EXECUTIVE SUMMARY

The *Legal Systems Monitoring Section* (LSMS) of UNMIK Pillar III (*Organisation for Security and Co-operation in Europe* - OSCE) has conducted a six month review of the justice system in Kosovo. The report covers the period from 1 February 2000 to 31 July 2000. LSMS has monitored seventy-seven of the one hundred and sixteen District Court trials completed within these dates (66%). Of the completed trials in this period, one hundred-forty defendants were convicted and twenty-nine were acquitted (83% conviction rate). This report also makes reference to a number of trials that were not completed by 31 July 2000.

The United Nations Mission in Kosovo (UNMIK) is vested with all executive and legislative powers, which are exercised by the Special Representative of the Secretary-General of the United Nations (SRSG). UNMIK has the mandate to administer the justice system in Kosovo, and the Administrative Department of Justice is responsible for the overall management of the judicial system and correctional service. The OSCE, as a part of UNMIK, shares the responsibility given by the United Nations (UN) Security Council "to ensure that human rights protection and promotion concerns are addressed through the over-all activities of the mission."

This public report provides a comprehensive overview of the justice system from a human rights law perspective. The purpose of this report, in accordance with *UN Security Council Resolution 1244* and outlined in the United Nations Secretary-General's letter of 12 July 1999 to the UN Security Council, is to assist UNMIK to "develop mechanisms to ensure that the police, courts, administrative tribunals and other judicial structures [operate] in accordance with international standards of criminal justice and human rights."

Although international human rights standards form a part of the applicable law, there is still confusion as to its application by the Kosovo legal community. For example, there are widespread violations throughout the territory of Kosovo of the applicable law that relate to arrest and detention. Arrested individuals are held in detention by law enforcement authorities for extended periods of time before being brought before a judicial authority and are often not informed of their rights. In fact, some persons are held in continued detention despite the lawful order to release by a judicial authority.

There are common patterns and practices of misapplication of the domestic law that often result in human rights violations. These patterns and practices have been identified throughout the legal system in Kosovo as a whole. For example, pre-trial detention orders rarely provide the specific facts regarding an individuals' case that warrant the deprivation of liberty before the individual has been proven guilty of a crime. Defence counsel often fail to use the provisions of the domestic law that provide for an active defence, leaving many defendants without any effective representation.

Moreover, there are provisions of the domestic law and UNMIK Regulations that, in themselves, may conflict with human rights standards. Under the domestic law, the courts

are not required to ensure that the court record accurately depicts the legal proceedings. *UNMIK Regulation 1999/26,* on the extension of pre-trial detention, as well as the domestic law, fail to provide for a review of the lawfulness of detention.

A long and continuing climate of ethnic conflict has severely impacted upon the objective impartiality of the courts and raises concerns as to actual bias on the part of certain judging panels. One response has been to appoint international judges and prosecutors to deal particularly with those serious criminal trials involving defendants from minority groups. This initiative is to be supported and should be pursued, even though, in the light of the majority voting system in the panels, the influence of the international judges over deliberations is restricted. Another problem is the insufficient number of international judges and prosecutors, because these international personnel do not act in all cases of a similar nature, in particular those involving war and ethnically motivated crimes. This has resulted in the unequal treatment of certain defendants before the courts and the denial of basic facilities by which to adequately prepare and present the defence. The appointment of further international judges and prosecutors should therefore be treated as a short-term priority.

In addition to concerns as to minorities, there are other vulnerable groups, including juveniles and victims of sexual violence, within the criminal justice system who require enhanced protection. Some juveniles have been subject to extended periods of pre-trial detention, as there are no viable alternatives for their placement. In cases of sexual violence, there is a failure of some courts to adequately pursue and prosecute these offences. In addition, in some cases, the treatment of the victim by the court raises concerns of discrimination.

On 18 January 2000, in the Gnijlan/Gjilane District Court, 36 judges and 4 public prosecutors were sworn into office. Over the next six weeks, similar ceremonies were held in Kosovo's four other regions and thus marked the beginning of a new criminal justice system for Kosovo. This was a criminal justice system that was starting from scratch, with not only a new legal framework, but also new participants. Much of the infrastructure of the courts was poor. Most courts were without heating, water, electricity, chairs, desks or even paper.

But the problem is more than infrastructure. A significant number of those appointed judges and public prosecutors had not worked as lawyers since 1989 and in any event, had no working knowledge of basic human rights law. Concepts such as the principle of "equality of arms" had no place in the local justice system. Indeed, with regard to the defence, challenging the state had in any event been historically fraught with danger.

Since November 1999, there have been a number of training sessions for judges and public prosecutors, but few, and only recent ones, specifically targeting defence counsel. In the seventy-seven cases monitored by LSMS, there has been only two occasions in which reference was made to international human rights standards. As of 31 July 2000, the courts are still applying those provisions of the domestic law that violate the

international standards. The legal profession has had insufficient training in international human rights law in order to be able to properly apply such law in practice.

UNMIK has taken positive steps in order to address many of the issues identified. UNMIK succeeded in building a functioning judicial system from scratch in less than a year. The presence of international judges and prosecutors has assisted, in a number of cases, to obviate some of the concerns raised above. In addition, UNMIK has, on a number of occasions, provided guidance to the courts as to the applicable law, including international human rights standards, and its application. UNMIK is also developing translation and interpretation support services for the international judges and prosecutors as well as developing a database of legal terminology. Despite this, in terms of fairness and effectiveness, the present system has much room for further improvement.

The statistics in this review have been obtained from court files. LSMS has, where possible, verified the information through other sources, including detention facility records, defendants and their counsel. This report would not have been possible without the assistance of judicial personnel and legal professionals. OSCE would like to express its gratitude to court staff who have, with patience and good grace, facilitated the LSMS monitors in performing their tasks. OSCE would also like to express its appreciation to detention centre commanders, UNMIK police and KFOR for providing, generally, unhindered access to detainees.

SECTION 1: MONITORING

I. The Mandate of the Legal Systems Monitoring Section

In *UN Security Council Resolution 1244*, the UN Security Council 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." (Para. 11 (j))

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) shall include human rights monitoring and capacity building.

The Report of the UN Secretary-General to the UN Security Council, 12 July 1999, instructed UNMIK to develop co-ordinated mechanisms in order to facilitate monitoring of the respect of human rights and the due functioning of the judicial system and added that reporting must be carried out in a co-ordinated manner in order to facilitate the response capacity. In particular:

> "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 Pillar III, 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. Moreover, pursuant to *Regulation 2000/15* 'On the Establishment of the Administrative Department of Justice', dated 21 March 2000, an agreement was reached between the Administrative Department of Justice and the OSCE, that the OSCE is an organisation responsible for the independent monitoring of the judicial system and correctional service.

However, LSMS has encountered increasing obstruction to its monitoring abilities including, for example, denial of access to detention centre lists and detainees. Attempts to resolve the issue with the Administrative Department of Justice have so far failed. LSMS has also been denied access to court files and juvenile trials in the

Mitrovica/Mitrovice District Court. This has significantly affected the ability of LSMS to effectively monitor war crimes related cases in that region, including the trial of a juvenile indicted for genocide.[1]

The Institution-building Pillar has proposed a Memorandum of Understanding to the Civil Administration Pillar. To-date the problem of access remains unsolved.

II. Relationship to other Pillars

The OSCE Department of Human Rights and Rule of Law, a part of the Institution-building Pillar, works in close co-operation with UN organisations such as OHCHR, UNHCR and UNICEF. The Department is a key player on both the Task Force on Minorities, established by UNHCR, and the UNICEF-led Task Force on Juvenile Justice. The Department also co-operates with both local and international organisations such as the Council of Europe, the International Committee of the Red Cross (ICRC) and the American Bar Association's Central and Eastern European Law Initiative (ABA-CEELI).

While the Rule of Law Division of that Department actively supports the Administrative Department of Justice in the development of the judiciary, its Human Rights Division has a unique position in relation to the Humanitarian Assistance Pillar (Pillar I) and Civil Administration (Pillar II). Although structurally part of UNMIK, its mandate requires a quasi-independent role to monitor the observation of human rights in Kosovo, including by a judicial system that is administered by Pillar II.

As a part of Pillar III and UNMIK as a whole, the OSCE legal systems monitoring mandate includes accurate and immediate reporting within UNMIK on:

i. current statistics relating to the criminal justice system,
ii. systemic violations of international law, and
iii. gross violations of fair trial standards in individual cases that must be immediately remedied.

Accordingly, LSMS, as part of the Human Rights Division, maintains consistent and co-operative relationships with other Pillars and international agencies.[2] It receives requests from the Administrative Department of Justice and the SRSG's Office, for information on various issues relating to the state of the criminal justice system, such as the status of on-going cases, juveniles in pre-trial detention, and persons indicted. Systematic violations, observed trends, individual problems and issues identified by LSMS are communicated to other departments and agencies within UNMIK. Many of these departments and agencies are charged with the responsibility of finding concrete solutions and remedies to critical problems (e.g. judicial-support needs, security issues, judicial misconduct and the training of, *inter alia*, legal professionals).

III. Right to a Fair Trial

International human rights standards are a part of the applicable law through, *inter alia*, *Regulation 1999/24*, which obliges those holding public office in Kosovo to uphold internationally recognised human rights standards. In addition, the Federal Republic of Yugoslavia is a party to numerous human rights instruments, including the *International Covenant on Civil and Political Rights (ICCPR)*, which, in turn, obliges any governing entity in the territory to ensure the people of Kosovo these rights.

LSMS analyses domestic law and practice for its conformity with international human rights standards for fairness in criminal proceedings. The international standards are detailed, *inter alia,* in Articles 9, 10, 14 of the ICCPR and Articles 5, 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) and other UN non-treaty standards. Domestic law, primarily the *FRY Code of Criminal Procedure* (FRY CPC) and *Kosovo Penal Code* (KPC), form the basis for any analysis by LSMS. '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.

LSMS monitors cases that proceed through the criminal justice system, from the moment of arrest and/or detention until trial and appeal. LSMS monitors cases involving serious crimes, the majority of which are designated as priority cases by LSMS, under the jurisdiction of the District Courts. Some Municipal or Minor Offences Court cases may be monitored if they involve priority issues, such as cases involving minorities, juveniles and women.

Before attending a formal trial proceeding, and where practicable, LSMS monitors' investigate the case to ensure they are able to address all the issues regarding pre-trial rights. This investigation forms the basis for the LSMS monitor's analysis of the trial proceedings. LSMS monitors collect this information by reviewing the file, if accessible; and, interviewing the suspect/detainee, police/KFOR, defence lawyer, public prosecutor, investigating judge and others. LSMS monitors attend trials and report on the practices in the pre-trial and trial proceedings in the light of domestic and international standards.

IV. The Priority Cases

The following is a guide to the priority cases over the past six months. Issues involving access to, and effectiveness of, counsel as well as prosecutorial and judicial misconduct are covered in the context of case monitoring. This is an on-going process since LSMS responds to the issues that arise as the legal system develops:

i. War Crimes

ii. Ethnically-motivated Crimes

iii. The Treatment of Juveniles

iv. Victims of Sexual Violence

v. Detention

LSMS monitors detention centres as they relate to "access to justice" issues. LSMS does not monitor the conditions of detention or ill-treatment since these are covered by OSCE human rights officers and *ICRC*.

V. Data Collection

In February 2000, LSMS developed a case-tracking system that tracks all *indicted* District Court cases. This system provides a breakdown of a defendant's case, and includes the following details: the offence charged, date of offence, date of detention, date of indictment, court file number, ethnicity of defendant and victim and name of defence counsel. LSMS created a separate case-tracking system for monitoring war crimes and ethnically-motivated crime. This system tracks cases of known persons *charged* with such offences.

On a weekly basis, the regional monitors within LSMS report on the following information:

- List of persons in detention
- Trial schedules
- List of persons indicted
- An update on *all* verdicts, sentences and appeals of District Court cases

Where requested OSCE provides immediate updates on cases and the general status of the criminal justice system to other parts of UNMIK, for example, the number of individuals detained, the number of juveniles detained, the number of indictments per region, trial dates, and breakdown of cases and verdicts.

VI. Legal System Monitoring Reporting

Over the past six months, LSMS has produced six thematic reports that address serious violations of international human rights standards.[3] These reports assess the substantive domestic laws and the practice in the field and make recommendations to the SRSG. LSMS has also produced individual case reports highlighting issues that stem from the conduct of judicial or other authorities.[4]

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[1] The court reasoned that access would be denied because the FRY Code of Criminal Procedure made no reference to the OSCE. LSMS believes that the charge of genocide has been reduced in this case.

