fourth Review at page 17.

Failure by UNMIK authorities to provide shelter facilities for witnesses so as to guarantee their physical protection

This issue has been given detailed consideration in the section of the report dealing with witness protection.

Failure to provide adequate translation/interpretation facilities in court for accused and witnesses

To date, one of the main problems in trafficking cases has been the failure of the courts to provide adequate translation facilities to suspects/accused and witnesses.[121] In so far as suspects or accused are concerned, the right to be informed in a language which s/he understands, of the nature of the charges against him/her[122] and the right to be provided with an interpreter during court proceedings where he/she cannot understand or speak the language used in court are enshrined in both applicable domestic and international law.[123] Furthermore, domestic law also provides that witnesses have a right to use their own language in the course of court proceedings and that witnesses in trafficking cases have the right to be provided with free interpreting services in a language of their choice.[124]

Violations of the above provisions have been observed by the OSCE on an ongoing basis throughout Kosovo, notwithstanding the fact that this has been highlighted in previous the OSCE reports.[125]

> On 5 February 2003, a Bulgarian woman and a Kosovo Albanian man were convicted of trafficking in persons and sentenced to one year and one and a half years of conditional imprisonment respectively at the Pejë/Peć District Court. The Bulgarian accused was deprived of her right to be informed promptly of the nature of the charges against her, when she was served with an indictment in Albanian even though she did not speak or understand the Albanian language.[126] Furthermore, on the basis of the judge's assumption that the accused understood some Serbian, the services of a Serbian translator were made

[121] See Fourth Review, at page 20.

[122] FRY CPC Article 4 provides that suspects have the right to know and understand the charges brought against them from the very first interrogation. UNMIK Regulation 2001/28 On the Rights of Persons Arrested by Law Enforcement Authorities states that an arrested person has the right to be informed about the reasons for his/her arrest in a language that s/he understands. Furthermore, Article 6(3)(a) of the ECHR and Article 14(3)(a) of the ICCPR both provide that everyone charged with a criminal offence shall have the right to be promptly informed in a language which he/she understands of the nature and cause of the charges against him/her. See also the decision of the ECHR in *Brozicek v Italy,* 19 December, 1989.

[123] FRY CPC Article 7(2) prescribes that suspects or accused have the right to use their own language in the course of investigative proceedings and during the trial; where the proceedings are not conducted in the language that the person understands, provision shall be made for oral translation of evidence and documents. Additionally, both Article 6(3)(e) of the ECHR and Article 14(3)(f) of the ICCPR provide for the free assistance of an interpreter if a suspect or accused cannot understand or speak the language used in court. Furthermore the ECHR held in the case of *Kamasinski v. Austria*, 19 December, 1989 that in view of the need for the rights guaranteed by Article 6(3) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter, but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided, see also decision of the ECHR in case of *Luedicke, Belkacem and Koc v. Germany*, 28 November, 1978. Additionally, the Human Rights Committee has expressed in General Comment 13, paragraph 13, (adopted by the Human Rights Committee under Article 40, paragraph 4 of the ICCPR) that the right to an interpreter is an integral part of the right to defend oneself and the right to adequate time and facilities to prepare a defence.

[124] See Article 7(2) of FRY CPC which prescribes that witnesses have the right to use their own language in the course of investigatory proceedings and in the trial; where the proceedings are not conducted in the language that the person understands, provision shall be made for oral translation of evidence and documents and see Section 10.1(a) of UNMIK Regulation 2001/4.

[125] See First Review, at page 21; Third Review, at page 66.

[126] According to the defence counsel, it was not until the day of trial (when the indictment was read to her in Serbian) that the accused was informed of the nature of the charges against her in a language that she understood.

available to her in court (no Bulgarian translator was provided at any point during the trial). However, when it subsequently became apparent during her testimony that she was unable to communicate properly in Serbian the judge failed to adjourn the proceedings and to request the services of a Bulgarian interpreter.[127]

In a case before Prishtinë/Priština District Court in May 2002, involving a Romanian woman charged with trafficking, the accused spoke very little English or Albanian but the court failed to provide her with a Romanian translator. She was provided with an English/Albanian translator for her testimony (not for the reading of the indictment) but during the proceedings the presiding judge merely dictated the various testimonies into the official record and no translation of the proceedings was provided. This deprived the accused of her right to be informed of the nature of the charges against her and of the right to be tried in a language, which she understood.

These violations continue to occur notwithstanding the fact the DOJ has established a pool of interpreters who are available to attend court proceedings throughout Kosovo and provide translation services in Albanian, Serbian, Romanian and Russian, on request.[128] Seemingly, judges are either unaware of the availability of interpreters or are failing to request their services where appropriate.