[2] i.e. OHCHR, UNHCR, UNHCHR, UNICEF and ICRC.

[3] *See* LSMS Report # 3, *Expiration of Detention Periods For Current Detainees (8 March 2000)*; LSMS Report # 4, *Update on the Expiration of Detention Periods for Detainees (18 March 2000)*; LSMS Report #5, *The Treatment of Minorities by the Judicial System(9 May 2000)*; LSMS Report # 6, *The Unlawfulness of Regulation 1999/26 (29 April 2000)*; LSMS Report # 7, *Access to Effective Counsel: Arrest to the First*

Detention Hearing (23 May 2000); LSMS Report # 8*, Access to Effective Counsel: The Investigative Hearings to Indictment (20 July 2000)*.

[4] *See* LSMS Reports on *Peter Muriuki (22 June 2000)*, *Moses Omweno (14 July 2000), the Momcilovics (16 August 2000) and Afrim Zeqiri (25 August 2000).*

<u>**DISTRICT COURT CASE DISPOSITIONS (1 FEBRUARY 2000 - 31 JULY 2000)**</u>

	TRIALS	MONITORED	GUILTY	NOT GUILTY	INDICT. DROPPED	ETHNICITY
Pristina/ Prishtine 44 defendants	26	18	28	10	6 persons	**Def**: all k/a, except 1 k/s (att.murder) 1 k/m (drugs); **Victims**: all k/a, except 1 k/s (murder victim), 1 k/r (rape victim), 1 international
Gjilane/ Gnjilane 37 defendants	30	28*	28	9	None	**Def**: all k/a, except 4 k/s, 1 k/r; **Victims**: all k/a except 2 k/s & 1 international
Prizren/ Prizren 48 defendants	33	17	35	2	11 persons	**Def**: all k/a, except 2 Alb. Nationals, 2 k/t; **Victims**: all k/a, except 2 k/t
Pec/ Peje 33 defendants	21	13	26	7	None	**Def**: all k/a except 5 Alb. Nationals, 1 k/r; **Victims**: all k/a except 3 k/r, 1 international
Mitrovice/ Mitrovica 7 defendants	6	1	6	1	None	**All defendants/victims k/a**

PR: **Murder**: 10 convicted, 5 acquitted (k/s victim), 4 indictment dropped; **Att. Murder**: 5 convicted, 2 indictment dropped; **Rape** (including aggravated and attempted rape): 2 guilty, 1 acquittal; **Drug Offences**: 4 convictions; **Robbery/Theft/Accessories**: 7 convictions, 4 acquittals.

GN: **Murder**: 5 convictions, 1 acquittal; **Att. Murder**: 2 convictions, 1 acquittal; **Rape**: 3 convictions, 5 acquittals; **Theft**: 5 convictions; **Weapons**: 5 convictions; **Other (less-serious offences)**: 8 convictions, 2 acquittals.
*This number includes trials that did not conclude prior to 31 July 2000.

PZ: **Murder**: 3 convictions; **Att. Murder**: 3 convictions, 1 indictment dropped; **Grevious Bodily Harm**: 1 conviction; **Rape**: 3 convictions, 1 acquittal; **Robbery/Theft**: 8 convictions, 1 acquittal, 1 indictment dropped; **Weapons**: 3 convictions, 1 indictment dropped; **Other (less-serious offences)**: 12 convictions, 1 indictment dropped. Note: one person convicted of both Robbery and Agg. Rape.

PE: **Murder**: 3 convictions, 1 acquittal; **Att. Murder**: 5 convictions, 5 acquittals; **Rape**: 2 convictions; **Robbery/Att. Robbery**: 8 convictions; **Weapons**: 5 convictions; **Drugs**: 2 convictions; **Enabling Escape**: 2 convicted, 1 acquittal. Note: one person convicted of both Att. Murder and Robbery.

MI: **Murder**: 2 convictions, 1 acquittal; **Att. Murder**: 2 convictions; **Assault**: 1 conviction; **Weapons**: 1 conviction.

A. Average Length of Sentence:

i. Murder:
PR: 10 yrs. 3 months; **PZ**: 10 yrs. 3 months; **GN**: 11 yrs.; **MI**: 10 yrs. 6 months; **PE**: 8 yrs.

ii. Rape:
PR: 2 yrs. 3 months; **PZ**: 2 yrs. 1 month **GN**: 5 yrs. 5 months **PE**: 6 yrs. 5 months

iii. Robbery:
PR: 1 yr.; **PZ**: 1 yr. 6 months; **PE**: 2 yrs. 6 months

iv. Weapons Possession:
PR: all acquitted; **PZ**: 5 months; **GN**: 8.4 months; **MI**: 3 months; **PE**: 1.8 months

B. Kosovo Supreme Court

i. Appeals Filed*
29 appeals filed: 22 denied - 7 succeed

ii. Proposals for Extension of Detention
71 filed
71 approved

iii. Requests to Recuse Judge
3 filed
3 refused

*KSC could not provide information as to whether an appeal was filed by the public prosecutor or the defendant.

C. Other Statistics

i. For this report LSMS interviewed 196 detainees;
ii. LSMS monitored 77 of the 116 completed District Court Trials (66%);
iii. The 116 trials involved 169 defendants;
iv. 140 defendants were convicted (83 % conviction rate);
v. 29 defendants were acquitted;
vi. Minorities: 9 Defendants: 4 Kosovo Serb, 2 Kosovo Roma, 2 Kosovo Turk, 1 Kosovo Muslim (all were convicted) (majority of victims were Kosovo Albanians;) 9 Victims: 3 Kosovo Serb, 4 Kosovo Roma, 2 Kosovo Turk (majority of defendants were Kosovo Albanian).

SECTION 2: BACKGROUND

Decades of communist rule and ten years of active repression have adversely impacted on the Kosovo Judiciary. At the time when UNMIK was established and deployed in Kosovo, there was no functioning court system. Most of the judges and public prosecutors active before the start of the NATO bombing campaign had fled, while those remaining were often denounced for having served under Belgrade's repressive regime.[1]

After Milosevic accepted the terms of the *Military Technical Agreement*, that officially ended the NATO intervention,[2] the UN Security Council adopted *Resolution 1244* on 10 June 1999. This resolution provides for the establishment of a UNMIK under which the people of Kosovo can enjoy "substantial autonomy and meaningful self-administration" within the Federal Republic of Yugoslavia. The international civil authorities' responsibilities include the performance of "civil administrative functions where and as long as required."

In the period following "K-day,"[3] the international community engaged in countless efforts to establish a functioning multi-ethnic judiciary. However, after the establishment of an Emergency Judicial System (EJS) and the process leading up to the appointments to the regular courts, the difficulties of convincing minority members to participate or to remain in the system became apparent. Allied to the legacy of discrimination and violence, the new campaign of violence, persecution and human rights abuses against minorities greatly hampered UNMIK's abilities to establish a court system that would offer a sufficient guarantee of impartiality for all Kosovars.

I. Emergency Judicial System

On 28 June 1999, the SRSG issued an emergency decree establishing the *Joint Advisory Council on Provisional Judicial Appointment* (JAC). The main mandate of the JAC consisted in recommending the provisional appointment of judges and public prosecutors for an EJS in Kosovo for a three-month renewable period. The primary purpose of the EJS was to conduct pre-trial hearings of detained defendants following their arrest by KFOR. Following JAC's recommendations, between June 1999 and September 1999, the SRSG appointed a total of fifty-five judges and public prosecutors. The ethnic breakdown was as follows: 42 Kosovo Albanians, 7 Kosovo Serbs, 4 Kosovo Muslims, 1 Kosovo Turk and 1 Kosovo Roma.

Provisional district courts and public prosecutors offices' were set up in Pristina/Prishtine, Prizren, Mitrovica/Mitrovice and Pec/Peje. Mobile Units operated out of the Pristina/Prishtine District Court and covered those areas not served by the other courts.

In July 1999, the first Kosovo Serb judge left the EJS and went to Serbia. In September 1999, one Kosovo Serb public prosecutor resigned his post and one further Kosovo Serb judge left after having been assaulted, allegedly by Kosovo Albanians. In October 1999, the three remaining Kosovo Serb judges and one public prosecutor resigned. They

claimed that the lack of security, application of unsanctioned law by Kosovo Albanian judges and public prosecutors, discrimination and insufficient remuneration motivated their departure.

On 25 July 1999, the SRSG approved *UNMIK Regulation 1999/1*, which provided that the law applicable in Kosovo should be the law in force before the start of the NATO intervention on 24 March 1999. This regulation required that the applicable law be consistent with internationally recognised human rights standards, *Resolution 1244*, and other UNMIK Regulations.

Members of the mainly Kosovo Albanian legal communities resented and resisted the applicable law enforced by UNMIK; namely the 'Serbian' laws of the repressive Milosevic regime up until the NATO intervention. Judges and public prosecutors willingly conducted criminal proceedings under the *FRY Criminal Code* and, when applicable, the *Socialist Federal Republic of Yugoslavia Criminal Code (SFRY Criminal Code),* for both laws were in effect before the Belgrade authorities stripped Kosovo of its autonomous province status on 22 March 1989. However, many Kosovo Albanian judges and public prosecutors disregarded *Regulation 1999/1* and instead applied the KPC, which had been annulled and replaced by the *Socialist Yugoslav Republic of Serbia Criminal Code (SPC)* as Kosovo became part of the Republic of Serbia in 1989-90. While the KPC and SPC are similar in many respects, the application of an unsanctioned law raised serious concerns with regard to the legality of the proceedings.[4]

The lack of material resources, whether office supplies, furniture or other basic equipment, also contributed to the crisis. The low salaries and delays in payment of judges, lay judges, public prosecutors, court-appointed counsel and court staff was another concern. In October 1999, court staff in Pristina/Prishtine went on a two-day strike over what they considered to be an insufficient stipend offered for judges (300DM).

In December 1999 the SRSG promulgated *Regulation 1999/24*, which repealed *Regulation 1999/1* and reinstated the laws applicable in the period of the *Socialist Autonomous Province of Kosovo*. Against that background, the EJS was phased out, and new judges and public prosecutors were appointed and sworn into the new regular judicial system from January 2000 onwards.

II. Establishment of the Regular Judicial System

UNMIK Regulation 1999/7 of 7 September 1999 established the *Advisory Judicial Commission* (AJC) with the mandate of recommending candidates for judicial and prosecutorial appointment on a permanent basis. The AJC was also empowered to recommend disciplinary measures, including the removal of judges and public prosecutors. While the JAC ceased its activities on 10 September 1999, the AJC began functioning on 27 October 1999.

The AJC advertised for judicial positions all over Kosovo. Starting in November 1999, the AJC received more than 700 applications and conducted close to 560 individual interviews. Notwithstanding the concerted efforts of UNMIK to find and recruit minorities into the legal system, very few filed applications citing two reasons: first, security could not be guaranteed and second, Belgrade had instructed the Serbian judges not to participate.

During its sessions on 11 and 12 December 1999, the AJC selected 301 professional judges, public prosecutors and lay judges. The recommendations were conveyed to the SRSG on 13 December 1999. The initial swearing-in ceremonies were held in January 2000, but with a low number of the appointed minority judges attending the ceremony. Although 301 judges and public prosecutors were appointed, only 245 judges and 42 public prosecutors were actually sworn in. Of the professional judges who took the oath, only eight were minorities, including two Kosovo Serbs.[5] Amongst the lay judges only 13 were minorities, none were Kosovo Serbs. Of the public prosecutors, only two belonged to a minority Kosovo community.[6] Thirteen judges resigned and four never began to work. One public prosecutor also resigned. As of 31 July 2000, there were 230 judges, 235 lay judges and 41 public prosecutors.

In August 2000, the SRSG appointed a further 125 judges, 309 lay-judges and 17 public prosecutors. As of 1 September 2000 an ethnic breakdown had not been provided.

In February 2000, an international judge and prosecutor were appointed to the Mitrovica/Mitrovice District Court. *UNMIK Regulation 2000/34* extended the power to appoint international judges and prosecutors to the courts in all of Kosovo. As of 1 September 2000, there were six international judges and two international prosecutors.