Admission of evidence in trafficking cases in circumstances where procedural guarantees intended to protect the alleged offenders in criminal proceedings have been violated

In its previous Review, the OSCE raised concerns about judges, prosecutors and defence counsel disregarding procedures designed to ensure fair trial guarantees to suspects and accused at all stages of criminal proceedings.[129] Judges continue to disregard some of these procedures. Most notably, they admit evidence at the trial stage of the proceedings in trafficking cases in circumstances where the accused or his/her defence counsel has not been afforded the opportunity to challenge it.

Pursuant to applicable law, where a witness makes a statement at the investigative stage of criminal proceedings, that witness is still required to testify at the trial and only in certain exceptional circumstances may the record of a witness's pre-trial testimony be read into the record of the trial.[130] The rationale behind this provision is to permit the accused or his/her defence counsel the opportunity to question the witness at the trial and to allow the trial panel to assess the witness's credibility by assessing his/her demeanour. International human rights instruments also guarantee the right of an accused or his/her defence counsel to examine and question a witness during a public hearing.[131] Any

[127] The assumption that the accused understood and spoke some Serbian was based on the judge's understanding that, during the investigative proceedings, the accused claimed to be able to speak some Serbian. Subsequently however, the interpreter stated in court that he was unable to fully understand the accused as she was using many Bulgarian words, which he did not know. In response, the presiding judge instructed the interpreter to continue translating to the best of his ability and added that the accused should speak up because one of the judges on the panel spoke some Bulgarian. In fact, it was unclear whether the accused was testifying in Serbian or in Bulgarian (or a combination of the two), but what was clear was that the interpreter could not properly and fully relate her evidence to the court. Simply because one of the judges on the panel understood some Bulgarian did not excuse the court of its obligation to provide a qualified interpreter.

[128] The DOJ currently employs Serbian, Albanian and one Romanian interpreter. They also employ the services of two Russian freelance interpreters on a needs only basis.

[129] See Fourth Review, at page 18.

[130] See FRY CPC Article 333.

[131] Article 6(3)(d) of the ECHR and Article 14(3)(e) of the ICCPR both prescribe that a suspect/accused has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The ECHR has interpreted this to mean that "the hearing of witnesses must in general be adversarial" and that "all evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument", see *Barbera, Messegue, and Jabardo v. Spain*, 6 December, 1988,

deviation from this procedure must not infringe on the rights of the accused. In this regard, domestic law includes the caveat that where it is likely that a witness giving evidence at the investigative stage of proceedings may not attend the subsequent trial, the prosecutor, the suspect and the defence counsel may attend the examination of the witness at the investigative hearing and examine and question the witness.[132] This provision thereby mitigates the prejudice to the accused where that witnesses evidence is subsequently read into the trial record and the procedure accords with international human rights standards and jurisprudence.[133]

In trafficking cases the primary witnesses are usually the victims of trafficking and while they may give evidence at the investigative stage of criminal proceedings, in the vast majority of cases they do not attend the trial, as they are normally repatriated before it commences.[134] In view of this, investigating judges in trafficking cases should endeavour to inform defence counsel of their right to attend the investigative stage of the proceedings so as to allow them the opportunity to examine the witness. Failure on the part of the investigating judge or defence counsel to observe the above procedure may have serious consequences for both the prosecution and the defence case at the trial where a witness does not attend. A defence counsel for example may object to the admission of that witness's evidence taken in his/her absence on the basis that the accused rights have been violated by the investigating judges' failure to afford him/her the opportunity to challenge that evidence.

Furthermore, where the court accepts that this is the position and deems the witness' evidence inadmissible, in circumstances where this witness's testimony is the primary or only evidence for the prosecution, this may result in the collapse of the prosecution case. Where defence counsel does not object to the admission of the witness's evidence that he/she has not been afforded the opportunity of testing, this may result in a violation of an accused's right to a fair trial. The OSCE monitoring of trafficking cases has revealed repeated failures on the part of investigating judges to inform defence counsel of their right to attend the examination of witnesses or to appoint defence counsel to represent suspects at victim/witnesses investigative hearings. It has also been observed that defence counsel have failed to attend investigative hearings in cases where they have in fact been informed of their right to attend. In some cases it has been reported that defence counsel have simply taken the view that their presence at the examination of the witnesses is not necessary.[135] Furthermore, all of this has not necessarily resulted in the collapse of the prosecution case. In a few cases where trial judges have proceeded to read statements made by witnesses at the investigative stage of the proceedings into the record of the trial in circumstances where defence counsel were not notified of their right to attend the examination of that witness, neither the defence counsel, the prosecutor or the panel members objected to this procedure, thereby displaying total disregard for the provisions of applicable law as outlined above.

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para. 78; *McCann and Others v. The U.K.*, 27 September, 1995 at para. 47; *Asch v. Austria*, 26 April, 1991 at para. 27; *A.M. v. Italy*, 14 December, 1999 at para. 25; *Delta v. France*, 19 December, 1990 at para. 36.

[132] See FRY CPC, Article 168(8).

[133] In *Kostovski v. The Netherlands*, *op. cit.* note *44,* at para. 41, the ECHR held that as a rule the rights enshrined under Article 6(3)(d) require that an accused should be given an adequate opportunity to challenge and question a witness against him, either at the time the witness is making his statement or at some later stage of the proceedings and that statement of witnesses need not always be made at public hearings in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with Article 6(3)(d), provided the rights of the defence have been respected. See also *McCann and Others v. The United Kingdom*, *op. cit.* note 44, at para. 47; *Asch v. Austria, op. cit. note 44*, at para. 27; A.M. v. Italy, *op. cit. note 44*, at para. 25; *Delta v. France*, *op. cit. note 44,* at para. 36.

[134] Note Section 5 of UNMIK Regulation 2001/4, which provides that the voluntary repatriation of victims cannot be inhibited or delayed by the taking of statements by either a law enforcement officer or an investigating judge.

[135] See further case monitored before District Court Pristinë/Priština in March, 2002, at page 41.

However, in one case monitored by the OSCE it was observed that when defence counsel objected to the admissibility of a witnesses statement in such circumstances, the trial panel disregarded his submission.

> In a case involving two Kosovo Albanians convicted of trafficking and sentenced to four years imprisonment before Pristinë/Priština District Court in May 2002, the court convicted the accused on the basis of the written statements of the two victim/witnesses (both ethnic Turks from Bulgaria) given to the investigating judge. While the accused had been present at the investigating hearing, they had no defence counsel at that time and the investigating judge did not appoint a defence counsel to represent them. During his closing submissions to the trial panel, defence counsel challenged the admissibility of the witness statements on the basis that he had not been given the opportunity to question the witnesses.[136] However the court failed to consider this and did not engage in any consideration of either applicable domestic or international law.

The accused in the above case and in many other cases were convicted on the basis of evidence the veracity of which could not be challenged by their defence counsel thereby amounting to a serious violation of their right to a fair trial.

Failure to impose sentences in trafficking cases which are in line with statutory provisions on sentencing

The OSCE, following consistent monitoring of trafficking investigations and trials, expresses ongoing concern regarding the attitude of judges when handing down sentences in trafficking cases. The OSCE's intention is neither to scrutinise the judicial decision-making process in the context of weighing evidence nor to comment on deliberations or to comment on acquittals. It does however wish to express concern regarding some sentences handed down to those convicted of trafficking, which are not in accordance with statutory provisions on sentencing in such cases.

UNMIK Regulation 2001/4 provides for sentences upon conviction of trafficking in persons of 2 to 12 years for engaging or attempting to engage in trafficking, 2 to 15 years where the victim is under the age of eighteen and 2 to 20 years where a person is found guilty of organising a group of persons to engage or attempt to engage in trafficking.[137] It is worth noting that these are not mere sentencing guidelines but are parameters imposed by statute and are intended to be mandatory. To date however, judges in some trafficking cases have failed to comply with the applicable minimum sentence. In a number of cases sentences of less than two years have been imposed. This practice both breaches the applicable law and raises legitimate concerns over the manner in which local courts assess the seriousness of trafficking related crimes. The rationale behind the enactment of UNMIK Regulation

[136] He failed however to submit that the admission of the witness statements into evidence also violated the provisions of applicable international law, namely, Article 6(3)(d) ECHR and Article 14(3)(e) ICCPR.

[137] See further Section 2 of UNMIK Regulation 2001/4 which prescribes:

2.1 Any person who engages or attempts to engage in trafficking in persons commits a criminal act and shall be liable upon conviction to a penalty of two (2) to twelve (12) years' imprisonment. 2.2 Where the victim of trafficking is under the age of 18 years, the maximum penalty for the person engaging in trafficking shall be up to fifteen (15) years' imprisonment.

2.3 Any person who organises a group of persons for the purpose of committing the acts referred to in paragraphs 2.1 and 2.2 shall be liable upon conviction to a penalty of five (5) to twenty (20) years.

2.4 Any person who, through negligence, facilitates the commission of trafficking in persons commits a criminal act and shall be liable upon conviction to a penalty of six months to five (5) years' imprisonment.

2001/4 was to set high limits of criminal liability and punishment for those convicted of trafficking crimes. The response of the local courts is inconsistent with the objective of the new legislation. This has the potential to seriously undermine the efforts of the international community to combat trafficking in the region.

Recommendation

- The DOJ should issue a Justice Circular to all judges and prosecutors informing them that interpreters are available to attend court proceedings on request.