III. The Courts

There is one district court in each of the five regions of Kosovo. The district court is competent to adjudicate criminal cases that carry a sentence of more than five years imprisonment. The municipal court is competent to adjudicate on criminal cases that carry a sentence of up to five years imprisonment. There are currently seventeen municipal courts functioning in Kosovo. The minor offences court is competent to adjudicate criminal cases that carry up to two months imprisonment. There are currently nineteen minor offences courts functioning in Kosovo. The Kosovo Supreme Court represents the highest appellate court in Kosovo.

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[1] LSMS Report No. 2*: The Development of Kosovo Judicial System (10 June through 15 December 1999),* Observations and Recommendations of the OSCE Mission in Kosovo Legal System Monitoring Section, 17 December 1999 (available at www.osce.org).
[2] Military Technical Agreement Between the International Security Forces (KFOR) and the Government of the Federal Republic of Yugoslavia and Republic of Serbia, 9 June 1999.
[3] Generally, the period from 12 June 1999 when KFOR entered Kosovo.
[4] *Id.* p.3. By 15 December 1999, more that one hundred pre-trial detention hearings had been conducted. There were 35 criminal trials completed, and all were conducted under either the Kosovo Criminal Code or the FRY Criminal Code, with none under the “applicable” Serbian Criminal Code.

[5] The Kosovo Serb judges were sworn in to the Kosovska Kamenica/Kamenice Municipal Court. As of 1 September 2000, citing security concerns, they have refused to work.
[6] *UNHCR/OSCE Assessment of the Situation of Minorities in Kosovo* (Period covering November 1999 through January 2000), p. 6.

SECTION 3: THE APPLICABLE LAW

A major problem in the Kosovo criminal justice system remains the lack of clarity in the applicable law, in particular in its application.

I. Basis of the Applicable Law

The current basis of law is *UN Security Council Resolution 1244* as expressed through *UNMIK Regulation 1999/24*. This states that the applicable law is the regulations promulgated by the SRSG and the law in force in Kosovo on 22 March 1989 (with the regulations taking precedence in cases of conflict). In addition, the Regulation states that:

> "2. If a court of competent jurisdiction or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in section 1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 3 of the present regulation, the court, body or person shall, as an exception, apply that law.
>
> 3. In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards, as reflected in particular in:
> ……...
> The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;
> ………
>
> 4. No person undertaking public duties or holding public office in Kosovo shall discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, natural, ethnic or social origin, association with a national community, property, birth or other status. In criminal proceedings, the defendant shall have the benefit of the most favourable provision in the criminal laws which were in force in Kosovo between 22 March 1989 and the date of the present regulation."

In a letter to the President of the Belgrade Bar Association, dated 14 June 2000, the SRSG confirmed that Section 3 of *Regulation 1999/24* applies to judges and that this means they must not apply any provisions of the domestic law that are inconsistent with international human rights standards.

The myriad sources of law in Kosovo created by UNMIK mean that understandable confusion continues to exist amongst the judiciary and lawyers as to which law applies in specific cases. This confusion is most noticeable when it comes to applying human rights standards. The major problems found by LSMS relate to: first, a lack of clarity over which laws take precedence in the case of conflict; second, the problems of directly applying human rights law, including the lack of knowledge of such law and how to implement it; and third, the problems of ensuring that all authorities are bound by the law

– which is a basic principle for all democratic countries, as expressed by the OSCE's principles.[1]

II. Supremacy of Laws

Regulation 1999/24 has created four possible sources of applicable law in Kosovo:

i. The law in Kosovo as it existed on 22 March 1989
ii. UNMIK Regulations
iii. The law applied in Kosovo between 22 March 1989 and 12 December 1999 (the date *Regulation 1999/24* came into force) if this is more favourable to a criminal defendant **or** it fills a gap where no law from March 1989 exists
iv. International human rights standards and laws

With so many potential sources of laws, it is very important for clarity to exist as to which takes precedence. This is not, however, the case in the current law in Kosovo. Although regulations take precedence over the 1989 law, the hierarchy between the other sources of law is not made clear.

The major problem remains that the supremacy of international human rights laws over domestic laws is not expressly stated in *Regulation 1999/24*. This is despite the fact that the precedence of human rights law above all other laws was made clear by the letter of the SRSG referred to above. The problem remains in ensuring that this supremacy is understood by the Kosovo legal community and implemented. In order to assist in this implementation, a working group is planned to identify those provisions of the FRY CPC that are in clear conflict with relevant international human rights laws.

III. Applying Human Rights Laws

Although many, if not most, countries treat human rights law as supreme in their constitutions, applying such supremacy in practice is difficult. Most of the international treaties which apply directly in Kosovo are statements of standards which may be difficult to apply to individual cases. The most developed body of international human rights law is that found in the case law of the European Court of Human Rights, which has developed the practical application of the standards of the ECHR. However, applying this case law directly in domestic courts creates problems across the continent, even in those countries that have been party to the Convention since 1950.

The latter problem applies directly to Kosovo, in particular as most of the judiciary and lawyers are familiar with a judicial system where human rights law had never been applied, and where the use of case law is unknown. This situation is similar to Bosnia, where the ECHR is applied directly, but there the Human Rights Chamber and the Constitutional Court are able to provide guidance as to the compatibility of legislation with the ECHR. No such central guiding body exists in Kosovo (although the Constitutional Court envisaged for Kosovo under the Rambouillet Agreements would have fulfilled this role). The Ombudsperson will be able to issue guidance on compatibility of laws with international standards, but it remains to be seen if such

guidance will be treated as binding by the judiciary or applied uniformly. This lack of central guidance makes it even more difficult for judges, unfamiliar with human rights law and how to apply it, to issue any judgements on the compatibility of provisions of domestic law. There is an overwhelming need for the SRSG to provide clear guidance in this regard.

There are three main ways in which judges should be applying international human rights law in Kosovo's courts.

(a) Disapplying incompatible laws

The most obvious case is when a court disapplys a provision of the domestic law that is not compatible with international standards. Although the existing code in Kosovo generally does comply with international standards, certain provisions do not. As will be developed further in the report, the articles which appear to be in breach of the ECHR include Article 74 FRY CPC, which allows the investigating judge to interfere in the defendant's communication with his or her lawyer. Article 152 FRY CPC allows the police to detain witnesses at the scene of a crime for up to six hours until the arrival of the examining magistrate. This article is in breach of the ECHR as detention for the purposes of being brought before a investigating judge as a witness is not, in and of itself, a valid reason for detention under ECHR Article 5(1).

UNMIK regulations themselves may be in breach of international human rights standards. A regulation in clear breach of the ECHR and the ICCPR is *Regulation 1999/26*, On the Extension of Periods of Pre-trial Detention, in that it fails to adequately allow for independent and an adversarial review of the detention by a court.[2] Another possible breach of the ECHR is the detention powers given to law enforcement officials under *Regulation 1999/2*, which appear to be "preventative detention" for security purposes, a form of detention that is clearly forbidden by Article 5(1) of the ECHR and its case law.[3]

Despite these breaches of international standards, LSMS has not monitored any cases in which a court has disapplied provisions of the domestic law where they are in breach of international human rights standards.

(b) Using human rights as guidance in applying existing laws

The most practical use of international human rights law is, on a day-to-day basis, to make decisions, including whether evidence should be excluded or detentions authorised. For example, where a person's liberty may be at stake, the European Court of Human Rights has stated that in most cases the authorities should provide free legal assistance.[4] Article 67(1) FRY CPC provides that the accused is entitled to defence counsel "throughout the entire course of criminal proceedings." A court applying the ECHR would interpret this provision in order to ensure immediate access to defence counsel. However, in many cases the courts have failed to provide representation, despite the fact that the defendants faced possible imprisonment and, in some cases, deportation.

The failure of the court to provide defence counsel has been highlighted in the prosecution of foreign women in Kosovo for prostitution, many of whom claimed to be victims of trafficking. In Mitrovica/Mitrovice, two foreign women were arrested, amongst others, after a bar raid. These women claimed that they had been brought to Kosovo under false pretences, had their passports seized by traffickers and been sold into prostitution. Despite this, these women were convicted on charges relating to prostitution and sentenced to 30 days imprisonment and deportation from Kosovo with a ban on returning for three years. The court did not provide these women with defence counsel. In another case resulting from a bar raid in Prizren, 8 foreign women were arrested and charged with prostitution, sentenced to ten days imprisonment and ordered to be deported from Kosovo including a ban on returning for three years. All of the above took place within 48 hours of their arrest. The court did not appoint defence counsel to assist any of these women. On appeal, these convictions were reversed and the case has returned to court.

The Administrative Department of Justice is issuing a circular to the Kosovo courts regarding court-appointed defence counsel that highlights the ECHR standards and provides for the appointment of defence counsel in cases involving possible imprisonment if justice so requires.[5] In this way, human rights law must be used by the courts as guidance in applying the existing laws. The human rights standards can assist in deciding whether a person has been detained for too long or for a justifiable reason or whether a trial is fair, including which witnesses should be heard or if evidence, such as polygraph tests, should be excluded. The main reason for the courts' reluctance to use and refer to human rights law seems to be a lack of knowledge of the law, both in its substance and on how to *implement* it in practice. In particular, what is needed is training on the case law of the ECHR and on applying this to the particular circumstances of each case.

(c) Filling in gaps in the law

International human rights law can be applied directly to fill in gaps in the law. The wide protection offered by international human rights law can go much further than any narrowly defined and specific provisions of a domestic code. A judiciary that is knowledgeable about, and confident in its use of, international human rights law can fill in major gaps in existing law to protect the rights of its citizens.

One example where such a gap should be filled is the lack of a provision in the domestic law of Kosovo allowing for any detention, particularly those carried out by KFOR and the UNMIK, to be challenged in the courts. Such a right is directly provided by Article 5(4) of the ECHR and Article 9(4) of the ICCPR. Therefore any court would be justified, given the supremacy of international human rights law, in hearing any case challenging a person's detention, and ordering the detainee's release. This has, in fact, occurred before a trial panel in Gnjilane/Gjilan District Court when faced with illegal detention by KFOR. The trial panel declared the detention unlawful, basing their decision on the ECHR.

IV. Applying Law to All Authorities

All authorities in Kosovo, including SRSG and KFOR, are bound by the applicable law, including international human rights standards.

UNMIK is bound by the applicable law, and as a UN body, by international human rights standards. This is made clear by *Resolution 1244*, and *Regulation 2000/38* setting up the Ombudsperson Institution. LSMS is not aware of any case in which UNMIK has denied that international human rights standards apply to it. However, by *UNMIK Regulation 2000/47*, UNMIK has, in certain circumstances, immunity from any legal process. This is subject to a waiver by the UN Secretary-General if such immunity would impede the course of justice. This far-reaching immunity makes it very difficult, if not impossible, for individuals to defend their rights against governmental authorities.

It is undisputed that the SRSG, who is vested with all executive and legislative power in Kosovo, must comply with international human rights. The Ombudsperson has the power to investigate the interim civil administration or any central or local institutions.[6] However, there is currently no legal remedy to challenge decisions taken by the SRSG.

With regard to KFOR, as a UN-authorised security force, supplied in the main by countries that are party to the major international human rights treaties, it is bound by international human rights law in all aspects of its activities. The recent report of the Panel on UN Peace Operations stressed "*the essential importance of the United Nations system adhering to and promoting international human rights instruments and standards and international humanitarian law in* ***all*** *aspects of its peace and security activities;"* (Paragraph 6) (emphasis added). Indeed, this was made clear on 4 July 1999 by Sergio Vieira de Mello, the then acting SRSG in Kosovo. In a document entitled *"Statement on the Right of KFOR To Apprehend and Detain,"* the SRSG stated that KFOR had "*the mandate and responsibility to ensure both public safety and order…until the UNMIK itself can take full responsibility*." The statement specifically states that in performing these tasks internationally recognised human rights standards would apply to KFOR.