D: Access to Effective Defence Counsel

Issues

Defence Counsel are failing to protect the interests of their clients:

- They repeatedly fail to object to the admission of evidence in circumstances where its admission prejudices their clients' defence and it is potentially inadmissible pursuant to applicable law;
- They fail to challenge the admissibility of evidence elicited by torture or ill treatment;
- They do not object in cases where their client has not been informed promptly of the reasons for their arrest and the nature of the charges against them;
- They do not adequately prepare for court hearings or not seek adequate time to so do.

Introduction

Defence counsel are obliged to act in the best interests of their clients. FRY CPC obliges defence counsel to play an active part throughout the proceedings so as to ensure the rights and interests of their clients are protected.[138] International law also imposes a similar obligation on defence counsel.[139]

The monitoring of judicial proceedings in the past has revealed that in many instances defence counsel have failed to advise and represent their clients in an effective manner.[140] In particular, they have failed to observe procedures designed to guarantee the rights of their clients to a fair trial. The continued monitoring of judicial proceedings reveals that this is an ongoing problem.

Failure to object to evidence in circumstances where its admission would be prejudicial to the defence and potentially inadmissible pursuant to applicable law

Both domestic and international law require that all prosecution evidence in criminal proceedings be produced in the presence of the accused at a public hearing with a view to adversarial argument.[141] This is central to an accused's fair trial rights. Applicable law provides for an exception in order to ensure an accused's fair trial rights are not violated in circumstances where a witness who gives evidence at an investigative hearing is unlikely to attend the trial. In such circumstances where it is intended to rely on his/her evidence at the trial applicable law provides that the accused and his/her defence counsel should

[138] See further the Kosovo Code of Lawyers Professional Ethics, in its section entitled "The Duty in Defence", which obliges all lawyers to advise and defend their clients without delay and consciously with zeal, at para. 2.1 thereof. See also, Third Review, at page 28; First Review, at page 45.
[139] See further Principles 13-15 of the Basic Principles on the Role of Lawyers which requires defence counsel to actively assist their clients by advising them of their rights and by representing them in court throughout the proceedings and providing them with a service which is both 'practical and effective'. See also the decision of the ECHR in the case of *Artico v. Italy*, 13 May, 1980.
[140] See further, First Review, at page 49; Second Review, at page 38; Third Review, at page 28; Fourth Review, at page 18.
[141] For a detailed discussion of both domestic and international law provisions, see page 36 of this Review.

be notified of their right to attend and examine the evidence of the witness at the investigative stage of the proceedings.[142]

The OSCE has however monitored repeated failures on the part of defence counsel to object in cases where the above procedure has not been complied with, thus resulting in the admission of a witnesses pre-trial statement at the trial, in circumstances where defence counsel has not been afforded the opportunity to test the evidence. This has mainly arisen as a result of investigating judges failing to observe the procedure or defence counsel failing to attend the pre-trial examination, notwithstanding the fact that they were notified of their right to attend.

> In a case before District Court Prishtinë/Priština in March 2002, involving a Kosovo Albanian suspect charged with trafficking, after the investigating judge notified the defence counsel of his right to attend the pre-trial examination of the primary witnesses, the defence counsel merely responded that it was not necessary for him to be present at the hearing.
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> In a case involving a Kosovo Albanian, who in July 2002 was convicted of rape and sentenced to one-year imprisonment before Prishtinë/Priština District Court, the accused was denied his right to a fair trial when his defence counsel failed to object to the admissibility of the evidence of the two primary witnesses into the trial record (two Bulgarian women) in circumstances where he had not been afforded the opportunity to examine these witnesses at the investigative stage of the proceedings. Additionally, the court proceeded to read the report of a forensic doctor into the record of the trial notwithstanding the fact that neither the trial panel or the defence counsel had been afforded an opportunity to challenge and question the doctor's evidence. The accused was convicted primarily on the evidence of these witnesses.
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> In another case before Prishtinë/Priština District Court involving a Kosovo Albanian man who was convicted in December 2002 for murder and sentenced to 10 years and 6 months imprisonment, the accused was convicted primarily on the basis of evidence given by three witnesses at a hearing held in Germany in circumstances where the defence counsel had not been afforded the opportunity to examine these witnesses.

The three eyewitnesses[143] in the case who lived in Germany refused to come to Kosovo and the trial court, co-operating with the German Authorities, decided to hear them in Germany pursuant to the provisions of Article 330(1) of FRY CPC.[144] In this case it would appear that the defence counsel was duly informed about the hearings and according to the judgement, arrangements were made for him by the office of the international prosecutor to travel to the court hearing in Germany.[145] However the defence counsel did not show up at the airport and did not attend the hearings in Germany and consequently there was no defence counsel present to represent the accused.[146] In their evidence, all three witnesses positively identified the accused as the person who shot at the victim.

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[142] For a detailed discussion of domestic law, see pages 35-36 of this Review.

[143] Efforts to contact the fourth witness in this case were unsuccessful.