Regulation 2000/47 states that KFOR "shall respect applicable law and regulations in so far as they do not conflict with the fulfilment of the mandate given [them] under Security Council *Resolution 1244*." However, *Resolution 1244*, particularly as a UN resolution, does not give KFOR the mandate to breach international human rights standards. As in relation to UNMIK, the immunities provided to KFOR under *Regulation 2000/47* create substantial barriers to the effective protection of rights.[7]

During a Round-Table organised by the OSCE-led Kosovo Judicial Institute in Pristina/Prishtine in July 2000, a representative of the KFOR legal department stated that KFOR are bound by international human rights laws. This statement is not, however, followed universally in all areas of KFOR's activities. In particular, it has been argued that *UN Resolution 1244* has granted them the authority to detain persons indefinitely without safeguards. LSMS has continued to document cases of persons held "*by order of*

the Commander of KFOR" (known as COMKFOR "holds") without any opportunity to challenge their detention in court. Furthermore these detentions seem to be on the basis of the persons being a "threat to peace and security." Indeed, *UNMIK Regulation 1999/2* provides for the temporary detention or restriction on the freedom of movement of individuals who may pose a threat to public peace and order.[8] A threat to public order may not, however, in the absence of a concrete suspicion that a person will commit an offence, be a sufficient ground upon which to justify detention under international human rights law.[9]

V. Examples of Inconsistent Approaches to the Law by the District Courts

The following section outlines a number of cases in which the district courts have inconsistently applied the law, in some cases in violation of the domestic and international law. This is by no means an exhaustive list.

(a) Statements before Investigating Judges

In some cases involving Kosovo Serb witnesses, investigating judges are failing to read back the testimony given by witnesses. Rather, the witness is simply requested to sign his/her statement, typed in Albanian, without verifying its accuracy in a language the witness understands. This is in violation of the fair trial provisions encapsulated in Article 6 of the ECHR.

(b) Testimony Summarised for the Record

LSMS has monitored a number of cases in which the presiding judge read into the court record a *summary* of a witness's/defendants trial testimony, rather than a *verbatim* account. The FRY CPC seems to permit this.[10] Because a defendant is entitled to a genuine review of the issues, only a *verbatim* trial record can adequately protect a defendants's rights on appeal, as set out in Art. 14 (5) of the ICCPR. In the case of *Peter Muriuki et al* there was a *verbatim* record of the trial proceedings.

(c) Statements "read" into the Record

In a number of cases, the presiding judge has attached statements to the record without reading the statements or disclosing the content to the defendant. This also includes the practice of inviting the witness to "give the same evidence as you did before the investigating judge," without reading the statement in open court for the defendant to hear. The witness's statement is then attached to the court record. These practices may deny the defendant the right to a fair and public trial.

(d) Regulation 2000/17

There seems to be a widespread misunderstanding of *Regulation 2000/17* by the District Courts. LSMS has encountered cases in which the presiding judge admits witness statements under this regulation. Where a witness cannot attend the investigative

hearings, the regulation permits **witness statements taken by relevant law enforcement authorities** to be admitted before an investigating judge in the **preliminary investigation, not the trial**. Indeed, Section 3 makes clear that the defendant retains his/her right to examine these witnesses at trial as guaranteed by international standards.

(e) Removal of Co-Defendants from the Court

In cases where there is more than one defendant, LSMS has observed some trial panels request co-defendants to leave court during the trial testimony of another defendant. This is apparently permitted by the FRY CPC on the basis that the presiding judge has an obligation to "familiarise" a defendant with the testimony of co-defendants.[11] But in cases monitored by LSMS, the presiding judges have failed to recount this testimony to co-defendants. This provision in the FRY CPC violates a defendant's right "to be tried in his presence."[12]

(f) Inadequate court translation

During its monitoring of district court cases, LSMS has observed widespread problems with court interpretation and translation.[13] This is despite the fact that the domestic law provides for the equality of regional languages in court proceedings. In June 2000, the Administrative Department of Justice issued a circular to the courts, reminding the courts of their obligations in this regard.[14]

Defence counsel representing *Milos Jokic*, a Kosovo Serb on trial for genocide, failed to attend the first day of his trial. In their absence, the trial panel discussed with the public prosecutor what to do next. This conversation lasted some 45 minutes and ended with the panel fixing a new trial date, stating that if the lawyers failed to attend the next hearing the court would appoint local counsel. Other than asking the defendant if he wanted to retain the same defence counsel for the next hearing, none of the above was translated into Serbian. When LSMS raised this with the President of the District Court, they were informed that since the trial had not actually begun, there was no "proceeding" as such and thus no obligation to translate.

At the trial of *Jokic* the panel also paraphrased witness testimony. On some occasions the witness testimony was not translated for the international judge until the presiding judge had paraphrased the testimony.

In the first trial of the *Momcilovics'*, court interpreters sat with the prosecution and defence counsel. During the three days of testimony, the translation into Serbian was often corrected by the court, and on the odd occasion, by persons in the public gallery. It appeared to LSMS that there were notable occasions when the defendants could not hear the translation. At the second trial, a different approach was taken. Pillar III provided the court with simultaneous translation equipment. The court interpreters were also new. This stems from a general lack of qualified interpreters in the legal field, although the Department of Justice has recently recruited a number of international translators and interpreters. At times the equipment failed to work; nevertheless, witnesses continued in

their testimony which was never translated for the defendants or the international judge. On other occasions, the interpreters would stop interpreting defence counsel's questions/speeches because he was talking too fast. There was no translation of what was said and the trial continued.

LSMS RECOMMENDATIONS

1. International human rights law (and in particular the ECHR and its case law) take precedence over all other laws. Accordingly it is recommended that UNMIK and KFOR act in strict accordance with these laws and promote their enforcement.

2. It is recommended that the SRSG issue an Administrative Directive which confirms that:

i. international human rights law is supreme over all other laws;
ii. judges and public prosecutors are obliged not to apply provisions of the FRY CPC that are in conflict with these standards;
iii. in line with these obligations, judges and public prosecutors shall use international human rights standards to address issues which are not addressed by the FRY CPC.

3. The Kosovo Judicial Institute should provide more comprehensive training on the application of international human rights law in the criminal justice context to both local and international judges and prosecutors. In particular, all appointed judges and public prosecutors should be required to undergo an intensive legal training course prior to taking their official posts.

4. It is recommended that the Department of Justice amend the current Administrative Instruction on court-appointed counsel so as to ensure that counsel are appointed in all cases where a person faces possible deportation.

5. It is recommended that the Department of Justice issue an Administrative Instruction and/or a Circular that highlights the following:

i. the courts should be provided with appropriate equipment to ensure a *verbatim* record of all legal proceedings;
ii. in line with the right to examine witnesses, defendants should not be removed from the courtroom during the taking of testimony;
iii. in line with the right to be tried in his presence, statements taken of witnesses without the presence of defence counsel or the defendant shall not be admitted and cannot form the basis for a verdict;
iv. all statements made by parties throughout the investigative hearing and at trial must be completely and fully reflected in the trial record.

[1] *See* the 1990 *Document Of The Copenhagen Meeting Of The Conference On The Human Dimension Of The CSCE* and in particular paragraphs:

(5.3) - the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;
(5.5) - the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;
(5.6) - military forces and the police will be under the control of, and accountable to, the civil authorities;
(5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law.

[2] *See* LSMS Report #6 *Extension of Custody Time Limits and the Rights of detainees: The Unlawfulness of Regulation 1999/26* (29 April 2000).

[3] *See* Jecius v Lithuania, App.34578/97, 31 July 2000.

[4] *See* Benham v UK 22 E.H.R.R. 293, where the European Court of Human Rights confirmed that the interests of justice would in principle require provision of a lawyer in all cases where a person's liberty could be at risk.

[5] *See* Draft UNMIK Justice 2000/17: *Instructions on the Extension of the Conditions for Court-Appointed Defence Counsel*—unsigned. The interests of justice must be interpreted in accordance with Benham v UK *Id*. at note 4.

[6] UNMIK Regulation 2000/38, *On the Establishment of the Ombudsperson Institution in Kosovo*, Section 3.

[7] Regulation 2000/47 *On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo,* 18 August 2000

[8] Regulation 1999/2 *On the Prevention of Access by Individuals and their removal to Secure Public Peace and Order*, 12 August 1999.

[9] Ireland v UK (1979-80) 2 EHRR 25 and Jecius v Lithuania ECHR 31 July 2000.

[10] *See* Art. 222 FRY CPC.

[11] Art. 319 FRY CPC.

[12] Art. 14 (3) (d) ICCPR.

[13] *See* Article 7 FRY CPC.

[14] *See* UNMIK Justice 2000/8: *Use of Languages in Court Proceedings,* 28 June 2000.

SECTION 4: PROHIBITION OF ARBITRARY ARREST AND DETENTION

Article 9 and 14 of the ICCPR and Article 5 and 6 of the ECHR provide a framework for the protection of persons subject to any form of arrest or detention. Art. 9(1) states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." This provision is mirrored in Art. 5(1) of the ECHR.

The ICCPR and ECHR provide that all persons detained shall have the right to challenge the lawfulness of their arrest and detention at any time.[1] The FRY CPC does not provide a mechanism for detainees to challenge the lawfulness of their detention. LSMS has previously reported that the failure to provide a *habeas corpus* mechanism is a serious flaw in the domestic law. As a result, persons are currently held in continued detention by UNMIK and KFOR without a remedy, despite the fact that they may be subject to arbitrary arrest or detention.

In addition, the ICCPR and ECHR provide that a person who has been found to be a victim of arbitrary arrest or detention, has the enforceable right to compensation.[2] In accordance with this international standard, the FRY CPC also includes entitlement to compensation for persons unlawfully arrested or detained.[3]

I. Unlawful detentions by UNMIK and KFOR

LSMS has observed cases in which persons have been detained by UNMIK, the executive authority, and KFOR in violation of the procedures proscribed by the FRY CPC. These cases of arbitrary detention illustrate the immediate need for a proper mechanism by which all persons detained in Kosovo can challenge the lawfulness of their arrest and detention.

(a) The "Extradition" of *Moses Omweno*

On 2 June 2000, *Moses Omweno* was arrested in Niarobi by Kenyan Authorities on the basis of a request by UNMIK police. *Omweno* was a former employee of the International Organisation for Migration (IOM) in Pristina/Prishtine which filed a complaint against him to UNMIK police for theft. *Omweno* was held in Nairobi *incommunicado* until 6 June 2000, when he was removed from the jurisdiction without a judicial hearing in violation of Kenyan domestic law and international human rights standards. *Omweno* was brought from Kenya to Kosovo by Kenyan police and an IOM representative without a passport. On 8 June 2000, *Omweno* arrived in Pristina/Prishtine where he was arrested and detained by UNMIK police. Once in detention, UNMIK police interrogated *Omweno* without informing him of his rights. In violation of the FRY CPC, the public prosecutor expanded the charges beyond the basis of the arrest warrant against *Omweno* to include two new allegations of theft. In requesting the removal of *Omweno* from Kenya, UNMIK police acted in violation of the extensive provisions of the FRY CPC on extradition.

On 14 July 2000, LSMS issued a report entitled *The "Extradition" of Moses Tengeya Omweno*. Based upon the findings in that report, LSMS concluded that the manner in which *Omweno* was "extradited" from Kenya to Kosovo, his subsequent detention and the expansion of the charges against him involved violations of domestic and international law. On this basis, LSMS concluded that the Pristina/Prishtine District Court was without jurisdiction and that his detention was unlawful. LSMS recommended to the SRSG that the most appropriate and effective remedy was an executive order for the immediate release of *Omweno.* This specific recommendation was made in light of the fact that the applicable law fails to provide any habeas corpus mechanism by which to challenge the lawfulness of arrest and detention and the special circumstances of the case.

At that time, *Omweno* remained in custody, but the Pristina/Prishtine District Court was informed of the LSMS report and its conclusions. As a result, on 20 July 2000, the investigating judge initiated a meeting with *Omweno's* wife in which he instructed her that *Omweno* may be released on bail if he could afford it and would need to promise to remain in Pristina/Prishtine. Mrs. Omweno stated that she needed to discuss the options with her husband. On 21 July 2000, the investigating judge informed Mrs. Omweno that her husband would have to remain in Pristina/Prishtine pending trial. Later, however, the investigating judge suspended *Omweno's* detention without such a condition, but on the basis that *Omweno* promise to respond to all court summonses. During the hearing, the investigating judge stated to *Omweno* that he questioned *Omweno's* innocence and believed that *Omweno* would be indicted. The suspension of detention was an order to release which did not constitute a judicial finding on the lawfulness of *Omweno's* detention.

LSMS was informed that the investigating judge initiated this "hearing", which did not conform to the FRY CPC provisions on bail or suspension of detention. The "bail hearing" was an *ad hoc* and inappropriate remedy for *Omweno's* case. This case highlights clearly the need for appropriate habeas corpus legislation.

(b) COMKFOR "Holds"

In the case of *Shaban Beqiri* and *Xhemal Sejdiu*, the suspects were ordered to be released by a judge on 16 November 1999. However, from 16 November 1999 until the date of their trial on 25 July 2000, 8 months, *Beqiri* and *Sejdiu* were held in detention by an order of COMKFOR. On the day of their trial, *Sejdiu* and *Beqiri* were brought to the court in handcuffs. Based on an objection from the defence counsel and a statement from the public prosecutor that he had not requested that the accused be detained, the trial panel ruled that, on the basis of *Regulation 1999/24* and the ECHR, only the court had the legal authority to deprive a person of their liberty. After this, KFOR released *Beqiri* and *Sejdiu*.

In this and other cases, KFOR has continued to detain individuals subject to criminal investigation despite the lawful order to release by a judge. As a result, COMKFOR "holds" have been improperly used to usurp a lawful decision of the judiciary made "*in*

accordance with such procedures as are established by law" and thereby subjected persons to arbitrary detention.

According to COMKFOR, their power to detain derives from *Resolution 1244*, that mandated KFOR with the responsibility for, amongst other things, "ensuring public safety and order *until the international civil presence can take responsibility for this task*." (Para. 9(d)).

It can be argued that UNMIK may not yet be in a position to take "full responsibility" for public safety and order in Kosovo. Nevertheless, UNMIK police, predominantly, have primacy throughout the province, and there is a functioning judicial system. As a result, there seems little, if any, justification for continuing the so-called COMKFOR "holds." Nevertheless, in the exceptional case where "holds" are used, in line with international standards, there must be a legal mechanism whereby the detainee can challenge the lawfulness of his detention.

II. The Right to be Brought Promptly in Front of a Judicial Authority

One of the safeguards against arbitrary arrest and detention is the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power.[4] The rationale behind this right is to ensure that the independent and impartial judiciary have control over deprivations of liberty by the executive and to prevent violations of other fundamental rights, such as the right to humane treatment.[5] In order to fulfil the right, the appearance of the accused in front of the judicial authority is necessary. Moreover, the officer authorised by law to exercise judicial power must be independent of the executive and the parties.[6] As a result, law enforcement authorities cannot fill the function of an officer authorised by law to exercise judicial power. In addition, a public prosecutor who is one of the parties to a case cannot fulfil this function as he does not possess the required impartiality.[7] There is no violation of the right to judicial control over detention, if a person is detained by the executive and released 'promptly' before being brought before a judicial authority.

Although there is no clearly articulated time frame to ensure the right to be brought promptly before a judge, international human rights jurisprudence provides some guidance. The *UN Human Rights Committee* in providing an authoritative interpretation of Art 9(4) of the ICCPR, has stated that "delays shall not exceed a few days."[8] The European Court of Human Rights found that the police detention in Northern Ireland of a person suspected of terrorism for a period of 4 days and 6 hours was a violation of the right to be brought promptly in front of a judicial authority.[9] Although the court recognised that the particular special circumstances facing the authorities in Northern Ireland, the court found that permitting those circumstances to justify a lengthy period of detention before a court hearing would "impair the very essence of the right to prompt judicial control."

(a) Domestic law on arrest and detention

The FRY CPC provides that pre-trial custody shall be ordered, if one of the four specific reasons for pre-trial detention exists, by an investigating judge in the first instance and thereafter by a panel of judges or a panel of the Supreme Court.[10] Law enforcement authorities may arrest and detain a person if the reasons for pre-trial detention exist. However, the FRY CPC mandates that law enforcement authorities bring arrested and detained persons in front of an investigating judge *within 24 hours of apprehension*. Failing this, law enforcement authorities must demonstrate to the investigating judge that there were circumstances which made the appearance *impossible*. The FRY CPC explicitly allows for law enforcement authorities to bring a detainee in front of an investigating judge of a lower court in the jurisdiction where the crime was committed if "that court can be reached more easily."[11]

As an exception, law enforcement authorities can "order" pre-trial detention. In order to detain on this basis law enforcement authorities must have a founded fear that the person will flee, or know of the existence of particular circumstances to justify a fear that another crime may be committed or that the person may destroy "clues to the crime." This custody can last for a maximum of 3 days, which is counted from the moment of apprehension.[12] This order for detention should conform to the provisions of pre-trial custody described above, in that "*custody shall be ordered in a written decision*…" and an arrest warrant shall be presented to a person to whom it pertains at the moment of apprehension or no later than 24 hours from his detention. The law provides for an appeal against this written order for detention and explicitly instructs law enforcement authorities to ensure that the detainee receives legal aid in submitting the appeal. In addition, the FRY CPC provides that the law enforcement authorities must immediately inform the public prosecutor of the police-ordered detention.[13]

In all cases of arrest and detention, the FRY CPC mandates that an arrest warrant be provided to the arrested individual either at the time of the arrest or within 24 hours of the detention.[14] A detained individual has the right to appeal the arrest warrant within 24 hours of its presentation.

(b) The "72 Hour Rule"

LSMS has observed that it is standard procedure for UNMIK police and KFOR to hold persons for 72 hours before bringing them in front of a judicial authority, rather than an exception as provided for by the FRY CPC. This practice has been termed "the 72 hour rule."

This practice is in violation of the FRY CPC, which mandates that the detainee be brought before an investigating judge within 24 hours or that an explanation be provided to the judge for why such appearance was impossible. LSMS is unaware of any cases where the procedures of the FRY CPC have been followed. In fact, in May 2000 UNMIK police issued a statement of policy on arrest and detention, *Bulletin 15*, which instructs

that "[w]hen a suspect is placed in a detention centre, *the case must be presented to the public prosecutor* within 72 hours of arrest." LSMS has highlighted to UNMIK police that this section does not comply with the FRY CPC, nor does it meet the requirements of the right to be brought promptly in front of a judicial authority in international human rights law.

Moreover, there is a systematic failure of law enforcement agencies and the courts to facilitate the issuance of an arrest warrant within 24 hours of a detention as provided for by the applicable law. The FRY CPC provides the right to an arrested individual to appeal an arrest warrant to a panel of judges. This provision, if implemented, would assist in protecting against arbitrary arrests, where the individual has been detained without a grounded suspicion that they have committed a criminal offence. The issuance of an arrest warrant, however, does not fulfil the requirements of the right to be brought in front of a judicial authority. In addition, law enforcement authorities routinely fail to provide a written order of the pre-trial detention as recommended by the FRY CPC. As a result, the provision of the applicable law that allows for an appeal of such decisions cannot practically be utilised. However, a written order of custody from a law enforcement authority does not meet the requirements of Art. 5(3) of the ECHR and Art. 9(4) of the ICCPR.

In the light of the fact that UNMIK police have primacy throughout most parts of Kosovo and that there is now a functioning judicial system, including municipal courts, the practice of holding persons for 72 hours is no longer necessary and is not in accordance with the FRY CPC. As a result, the practice subjects persons detained to violations of their right to be treated "in accordance with procedures prescribed by law." This practice must cease and UNMIK police and KFOR should bring arrested and detained persons in front of an examining magistrate within 24 hours of apprehension. Only on a showing of exceptional circumstances should UNMIK police and KFOR be able to detain a person for up to 72 hours without bringing them in front of a judicial authority.

(c) Prolonged Police Custody

During the EJS, it was common for arrested individuals to be held in detention for extended periods beyond 72 hours before being brought before a judicial authority. For example, *Zymer Thaci* was arrested on 25 September 1999 by UNMIK police and detained in Pristina/Prishtine Detention Centre on 26 September. *After almost one month in detention*, on 22 October 1999, *Thaci* was first brought in front of an investigating judge. Unfortunately, similar violations of the procedures proscribed by law and the right to be brought promptly in front of a judicial authority have continued since February.

Arben and Arsim Bajrami

On 8 April 2000, *Arben* and *Arsim Bajrami*, who were arrested with *Peter Muriuki* for theft from an international NGO in Urosevac/Ferizaj, were detained by UNMIK police in Urosevac/Ferizaj and taken to Gnjilane/Gjilan. They were interviewed by UNMIK police two times without the presence of a lawyer. During these interviews, *Arben Bajrami* alleges that he was slapped by the international UNMIK police officer and *Arsim Bajrami*

alleges that he was grabbed by the throat, pushed up against a wall and threatened by a Kosovo Police Service (KPS) officer. From 8 April 2000 until 19 April 2000, the detainees were not seen by an examining magistrate either in the Pristina/Prishtine District Court, or the Urosevac/Ferizaj Municipal Court where the crime took place. On 19 April 2000, there was a hearing scheduled in front of an investigating judge in the Pristina/Prishtine District Court, but UNMIK police failed to bring the detainees on time. By the time the detainees were brought to the court, their defence counsel had been sent home. It was not until 21 April 2000, after 13 days in detention, that *Arben* and *Arsim Bajrami* were seen by a judicial officer.

Despite the fact that the FRY CPC explicitly provides that detainees may be brought in front of an investigating judge of the lower court in the jurisdiction where the crime occurred to ensure that detainees are seen promptly by a judicial authority, *Arben* and *Arsim Bajrami* were held for 13 days in detention without being brought in front of a judge in the Municipal Court of Urosevac/Ferizaj in violation of the law. During their time in detention, they were not provided a written decision regarding the police ordered custody nor a written warrant of arrest. Throughout this time, *Arben* and *Arsim Bajrami* could not challenge the lawfulness of their detention.

Detainee S

On 18 June 2000 *Detainee S* was arrested and detained for weapons possession by KFOR who flew the suspect by helicopter to Pristina/Prishtine where he was detained in the Pristina/Prishtine Detention Centre. During this time, *Detainee S* reported that he was interviewed by KFOR soldiers and UNMIK police multiple times. In addition, he stated that UNMIK police did not notify his family of his arrest and place of detention until 4 days after his arrest. Detainee *S* was never provided a written order of his detention. On 4 July 2000, Detainee *S* was seen by an investigating judge at the Pristina/Prishtine District Court. By the time he was seen by a judge, *Detainee S* had been in detention in Pristina/Prishtine for 16 days. *S* was released from detention on 11 July 2000 by the investigating judge, after the public prosecutor dropped the investigation.

LSMS was informed by UNMIK police and the public prosecutor in the case that a verbal order to detain by a public prosecutor was the basis for the continued detention beyond the police custody time limit. The FRY CPC does not provide for an order of detention by a public prosecutor, let alone a verbal one. In addition, a verbal order of a public prosecutor to the police does not meet the requirements of the right to be brought in front of a judicial authority. This right entails, as mentioned above, the presence of the accused in front of an authorised officer and that that officer be impartial, not a party to the case such as a public prosecutor. The case of *Detainee S* is not isolated; in other cases a verbal order from a public prosecutor has been used to prolong police custody. For instance *Detainee A,* who is currently in detention, was detained from 8 March 2000 until 15 March 2000, 6 days, before being brought in front of an investigating judge on this basis.

6 Kosovo Albanian males

On 20 June 2000, 6 Kosovo Albanian males were arrested in Pristina/Prishtine after being stopped by UNMIK police and KPS officers. These suspects have been charged with the offence of assaulting a public officer, an offence under the jurisdiction of the municipal court. According to two of the detainees, they were never informed of the reasons for their arrest. Both of the two allege that they were beaten by KPS officers both during the arrest and separately in detention. Some of the detainees were released on 28 June 2000 and others on 29 June 2000 - 8 and 9 days from their detention - without being brought in front of an investigating judge.

The defence counsel for some of these suspects advised LSMS that UNMIK police did not inform the competent public prosecutor of the arrest and there was never a written order for their detention. This was confirmed by the President of the Municipal Court who stated that the court was not informed of the arrest and detention of the suspects until 30 June 2000, after the suspects had been detained for 8 and 9 days and released. That day, the Municipal Court public prosecutor filed a request for an investigation into the case and the suspects were summoned to appear in front of an investigating judge. The FRY CPC provides that law enforcement authorities must *immediately* notify the competent public prosecutor of a "police ordered" detention. In this case, the competent public prosecutor was not notified until 8 days after the detention.