[144] FRY CPC Article 330(1) prescribes that if it is learned during the main trial that a witness who has been summoned and who has not been previously heard is unable to appear before the court or would have great difficulty in appearing, the panel may order if it deems his testimony important that he be heard out of the main trial by the presiding judge of the panel or judge who is a member of the panel. See also Article 330(3) of the FRY CPC.

[145] According to the judgment, it was agreed that the expenses of the defence counsel would be met by the budget of the DOJ. However as the paperwork needed or required some time to process, it was agreed that his expenses would be reimbursed at a later stage. At no time did the defence counsel object to this arrangement. He in fact indicated that he would try to attend.

[146] Before questioning the witnesses, the German judge, the two international members of the panel and the international prosecutor discussed the possibility to appointing a German lawyer to represent the accused but they did not proceed to do so.

> When the statements of the three witnesses were read into the record of the trial the defence counsel did not object to their admission. Instead, he expressed his regret that the hearings conducted in Germany revealed evidence, which was unfavourable to his client. In handing down a guilty verdict, the panel stated that the conviction was based on the statements of the three eyewitnesses heard in Germany. The court also mentioned that: "Though these witnesses were not subject to cross examination by the defence, the defence attorney himself admitted after perusing the record of the testimony of these witnesses that his presence during the examination of these witnesses would have made no difference to the testimony they made. Therefore the defence attorney has expressly indicated his intention that he was not going to challenge the testimony or that even if he had tried to do so he would have been unable to shake the credibility of those witnesses."

This particular case raises serious concerns regarding defence counsel's professionalism and his ability to effectively represent his client. Ultimately the accused was sentenced to 10 years and 6 months imprisonment solely on the basis of evidence, which was not tested by the defence.

Failure to object to the admission of evidence elicited by torture or ill treatment

It is well settled law that evidence, including confessions by suspects/accused elicited as a result of torture or other inhumane or degrading treatment is inadmissible at trial. Both applicable domestic and international law clearly provide for the exclusion of such evidence.[147] In a trial for attempted murder at Gjilan/Gnjilane District Court in August 2002 defence counsel did not object to the admission of his client's confession even though he was aware that it had been obtained under duress. The international prosecutor in the case sought to have the evidence admitted.

> The case involved four Kosovo Albanians charged with attempted murder of a Kosovo Albanian former commander of the Kosovo Liberation Army. The circumstances of the case were that two of the defendants standing trial were abducted by what were believed to be unknown associates of the victim, and taken to a deserted house where, after alleged beatings, they were forced to make video-taped confessions of the crime. Following the so-called confessions, the two defendants were delivered to US KFOR, and were later handed over to the UNMIK law enforcement authorities. The international prosecutor in the case sought to admit the videotaped confessions as official evidence in the case notwithstanding the fact that both applicable domestic and international law clearly provides for the exclusion of evidence.[148] The court however deemed the evidence inadmissible.

The defence counsel's failure in this case to object to the admission of his client's confession, when he knew of the circumstances in which it had been obtained, constituted a serious failure on his part to vindicate his client's fundamental human rights guarantees.

[147] See FRY CPC, Article 218, para. 7-8; Article 12 of the Declaration Against Torture; Article 15 of the Convention Against Torture; Article 6 of the ECHR; Guideline 16 of the Guidelines on the Role of Prosecutors and Article 69(7) of the Rome Statute of the International Criminal Court.

[148] There were strong indications in the case that the evidence had been obtained under duress. It was also gathered outside the framework of a judicial investigation and by unauthorised non-official actors.

Failure of defence counsel to object in cases where his/her client has not been informed promptly of the reasons for arrest and the nature of the charges against them

Failure to inform a suspect or an accused of the reasons for his/her arrest and of the charges against him/her, violates a suspect's right to a fair trial under both domestic[149] and international law.[150]

Violations of these provisions continue to be observed on an ongoing basis throughout Kosovo. Several cases have been highlighted in this report where the suspect or the accused have not been informed of the nature of the charges against him/her due to translation difficulties and defence counsel have not objected.[151] However, even in some cases where no translation/interpretation difficulties arose, suspects and accused have still not been informed thereof .

> For example, in a case before Mitrovicë/Mitrovica District Court in October 2002 involving four Kosovo Albanian suspects, three being juveniles, charged with rape, unlawful detention and kidnapping, two of the suspects were denied their right to know and understand the charges against them. The international investigating judge had not informed the suspects of the charges against them or of the grounds on which they were suspected of having committed the offences charged, at the commencement of the investigative hearing. When the defence counsel for the first juvenile raised this issue, the international investigating judge replied that since his client had been in police custody he should have known the charges against him. It was only when the defence counsel in question further insisted on the investigating judge informing his client of the nature of the charges against him that the suspect was so informed.[152]
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> However, neither of the other two defence counsel representing the other juvenile suspects raised this issue before their clients made statements to the investigating judge. One of the defencecounsel referred to this issue only at the end of his client's interrogation and the suspect was only informed of the nature of the charges then. The defence counsel reacted by stating that he was very surprised to hear that his client was charged with such crimes and added that he would have posed different questions to his client, had been aware of the nature of the charges against him.