Detainee R

During the night of 8 July 2000 and the morning of 9 July 2000, *Detainee R* was arrested in Vitina by KFOR for a curfew violation and allegedly resisting arrest. From that day until 27 July 2000, when he was released, he was held in the detention centre in Camp Bondsteel. Although KFOR reported that *Detainee R* was escorted to Gnjilane/Gjilan to be brought before an investigating judge, he was in fact never seen by a judicial authority and was not provided an arrest warrant. As a result, *Detainee R* spent approximately 18 days in detention without ever seeing a judicial authority. In fact, LSMS was unable to identify a case file or a public prosecutor's request for an investigation against *Detainee R* in Gnjilane/Gjilan District Court, Vitina/Viti Municipal Court or Gnjilane/Gjilan Municipal Court. It appears that no court was ever informed of the detention of *Detainee R*.

The above-mentioned cases describe persons who were subject to unlawful detentions in that they were detained by UNMIK police and KFOR for extended periods in violation of the FRY CPC and without being brought promptly before a judicial authority. In addition, LSMS has observed that there are persons subject to such unlawful detentions at the time of the writing of this report. For example, *two detainees* are currently being held by KFOR in Pec/Peje. The *two detainees* were arrested on 2 August 2000 for automobile theft. On 24 August 2000, LSMS visited the detainees who until that day had not been seen by an investigating judge. At that time, the detainees had been in detention for 22 days without being brought before a judicial authority.

In following up in relation to these cases, some Detention Centre Commanders stated that they will hold persons indefinitely until there is an *order to release* from the police or the court. On the contrary, Detention Centre Commanders who are holding persons beyond the period of 24 hours without lawful written orders to detain by either the police for 3 days in exceptional circumstances or an appropriate judicial authority have an obligation to immediately release those persons.

III. Access to Counsel during custody and notification of rights

Before being brought before a judicial authority, international human rights standards provide other safeguards against arbitrary arrest and detention, in particular the right to assistance of legal counsel. The *UN Basic Principles on the Role of Lawyers* entitles persons to assistance of legal counsel at all stages of the criminal proceedings, including during interrogations.[15] In determining a time-frame for access to defence counsel, the European Court of Human Rights has found that a delay in access of 48 hours was excessive.[16] The time frame of 48 hours is reflected in Principle 7 of the *Basic Principles on the Role of Lawyers.* This guarantee is vital to prevent violations of other fundamental human rights such as the right to an effective defence during both the pre-trial and trial process. Additionally, persons arrested and detained are entitled to be immediately informed of the reasons for their arrest,[17] of the right to silence[18] and the right to inform or have the authorities inform a family member or friend of the arrest and the place of detention.

In violation of international human rights standards, the FRY CPC does not provide for immediate access to defence counsel.[19] As mentioned above, however, the FRY CPC does instruct law enforcement authorities to ensure access to legal assistance to enable a detainee to appeal a police-ordered custody. In addition, the FRY CPC mandates that law enforcement authorities must notify the family of an arrested and detained person within 24 hours of the arrest.[20]

In the cases of *Detainee S*, the *6 Albanians* and *Arsem* and *Arbin Bajrami*, the families of the detained persons hired private defence counsel during the time that they were held in detention. However, none of the defence counsel were present during any of the interrogations of the detainees. In fact, during the trial of *Peter Muriuki, Arben* and *Arsim Bajrami*, a KPS officer testified that during the interrogation of *Arben Bajrami, Arben* explicitly requested the presence of counsel during his interrogation. This request was denied. The KPS officer also testified that during interrogations, he believes *Peter Muriuki* also requested a lawyer. This request was also denied. During the time in police custody, the detainees were given lie detector tests.[21] As a result, the primary issue raised at the trial of *Peter Muriuki, Arben* and *Arsim Bajrami* was the conduct of the police investigation in light of retractions of statements given to the police by the eyewitnesses. In calling the police officers as witnesses, the prosecution questioned the credibility of the statements of the accused and the witnesses regarding the police conduct. The provision of defence counsel on request of the accused during interrogations would have protected against this and ultimately ensured greater fairness in the proceedings. On 21

August 2000, *Peter Muriuki*, *Arben* and *Arsim Bajrami* were acquitted of the crime of theft and released from custody.

UNMIK police Bulletin 15, which was published after the detention of *Arben* and *Arsim Bajrami*, provides that UNMIK police must inform the person of the reason for the arrest, the right to remain silent and make no statements, the right to inform family or employer of detention, the right to contact a lawyer before any statements to the arresting authority. Although the Bulletin provides for these rights, LSMS has observed that there have been failures to implement these policies since their introduction. For instance, *Detainee S'* family was not informed of his arrest and place of detention until 4 days after his detention. Moreover, it is still common practice for UNMIK police and KFOR to interrogate detainees without the presence of defence counsels. However, UNMIK is currently seeking to address the issue of access to defence counsel from the moment of arrest.

IV. The Presumption of Innocence and the Right to Trial within a reasonable time or to release pending trial

International human rights standards provide for the presumption of release pending trial in accordance with the fundamental principle of the presumption of innocence and the right to liberty and security of persons. Article 9 (3) of the ICCPR and Article 5 (3) provide that persons arrested or detained are entitled "*to trial within a reasonable time or to release pending trial*." This has been interpreted to mean that authorities must act with particular expedience and urgency when an accused is subject to a deprivation of liberty before he has been proven guilty of a criminal offence. With regard to juvenile suspects, international human rights standards mandate that "[a]rrest, detention or imprisonment of a child should be used as a measure of last resort… and for the shortest period of time."[22]

The European Court of Human Rights has stated that the authorities must show "*relevant and sufficient reasons*" to justify pre-trial detention.[23] The *UN Human Rights Committee* has interpreted the ICCPR to allow pre-trial detention, but only where it is "necessary"- which should be interpreted narrowly. Both the ECHR and ICCPR recognised that pre-trial detention may be ordered on the basis that it is necessary to prevent flight, interference with the course of justice, prevention of a crime and the preservation of public order. The European Court jurisprudence provides guidance on the specific factors necessary for an order of pre-trial detention on any of these four grounds. For example, in order to detain an individual on the ground of preserving public safety, the Court requires the existence of evidence that shows a release of the particular individual would *actually result* in a disturbance to public order. In ordering pre-trial detention, the authorities have an obligation under the ECHR to "examine all facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and *set them out in their decisions*…." (emphasis added)[24]

During the course of pre-trial detention, detainees have a right to challenge the detention in order to ensure that detention is absolutely necessary for the progression of the

criminal proceedings, that trial takes place within a reasonable time and that the investigation is conducted with expedition. In order to effectively secure the right to challenge, the authorities may provide for periodic detention reviews and, further, may grant the detainee the right to initiate review by his/her own motion. Moreover, where there has been a sufficient change in a detainee's circumstances, there must be a process by which to challenge the basis for continued detention.

The forum by which detention is challenged must take the form of a court and must guarantee judicial process.[25] Following a decision of the European Court of Human Rights it is clear that this process must be *adversarial,* guaranteeing equality of arms and the relevant constituent elements of a fair trial.[26] These elements include an oral hearing before an independent and impartial tribunal; access to effective legal representation[27]; and the right to make representations in person or through a legal representative; and a fully reasoned decision as to the basis for an order for continued detention.

(a) Domestic law on Pre-trial detention

The FRY CPC states that *"no one may be deemed guilty of a crime until guilt has been established by a final verdict."*[28] The FRY CPC provides that pre-trial custody shall be kept to the shortest time possible and places an obligation on the state "*to proceed with particular urgency if the accused is in custody*."[29]

In cases regarding juveniles, the FRY CPC places an obligation on the authorities to "proceed with the greatest urgency so that the proceeding is completed as soon as possible."[30] The FRY CPC provides that pre-trial detention of juvenile suspects should be ordered *as an exception* where the grounds for pre-trial custody exist.[31] As a preference to detention, the FRY CPC provides the court to order the placement of juveniles in alternative settings.[32] If detention is ordered, the FRY CPC requires that such detention should be ordered for one month and a maximum of three months *for good cause*.[33] In addition, the FRY CPC mandates that once a trial of a juvenile has commenced, it should be concluded within the shortest time possible.[34] Delays in the pre-trial and trial proceedings regarding juveniles should be strictly monitored and on some occasions authorised by the President of the Court.[35] During the trial of a juvenile, the court has the obligation to "be circumspect, mindful of the mental development, sensitivity and personal characteristics of the minor, so that the conduct of the criminal proceeding will not have an adverse effect on the minor's development."[36]

Under the FRY CPC Article 191 (2) custody may be ordered if one of the following four grounds for custody exist:

i. if he conceals himself or if his identity cannot be established or if other circumstances obtain which suggest the strong possibility of flight;
ii. if there is a warranted fear that he will destroy the clues to the crime or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, fellow defendants or accessories after the fact;

iii. if particular circumstances justify a fear that the crime will be repeated or an attempted crime will be completed or a threatened crime will be committed;

iv. if the crime is one for which a prison sentence of 10 years or more severe penalty may be pronounced under the law and if because of the manner of execution, consequences or other circumstances of the crime there has been or might be such disturbance of the citizenry that the ordering of custody is [urgently] **necessary** on behalf of the unhindered conduct of criminal proceedings or human safety. (emphasis added) [37]

An order of pre-trial detention should be made in a written decision which provides the legal basis and "a brief substantiation in which the basis for ordering custody is specifically argued."[38]

An order of custody prior to an indictment by an investigating judge can be appealed to a panel of judges who must decide on the appeal within 48 hours. After the initial period of one (1) month pre-trial custody, the custody may be extended by a maximum of two (2) months. There is a right to appeal this order. If the detention is ordered in the cases of a person charged with an offence that carries a sentence of more than five (5) years, a panel of the Kosovo Supreme Court can extend the detention for another three (3) months. Under *Regulation 1999/26*, this period can be extended to up to 12 months before an indictment is issued.[39]

When the grounds for pre-trial detention cease to exist, the FRY CPC mandates the termination of pre-trial custody.[40] If pre-trial custody is not terminated by the investigating judge within the period provided for by law and an indictment has not been issued, the detainee is entitled to immediate release.

Once an indictment has been issued and until the end of the trial, pre-trial custody can be ordered or terminated on the basis of a decision of a panel of judges after hearing the public prosecutor and shall be reviewed by the panel every two months. These decisions may be appealed.[41]

During the course of pre-trial detention, the FRY CPC does not provide for the right to make representations in person on appeals of detention orders or in an application for bail; these appeals always take place without the presence of defence counsel and the detainee.

(b) Extended Periods of Pre-trial Detention

In light of the fact that UNMIK has had to re-establish the justice system in Kosovo since July 1999, extended pre-trial detention has been a major issue of concern regarding defendants' rights during the EJS. However, LSMS has observed that some persons continue to be held in extended periods of pre-trial detention without indictment or trial, which is severely impacting the detainees' right to trial without undue delay or to release. LSMS has found that the cases of extended periods of pre-trial detention have disproportionately affected Kosovo Serbs. Also, in some cases of juveniles, the courts

have failed to proceed with the required urgency regarding the case to ensure that the pre-trial detention of juvenile is kept to the shortest time necessary.

Kosovo Serbs

Although some Kosovo Serbs who have been detained for around one year in pre-trial detention have been tried, some remain in detention at the writing of this report. For example, *Slobodan Joksimovic* has been detained since 9 July 1999. Although *Joksimovic's* trial was scheduled to take place in the Pristina/Prishtine District Court on 1 June 2000, it was postponed indefinitely. Other cases involving Kosovo Serbs have been postponed indefinitely in the Pristina/Prishtine District Court. For example, the trials of *Lubjomir Stolic* for attempted murder, who has been detained since 11 July 1999 and *Milos Skulic* for murder, who has been detained 23 June 1999 and indicted have been postponed indefinitely.[42]

Seven Kosovo Serb detainees have recently been indicted in the Prizren District Court just as they were approaching one year in detention, when they would have been entitled to release. The trial of the seven has yet to be scheduled. Nine other minority suspects, are detained in Mitrovica/Mitrovice Detention Facility under the jurisdiction of the Prizren District Court. These nine are still under investigation and will reach the limit of one year in detention prior to an indictment in September and October 2000.

In one of these cases involving a Kosovo Serb, *Suspect D*, who has been detained since October 1999, UNMIK police have requested his release. The recommendation of UNMIK police is based on the fact that their investigation into the case has uncovered no evidence to support the accusation, in particular that none of the witnesses could identify a photo of the suspect as a perpetrator. *D* has been detained for 10 months.[43] In a similar case, *Suspect M* was detained on 24 September 1999. On 29 October 1999, the public prosecutor of the Prizren District Court was informed by UNMIK police that none of the witnesses could positively identify the suspect as a perpetrator of the crime from a photo. After a delay of seven months in detention, the court suspended the investigation and *M* was released on 20 April 2000 due to the fact that witnesses could not support the allegation. In the case of *Suspect M*, the Prizren District Court violated their obligation to proceed with urgency when a defendant is in custody.

Juveniles

On 13 September 1999, two juveniles were arrested as accomplices to a murder allegedly perpetrated by an adult co-suspect. The general rule in the FRY CPC is that juveniles should be tried separately from adults using special procedures for juveniles.[44] However, in this instance, the court decided that the cases should be joined for the purposes of trial under an exceptional provision to the rule provided for by the FRY CPC.[45] Although the trial was scheduled to take place on 23 December 1999, it was postponed due to a question regarding the appropriate possible sentence for the adult suspect after the abolition of the death penalty under *Regulation 1999/24*. The question of the possible punishment for the adult did not affect the situation of the juveniles in the case. However, the court did not separate the cases in order to bring the juveniles to trial in December.

Rather, the two juveniles remained in custody, in an adult detention centre, for nine months, until 28 June 2000, when they were tried with the adult co-defendant. In the light of the fact that the provision for joining juvenile and adult defendants is at the discretion of the court, there was no justifiable reason for the delay in the trial of the juveniles in this case. As a result, the court failed, under the FRY CPC and international human rights standards, to bring these detained juveniles to trial within the shortest time possible.

Another juvenile, a Kosovo Serb who may be suffering from some form of mental impairment, has been detained facing genocide charges since 27 September 1999 despite the fact that the investigation against him was concluded on 23 December 1999. Although the trial was scheduled for 10 July 2000, it was postponed until 14 August 2000 on request of the international prosecutor. LSMS was informed by the President of the Court that he disagreed with this postponement. At the beginning of the trial, the international prosecutor amended the charges from genocide to "causing general danger." At this time, the juvenile had spent almost a year in pre-trial detention in an adult detention centre. In addition, on 16 August 2000 the name of the juvenile was released in a UNMIK press statement.[46]

The release of the juvenile's name was a breach of domestic and international laws, which seek to shield the identity of juveniles. Moreover, there was an unreasonable delay in the trial in this case in light of the fact that there was an eight-month period between the conclusion of the investigation against this juvenile and the trial where the charges were significantly reduced. Consequently, the court violated their obligation to proceed with "the greatest urgency" regarding this juvenile as mandated by domestic and international law. The juvenile was found guilty and, despite recommendations for release made by the international prosecutor and defence counsel, he was sentenced to correctional facility educational measures for between one to five years. Pursuant to the FRY CPC, juveniles under 16 years old at the time of the offence cannot be sentenced to imprisonment. However, no appropriate facility currently exists in Kosovo to provide such educational measures. As a result, it presently appears that the juvenile will remain in an adult detention centre for an indeterminate period of time. He was not released pending appeal. On 19 September 2000, another juvenile was found guilty of murder and sentenced by the same court to educational measures. It again appears that this juvenile will remain in an adult detention centre for an indeterminate period of time.

In another case, a juvenile was detained on 27 September 1999 after confessing to shooting another youth by accident and/or in self-defence. It was reported, well after the fact, that during his time in detention before the trial, the juvenile attempted to commit suicide, but did not receive the appropriate treatment. The trial proceedings that lasted around 4 months, included a reconstruction of the crime scene in the middle of the city, where the juvenile had to stand handcuffed on the street and re-enact the crime for approximately 5 hours. At the conclusion of the trial on 27 June 2000 and on hearing the proposed sentence of 7 years imprisonment, the juvenile became visibly upset and began banging and hitting furniture. After the trial, a psychiatric evaluation of the juvenile concluded that, currently and even prior to the offence and his detention, the juvenile was suffering from post-traumatic stress disorder and subsequently required intensive

treatment. Over the period of nine months in an adult detention centre and four months on trial, the court should have made greater efforts to conclude this trial in the shortest time possible. In accordance with this, the judge appears to have disregarded the state of the juvenile's mental health and not treated him with the appropriate sensitivity, despite the court's obligation to ensure so that the conduct of the criminal proceedings would not adversely affect the juvenile's development.[47]

In the case of a juvenile, who is an Albanian national, a court in Prizren held the juvenile in an adult detention centre for over 6 weeks, charging him with a car theft in Pristina. The court file contained a certificate from an Albanian neuro-psychological hospital dated 1 August 2000, which stated that the juvenile was "mentally-ill" and under constant medical care. At the final day of the trial, which was postponed 2 times, the juvenile's defence counsel did not appear as he was allegedly appointed to be a judge two days before. As a result, the juvenile judge on the case asked the court secretary to find a defence counsel present in the building. A defence attorney who had never been involved in the case appeared and spoke with the juvenile for two minutes. He never reviewed the court file on the case. During this time in the trial, the juvenile judge gave a witness the court file to read as the witness had stated earlier that "he could not remember anything about the case." The father of the juvenile who had been present in the trial but left during a break was never called back into the courtroom for the rest of the proceedings. The fact that the juvenile possessed a passport (not his own) stamped with a date of entry in Kosovo, 4 days after the alleged theft in Pristina, was never mentioned at trial although it corroborated the juvenile's story. No evidence was presented at trial that the juvenile had ever been in Pristina, let alone at the time of the theft. At the end of the proceedings, the judge found the juvenile guilty of car theft but sentenced him to "raised observations by the parents." The juvenile was then released.

On 22 August 2000, the Department of Justice issued an instruction to the courts reminding the courts of their obligations under domestic law regarding procedures involving juveniles.[48] This complements an earlier instruction to the courts, highlighting that the maximum period of pre-trial custody for juveniles set out by the domestic law is three months.[49]

(c) Pre-trial Detention Orders

Many, if not most, pre-trial detention decisions from the district courts and the Kosovo Supreme Court fail to state the specific facts and circumstances concerning an individual's case which warrant the imposition of pre-trial detention. In fact, in some pre-trial detention decisions, the court merely repeats the wording of the FRY CPC grounds for pre-trial detention without providing any facts regarding the individual's case which supports a deprivation of liberty. For example, in the case of *Nazim Hamiti*, discussed below, the court simply repeated *verbatim* Article 191 Para. 2 Section 2. Moreover, many decisions appear to be based fundamentally on the grounded suspicion that an individual has committed a crime. For example, a decision on the extension of detention from the Mitrovica/Mitrovice District Court states, "[T]his court has a reason for this decision and also the person in question will be indicted charged with violent sexual harassment…"

The practice of failing to provide specific facts which warrant the imposition of pre-trial detention on one or more of the four legal grounds violates both the FRY CPC and international human rights standards. Both the FRY CPC and international human rights law require specific argumentation supporting the deprivation of a person's liberty before they have been proven guilty of a criminal offence. In addition, international human rights law strictly prohibits the imposition of pre-trial detention merely on the basis of a grounded suspicion that the person detained has committed a criminal offence.

(d) Pre-trial detention on the grounds of protecting public order

The practice of failing to provide reasoned decisions as to an order for detention is of particular concern in regards to the imposition of Article 191 (2)(4) which is the ground for pre-trial detention on the basis of protecting public order. For instance, one extension of the pre-trial detention of a Kosovo Serb on this ground was justified "by being the accused already indicted," his release would cause disturbance to the citizenry or represent an obstacle to the conduct of criminal proceedings. The current application of Article 191(2) (4) by the courts may result in arbitrary pre-trial detentions.

Enes Haxhialjevic

On 1 April 2000, *Haxhialjevic* was arrested while present in an apartment of friends where more than 1 kilogram of marijuana was found. After being interrogated, *Haxhialjevic* was released by UNMIK police the next day. The other two suspects in the case remained in detention. On 10 April 2000, *Haxhialjevic* came to the court to be interviewed by the investigating judge. As the investigating judge did not have time to see him that day, he was asked to return. The next day on 11 April 2000, *Haxhialjevic* returned to be heard by the investigating judge. After the hearing, LSMS was informed that *Haxhialjevics'* detention was ordered on the basis of Art. 191 (2), (3) and (4). *Haxhialjevic* voluntarily went to the Detention Centre in Pristina/Prishtine where he was refused entrance because he had not been escorted by UNMIK police. The next day on 12 April 2000 *Haxhialjevic* was escorted to the detention facility.

Haxhialjevic pre-trial detention was ordered on the grounds that there were "particular circumstances that justify a fear that the crime would be repeated" and that "the manner of execution, consequences or other circumstances of the crime there has been or might be such disturbance of the citizenry that the ordering of custody is **[urgently] necessary** on behalf of the unhindered conduct of criminal proceedings or human safety." During his more than ten days after being released from detention, there was no evidence to suggest that *Haxhialjevic* of repeating a crime. *Haxhialjevic* had no criminal history. The only evidence collected and presented at trial was the testimony of the three defendants. By the time that *Haxhialjevic* was heard by the investigating judge, the other two defendants had provided their statements and the investigation was thereby concluded. The investigating judge informed LSMS that upon hearing the other defendants, he was sure that *Haxhialjevic* had been the primary instigator of the crime and he had ordered his detention because the co-defendants were in detention. Moreover, the investigating judge stressed that on the ground of public order the detention was justified for such an offence.

International human rights standards clearly prohibit the use of a grounded suspicion that a person has committed a crime as the sole ground for pre-trial detention. The FRY CPC explicitly states that pre-trial detention must be *[urgently] necessary* to ensure against a threat to public order. Under the ECHR, there must be evidence that a release would *actually result* in a disturbance to public order.[50] During more than ten days that *Haxihaijelivic* was released from custody, there was no disturbance of public order due to his release. Moreover, pre-trial detention of an individual must result from specific facts concerning that individual's case. The FRY CPC does not provide for an order of pre-trial detention on the ground that co-defendants are detained. However, it is common practice in the courts to order detention on the basis that co-defendants are detained.

Detainee B

Detainee B has been detained with her child since 18 May 2000. She is charged with the murder of her husband who she has confessed to shooting accidentally. The pre-trial detention of *Detainee B* is based, at least in part, on Article 191(2)(4), in that if she were released there might be "such disturbance of the citizenry that the ordering of custody is **[urgently] necessary** on behalf of the unhindered conduct of criminal proceedings or human safety or the protection of public order." LSMS was informed by the investigating judge that serious crimes such as murder justify pre-trial detention. He further explained that he supported the imposition of Article 191(2)(4) because the residents of *Detainee B's* village would not understand if a suspect for such a serious crime were freed. The judge reiterated to LSMS that the gravity of the offence justifies the pre-trial detention.

International human rights standards prohibit the use of pre-trial detention solely on the basis of the gravity of the offence. Moreover, many persons suspected of committing such serious offences as murder have been released from pre-trial custody. For example, *Suspect F*, a member of the Kosovo Protection Corps (TMK), the civilian organisation resulting from the demilitarisation of the Kosovo Liberation Army (KLA), was involved in a series of high profile shootings in the centre of Pristina/Prishtine which resulted in the death of a well known TMK (former KLA) Commander and another victim. *F* has been charged with mitigated murder in self-defence, "murder extended in defence of necessity," despite the fact that the ballistic expertise shows that the victim was shot in the back. Unlike *Detainee B* and her child, *F* has been released from pre-trial detention after his arrest. Additionally, the requirement under the FRY CPC and the ECHR that detention be [urgently] necessary to protect against a disturbance of public order requires a higher standard regarding the threat to public order than the explanation provided by the investigating judge in the case of *Detainee B*.

Nazime Hamiti

Hamiti, a 21 year old illiterate, was arrested and detained on the charge of murder after killing her baby immediately following the birth in Pristina/Prishtine Hospital. *Hamiti* claimed that the baby was the result of a rape and that she was so distressed after the birth that she was not aware of killing her baby. Despite this, the public prosecutor charged her with murder and not the crime of infanticide. During the hearing of *Hamiti* in front of the investigating judge and her trial, LSMS observed that she showed signs of serious

emotional distress. *Hamiti's* pre-trial detention was ordered on the basis of Article 191 (2), subsection 1, 2 and 4. Section 1 requires circumstances which "require a strong possibility of flight" and Section 2 requires "a warranted fear that the suspect will destroy clues to the crime or if particular circumstances indicate" that the suspect will hinder the investigation by influencing the witnesses.