The defence counsels' failure to interject in the investigative proceedings when it became evident that the investigating judges had failed to inform the suspects of the charges against them, represented a serious shortcoming in the defence counsels' obligation to protect the rights and interests of their clients.

Failure of defence counsel to adequately prepare for trial or to seek time to so do

Both applicable domestic and international law provide that an accused must be given sufficient time to prepare his/her defence.[153] However, the OSCE has observed that this right has been violated not only

[149] For a detailed discussion of domestic and international law provisions see, *op. cit*., note 35.
[150] See also Article 5(2) of the ECHR. The ECHR has stated that Article 5(2) provides 'the elementary safeguard that any person arrested should know why he is deprived of his liberty. Any person arrested must be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness', see *Fox, Campbell & Hartley v. United Kingdom*, 30 August 1990, para. 40.
[151] See cases discussed at pages 34-35 of this Review.
[152] The investigating judge justified his failure to do this earlier by stating that he was in a hurry and did not have time to do so.
[153] See Article 11.3 FRY CPC and see also Article 6(3)(b) of the ECHR and Article 14(2)(b) of the ICCPR both of which provide that everyone charged with a criminal offence shall have the right to have adequate time and facilities for the preparation of his/her defence. This has been reiterated in the jurisprudence of the ECHR on numerous occasions where the court has consistently held that "under the principle of equality of arms, as one of the features of the wider concept of fair

by the courts but also by defence counsel who have failed to request sufficient time to enable them to prepare their client's defence. This problem has been observed particularly in the case of appellate hearings before the Supreme Court.

> One such case involved a German citizen convicted of terrorism, murder and attempted murder and sentenced to 23 years imprisonment by the first instance's court. After the defence filed an appeal in the Supreme Court, the chief prosecutor submitted 11 days later a summarily motivated answer proposing that the court reject the appeal of defence as being ungrounded. No further answer from the office of the prosecutor was filed until a few minutes before the appellate hearing commenced when the international prosecutor delivered a fourteen page answer in English to the Kosovo Albanian defence counsel. Notwithstanding the fact that the Albanian lawyer took issue with the late delivery of the answer as well as the fact that the prosecutor's written submissions had not been translated into Albanian, he did not seek an adjournment of the hearing to allow him to fully apprise himself of the prosecution case. Instead he deliberately refrained from exercising his right to orally reply to the prosecution.

Defence counsel have also violated their client's right to adequate time to prepare for trial in circumstances where they have failed to seek time in which to consult privately with them about their defence. It is implied in the right to have adequate time and facilities to prepare a defence that a suspect or an accused has a right to communicate privately with his/her defence counsel in the absence of police or other officials.[154] However during the course of monitoring the OSCE has noted several instances where suspects or accused have not been able to exercise this right and defence counsel have not objected or sought further time within which to permit them to so do.

> In a case monitored in Mitrovicë/Mitrovica District Court, in September 2002 involving a defendant who was a juvenile at the time of the offence and was accused of rape and unnatural sexual relations, the court appointed defence counsel asked the court to be allowed a few minutes to discuss the case privately with his client prior to the commencement of the trial. After being granted a short period for consultation outside of the courtroom, the public prosecutor in relying on a provision of domestic law requested that the defence be recalled.[155] Without any objection, the defence counsel returned to the courtroom and the trial commenced. The defence counsel did not seek further time within which to allow him to consult with his client despite the fact that the case involved very serious charges against his client and merited detailed preparation. Furthermore, defence counsel should have relied on the provisions of applicable law, which provides for unlimited access and consultation with an accused once the indictment has been served.[156] In this case the statutory provision on which the prosecution sought to

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trial, each party must be afforded a reasonable opportunity to present his case in condition that does not place him at a disadvantage vis-à-vis his opponent', note also the decision of the ECHR in *Bulut v. Austria*, 22 February 1996, para. 47; *Foucher v. France*, 18 March 1997, para. 34; *Lanz v. Austria*, 31 February 2002, para. 57. The Court has also emphasised "the need to respect the right to adversarial procedure, noting that this entails the parties' right to have knowledge of and comment on all evidence adduced or observation filed', see *Kress v. France*, 7 April 2001, para. 65; *Brandstetter v. Austria*, 28 August 1992, para. 67; *Kremzow v. Austria*, 21 September 1993, para. 48; *Campbell and Fell v. U.K.* 28 June, 1984 at para. 113.

[154] The jurisprudence of the ECHR has confirmed this, see further *Campbell & Fell v. United Kingdom*, 28 June 1984, para. 113. Note also UNMIK Regulation 2001/28 which expressly makes provision for such a right. Section 3.3 of the Regulation provides that an arrested person has the right to communicate confidentially with defence counsel orally and in writing and that communication between an arrested person and his or her defence counsel may be within sight but not within the hearing of the law enforcement authorities.

[155] See Article 74(2) FRY CPC, which states the accused may converse with defence counsel only in the presence of the examining magistrate (investigating judge) or other official during the investigative hearing.

[156] FRY CPC, Article 74(3) prescribes that when the examination has been completed, or when the indictment has been brought or information preferred without an examination, the accused may not be prohibited from freely corresponding and conversing with his defence counsel without surveillance; see also international human rights jurisprudence, cited, *op. cit*. note 70.

rely, namely FRY CPC Article 74.1 was not applicable as it only applied during the investigating hearing but the defence counsel also failed to raise this matter.[157] At the conclusion of the hearing, the accused was found guilty and sentenced to 8 years imprisonment.

Cases such as these serve to highlight the fact that defence counsel fail on a regular basis to represent the interests of their clients on an ongoing basis throughout Kosovo.

[157] It should be noted however that the OSCE has continually expressed the view that FRY CPC Article 74(1), which seeks to restrict an accused's access to defence counsel while in custody until after he has been examined, is in breach of international law, see Second Review at page 13 and the Seventh and Eighth LSMS Special Reports on the Right to Effective Defence Counsel, dated May and July 2000 respectively.

SECTION 5:

SIGNIFICANT DEVELOPMENTS IN THE LEGAL SYSTEM

Since the last OSCE review of the criminal justice system there have been several significant developments, some of which are outlined below:

1. Regulations

UNMIK/Regulation 2003/1 amending the Applicable Law On Criminal Offences involving Sexual Violence, enacted on 6 January 2003.

UNMIK Regulation 2002/20 amended UNMIK Regulation 2000/64 On the Assignment of International Judges/Prosecutors and or Change of Venue, enacted on 14 December 2002.

UNMIK Regulation 2002/7 On the use in Criminal Proceedings of Written Records of Interviews conducted by the Law Enforcement Authorities, enacted on 28 March 2002.

UNMIK Regulation 2002/6 On Covert and Technical Measures of Surveillance and Investigation, enacted on 18 March 2002.

2. Administrative Directions

Administrative Direction 2003/1 implementing UNMIK Regulation 2001/7 On the Authorisation of Possession of Weapons in Kosovo, enacted on 17 January 2003.

Administrative Direction 2002/25 implementing UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, enacted on 13 November 2002.

3. The Human Rights Oversight Committee and the Inter-Pillar Working Group on Human Rights

Previously the OSCE expressed concern about the lack of human rights screening of UNMIK Regulations.[158] In this regard, the OSCE welcomes the introduction of the Human Rights Oversight Committee (Committee) and the Inter-Pillar Working Group on Human Rights (IPWGHR), established in June 2002 which marks a clear improvement in the situation since the last LSMS Report. The aim of the Committee is to "consider and agree on actions and policies to enhance human rights protection in Kosovo and ensure that the actions and policies of all UNMIK Pillars and Offices are in compliance with international human rights standards."[159] The IPWGHR acts as the "feeder" for the Committee and is mandated to "review from a human rights perspective draft Regulations and Administrative Directions prepared under the initiative of the UNMIK components [and may also] review draft administrative instructions, orders and other legislative, executive or administrative documents from a human rights perspective."[160] Issues not resolved at the IPWGHR are presented to the Committee, where appropriate. The Department acts as the Secretary for the Committee and the Chair of the

[158] See Fourth Review at page 11.
[159] Terms of Reference of Human Rights Oversight Committee and Inter-Pillar Working Group on Human Rights at page 1.
[160] *Ibid,* at page 3.

IPWGHR. However, the OSCE notes with regret that on occasion UNMIK has failed to put draft legislation before the Committee for review.

4. Opening of new courts in minority communities and ongoing judicial integration

Since the last Review, the DOJ has taken positive steps towards integrating minorities into the judiciary. Along with the integration and employment of minority judges and prosecutors, several courts have recently opened in minority communities. UNMIK has established municipal and minor offences courts in Leposavić/Leposaviq and Zubin Potok, all of which officially opened on 13 January 2003. In addition, a Department of the Municipal Court of Ferizaj/Uroševac and a Minor Offences Court is scheduled to open soon in Štrpce/Shtërpcë.[161]

As the major push for the integration of judges, prosecutors and support staff is underway, UNMIK remains in charge of ensuring that those who are employed in the courts are able to reach the court safely and work in a safe environment. The Joint Declaration on the Recruitment of Judges and Prosecutors of Serb Ethnicity into the Multi-ethnic Justice System[162] in Kosovo contains a provision on security for newly recruited judges and prosecutors, stating that UNMIK will provide protection based on individualised threat assessments. The OSCE will closely monitor the implementation of this process. On the other hand, court support staff must also be protected, especially the staff who are travelling from enclaves. In this regard there have been a few minor improvements.[163]

Additionally, following a series of diplomatic and technical difficulties, UNMIK has proved successful in hiring a substantial number of judges and prosecutors from minority communities into the UNMIK judiciary.[164]

5. Access to the Courts

One of the greatest problems of public access to justice remains physical access to the courts. While access to the court still varies significantly from region to region,[165] since the last Review, the situation has been steadily improving. In this regard reference is made to the Access to Court Project for Gracanica, which was developed by the DOJ's Judicial Integration Section ("JDD"). This project, which began in January 2003, provides transport to citizens from Gracanica (a Kosovo Serb enclave) to various courts in Pristina. In addition, two Court Liaison Officers provide guidance and facilitate the link between the population in Gracanica and the courts. Displaced persons (currently living in Serbia) have also started to use this service.

[161] This has opened up several vacancies for court support staff and the Department of Judicial Administration (DJA), with the support of the DOJ, is currently filling several support vacancies and members of minority communities have been encouraged to apply, see further Tenth Assessment of the Situation of Minorities in Kosovo, March 2003 at p. 29.

[162] This Joint Declaration was signed on 9 July, 2002 between the Minister for Justice of the Republic of Serbia and UNMIK Deputy SRSG for Police and Justice to further facilitate the recruitment of Kosovo Serb prosecutors and judges, see further Tenth Assessment of the Situation of Minorities in Kosovo, March 2003 at p. 29.

[163] See further Tenth Assessment of the Situation of Minorities in Kosovo, March 2003 at p. 29-30.

[164] A large part of the "Joint UNMIK – Yugoslav Document" (the Common Document), which was signed on 5 November 2001, focuses on integration of minorities into the judiciary, and confirms the commitment of UNMIK towards furthering the multi-ethnicity of the judiciary by employing more Kosovo Serb judges and prosecutors, thus addressing deep-seeded concerns of ethnic bias. The process of judicial integration has, however, been slow, due mostly to diplomatic disagreements between UNMIK and Republic of Serbia. According to the document, UNMIK has also agreed to "create and staff a new unit of the DOJ that will be responsible for furthering efforts in this area", see further Tenth Assessment of the Situation of Minorities in Kosovo, March 2003 at p. 29.

[165] See further Tenth Assessment of the Situation of Minorities in Kosovo, March 2003 at p. 31.

However, the existence of parallel courts throughout Kosovo continues to effect access to justice in so far as Kosovo Serbs are concerned. Furthermore, instances of overlapping jurisdiction and double jeopardy have still been documented by the OSCE.[166] One of the intended effects of UNMIK's programme of judicial integration will be the simultaneous dismantling of the parallel courts. The creation of municipal and minor offences courts in Zubin Potok and Leposavić/Leposaviq will strengthen UNMIK's jurisdiction over the northern municipalities, and the phenomenon of parallel courts should begin to taper off. The recruitment of judges, prosecutors and support personnel for these courts will be in direct proportion to the ethnic composition of the population. Accordingly, only Kosovo Serb judges will likely be appointed for these new courts in the north. It is also expected that the integration of Kosovo Serb judges into the courts in Mitrovicë/Mitrovica will weaken the parallel court in Zvečan/Zveçan.

6. Status of the Provisional Criminal Code and the Provisional Criminal Procedure Code

The Provisional Criminal Code (PCC) and the Provisional Criminal Procedure Code (PCPC) have recently been sent by UNMIK to the Kosovo Prime Minister for review by the Government and Assembly of Kosovo. On 7 May 2003 the Commission for Judicial Matters, Legislative Matters and the Constitutional Framework reviewed the draft provisional Codes and submitted its recommendations to the Kosovo Assembly. When the comments and observations of the Government and Assembly are communicated to UNMIK, it is intended that the Codes will be reviewed and adjusted as necessary and promulgated promptly thereafter.

The review and revision of the Codes was undertaken by UNMIK's Office of The Legal Advisor after initial drafts were finalised by the Joint Advisory Council on Legislative Matters in November 2001 in close cooperation with the Council of Europe. The process has also involved the OSCE, the Council of Europe, UNICEF, the American Bar Association Central and Eastern European Law Initiative legal practitioners in Kosovo such as judges and prosecutors, as well as academics. On 12 May 2003 the draft provisional Codes were submitted to the IPWGHR for review from a human rights perspective.

[166] See the legal analysis and assessment of these issues in the *OSCE /UNHCR Joint Ninth Assessment of the Situation of Ethnic Minorities in Kosovo - September 2001 to April 2002* (hereinafter the Ninth Assessment). Further cases with risk of double jeopardy have been monitored by the OSCE during the current reporting period.