The pre-trial detention order in *Hamiti's* case simply restated the language of the Section 2 without providing any particular circumstances which indicated that *Hamiti* could influence the witnesses, who were doctors and nurses from Pristina/Prishtine Hospital. In addition, there were no clues to the crime that *Hamiti* could have destroyed. Moreover, the decision did not provide specific facts which supported the imposition of Section 1, the fear of flight. The final ground for pre-trial detention was the ground of protecting public order, which was not substantiated by an particular circumstances that supported that *Hamiti's* pre-trial detention was '[urgently] necessary.' International human rights law prohibits the use of pre-trial detention as a punishment for crimes perceived as particularly morally reprehensible before the person has been proven guilty.

The current practice of the Kosovo courts in applying the grounds for pre-trial detention call into question the commitment of the courts to the presumption of innocence. LSMS has noted, in discussions with court officials, that their belief in a persons' guilt or the moral reprehensibility of their alleged actions play a major role in their decisions regarding pre-trial detention.

(e) Challenging Pre-trial Detention Orders

The current practices regarding the imposition of pre-trial detention in Kosovo make detention decisions extremely difficult to challenge. Between February and 31 July 2000, there were 71 proposals for extension of detention to the Supreme Court, and the Court approved all 71 proposals. In fact, LSMS is not aware of one case in which the imposition of pre-trial detention was overturned by a higher court.

Due to the fact that pre-trial detention involves the deprivation of an individual's liberty before he has been found to have committed a criminal offence, international human rights standards require that pre-trial detention decisions are regularly reviewable and challengable. LSMS has previously highlighted that the FRY CPC does not conform to international human rights standards as the provisions regarding review of detention decisions do not guarantee an effective forum for such review.

LSMS RECOMMENDATIONS

1. Any person deprived of their liberty despite a lawful order to release from a judicial authority should be immediately released.

2. UNMIK must establish a proper mechanism by which all persons detained in Kosovo can challenge the lawfulness of their arrest and detention at any time. In particular:

i. the Kosovo Supreme Court shall have the power to review any complaint by a detainee on the lawful nature of his arrest and /or detention;
ii. international judges should be appointed to the Kosovo Supreme Court to participate in sitting on these reviews;
iii. the review of the Kosovo Supreme Court shall consist of an open hearing in which the parties are present and can make representations;
iv. the decisions of the Kosovo Supreme Court shall be binding on all authorities in Kosovo.

3. UNMIK must create an accessible and effective mechanism for the provision of compensation to persons who have been unlawfully detained or otherwise entitled to compensation in accordance with the domestic law.

4. It is recommended that an order by COMKFOR to detain should cease until such time as they can be appropriately reviewed by a court.

5. KFOR and UNMIK police should cease the regular practice of detaining arrested individuals for 72 hours, or longer, before bringing them before a judicial authority in violation of the domestic law. Until such time as the FRY CPC is amended, all legal provisions concerning arrest and detention, such as the issuance of an arrest warrant and the written order to detain by the police should be followed by law enforcement authorities. Detention Centres shall release persons not subject to lawful orders to detain.

6. The UNMIK police Commissioner must ensure adequate distribution to the field of the applicable law and all relevant internal policy and procedures.

7. In line with *UNMIK police Bulletin 15*, law enforcement authorities must inform arrested individuals of their right to legal counsel including during interrogations and the right to remain silent. All persons arrested and/or detained should be provided immediate access to counsel. Additionally, all arrested individuals should be informed of the reasons for their arrest and, if detained, the right to inform or have law enforcement authorities inform their family of the arrest and place of detention. UNMIK police should ensure that all police stations contain signs or pamphlets informing arrestees of their rights.

8. Court officials should cease in providing UNMIK police with verbal orders to continue detention after the period of police custody and uphold the requirements of domestic law and international human rights standards regarding the right to be brought promptly in front of a judicial authority.

9. In cases involving juveniles, the courts must ensure that the investigations and trials proceed as quickly as possible when the juvenile is subject to pre-trial detention in accordance with domestic and international standards. Additionally, in juvenile proceedings courts need to uphold their obligations regarding the appropriate treatment of juveniles to ensure that the proceedings, including detention, do not

adversely affect the juveniles' mental and emotional development. UNMIK should increase funding, personnel and training of the Centres for Social Work to ensure that the courts meet their obligations under the law. Juvenile judges should receive specific training.

10. All detention orders by courts in Kosovo must set out the specific facts that support the imposition of any particular ground of pre-trial detention in line with the domestic law and international human rights standards.

11. KFOR, UNMIK police and UN Penal Management, the relevant authorities administering detention centres, should instruct detention centre commanders that they are obliged to release persons not subject to lawful orders to detain.

12. It is recommended that the SRSG revise the applicable law regarding the review of pre-trial detention decisions so as to include:

    i. The means by which to initiate a review of an order for continued pre-trial detention;

    ii. Access to effective legal representation;

    iii. Adequate time to prepare a response to an application for continued detention and, in any event, notice of an application to extend custody time limits no later than seven days before the hearing;

    iv. The right to make representations in person or through a legal representative;

    v. Advance disclosure of any evidence relied upon by the public prosecutor or the investigating judge as a basis for recommending continued detention;

    vi. Advance disclosure of any evidence which may undermine a recommendation for continued detention made by the investigating judge or the public prosecutor;

    vii. The opportunity to present relevant evidence; and,

    viii. A fully reasoned written decision as to the basis for an order for continued detention.

13. The Kosovo Judicial Institute should provide intensified practical workshop training to all judges and public prosecutors on the imposition of Article 191 of the FRY CPC regarding pre-trial detention.

14. Defence lawyers should be trained in providing effective representation regarding the imposition of pre-trial detention.

[1] Art. 9 (4) ICCPR and Art. 5 (4) ECHR.
[2] Art. 9 (5) ICCPR, Art.5 (5) ECHR.
[3] *See* Art. 12, Art. 545 FRY CPC.
[4] *See* Art 9 (4) ICCPR, Art. 5 (3) ECHR.
[5] *See* Schiesser v Switzerland, A/34 (1979) 2 EHRR 276 "judicial control of interference by the executive with the individuals right to liberty."
[6] *Id*. The Court states that a characteristic of this officer "is his independence of the executive and of the parties."
[7] *Id*. Court has explicitly stated that a prosecutor does not qualify as such an officer, nor does a officer that may later assist in the prosecution.
[8] *See* UN Human Rights Committee, General Comment No.8, para. 2
[9] *See* Brogan v U.K A/145-B (1988) 11 EHRR 117.
[10] *See* Art. 192, Art. 197 FRY CPC.
[11] *See* Art. 195 FRY CPC.
[12] *See* Art. 196 FRY CPC.
[13] *Ibid*.
[14] Art. 192 FRY CPC.
[15] *See* also, Principle 17 (1) of the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment.
[16] Murray v. UK (1996) 22 EHRR 29.
[17] Article 9 (2) of the ICCPR and Article 5 (2) of the ECHR.
[18] *See*, for example, Funke v France (1993) 16 EHRR 297 and Article 14(3)(g) ICCPR.
[19] *See* LSMS *Report No.7: Access to Effective Counsel, Stage 1: Arrest to the First Detention Hearing*, 23 May 2000.
[20] *See* Art. 200 FRY CPC.
[21] Since this case, the use of polygraph tests has been abolished by UNMIK police, *see* UNMIK Police Bulletin 30, "*Utilisation of Polygraph Examinations*," 5 May 2000.
[22] *See* Art. 37 (b) of the Convention on the Rights of the Child. *See also*, Rule 1 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.
[23] Wemhoff v FRG, A 7 p 24 (1968).
[24] Letellier v France, A 207 para 35 (1991).
[25] ECHR Article 5 (3) and (4) and ICCPR Article 9 (3) and (4).
[26] (1992) 14 EHRR 551, Neumeister v Austria (No.1) (1979-80) 1 EHRR 91 has now been overruled
[27] *See*, for example, Woukam Moudefou v France (1991) 13 EHRR 549.
[28] Art. 3 FRY CPC.
[29] Article 190 (2) FRY CPC.
[30] Article 462 FRY CPC.
[31] *See* Article 474 (1) FRY CPC.
[32] *See* Article 473 FRY CPC.
[33] *Id.* at Section (2).
[34] Article 462 FRY CPC.
[35] Article 484 FRY CPC.
[36] Article 454 (2) FRY CPC.
[37] The Serb text suggests urgently necessary.
[38] Article 192 (2) FRY CPC "Custody shall be ordered in a written decision containing the following: the first and last name of the person being taken into custody, the crime he is charged with, the legal basis for custody, instructions as to the right to appeal, a brief substantiation in which the basis for ordering custody shall be specifically argued, the official seal, and the signature of the judge ordering custody."
[39] LSMS has already reported on the failure of *Regulation 1999/26* to conform with international human rights standards. *See* LSMS Report No.6 *The Unlawfulness of Regulation 1999/26*.
[40] Art. 190 (3) FRY CPC provides that "throughout proceedings custody shall be terminated as soon as the grounds on which it was ordered cease to obtain."
[41] Article 199 (1) (2) (3) (4) FRY CPC.
[42] These two men escaped from detention on 2 September 2000.
[43] Suspect D has since escaped from detention.

[44] *See* Article 457 (1) FRY CPC.
[45] Id. at Section (2).
[46] http//www.un.org.- 16 August 2000 *Trial of Man Charged with Genocide Starts in Mitrovica*.
[47] The judge in this case was the President of the District Court, not an appointed juvenile judge.
[48] UNMIK Justice 2000/18: *Proceedings Involving Juveniles,* 22 August 2000.
[49] UNMIK Justice 2000/6: *Custody of Juveniles,* 16 May 2000.
[50] *See*, for example, Letellier v France (1992) 14 EHRR 83 at Para.51.

SECTION 5: THE RIGHT TO COUNSEL

International fair trial standards impose a dual obligation on the state regarding court-appointed counsel: first, adequate time and facilities must be provided in order to ensure the proper preparation of the defence[1] and second, the legal representation provided must be adequately qualified and experienced. Counsel must provide services that are "practical and effective."[2] A "manifest" failure to represent a defendant effectively is a violation of the fair trials standards. Although the conduct of a case is a matter between the defendant and counsel, the state is required to intervene if the failure by counsel to provide effective representation is "manifest." [3]

I. The Domestic Law

The FRY CPC contains a number of provisions dealing with the role of defence counsel during the investigative stage, that clearly envisage an active role for defence counsel. Similar provisions that relate to the trial stage, such as the right to request additional evidence and the right to object to the admissibility of evidence, among others, are also provided for in the FRY CPC. For the sake of this overview, the relevant provisions of the investigative stage will be examined and divided into three categories: The "Watchdog" Function, The Examination and Collection of Evidence Function and The Guiding and Assisting the Investigation Function. It is imperative that adequate facilities and procedures are in place in order to ensure that defence counsel can perform these functions effectively.

(a) The "Watchdog" Function

According to the FRY CPC the courts and other relevant authorities are under a duty to truthfully and completely establish the facts important to the rendering of a lawful decision and, with equal attention, to establish those facts both for and against an accused.[4] Moreover, once the decision to initiate an investigation has been taken, the court is under a broad duty to gather, amongst other things, all evidence and information necessary for deciding whether or not to bring an indictment; all evidence that may not be available at trial, or the presentation of which may prove difficult at trial; and all other evidence that may be useful to the proceedings.[5] As a part of the "watchdog" function, defence counsel is obliged to ensure that the court performs these tasks properly, the consequences of the court's actions will have a direct impact upon the investigation and may affect the defence at trial.

During the first examination, the accused must be allowed to present his position concerning all incriminating circumstances and to present all facts in his favour.[6] In a mandatory defence case, the examination *must* take place in the presence of defence counsel.[7] In a non-mandatory defence case and in the absence of an express waiver, defence counsel should also generally be permitted to attend the examination, except where the accused has failed to provide counsel despite having been given 24 hours notice to do so,[8] where counsel fails to attend the hearing despite having been given sufficient notice, or where counsel has been denied access to an investigatory action.[9] A

breach of the safeguards governing the examination of the accused may render the accused's statement inadmissible.[10]

Consonant with their "watchdog" function, defence counsel may lodge a complaint with the President of the District Court on the basis of a prolongation of proceedings or other irregularities in the conduct of the investigation.[11]

(b) The Examination and Collection of Evidence Function

The FRY CPC contains provisions granting defence counsel the right to examine evidence during the investigation. Once a decision to conduct an investigation has been taken, Article 73 (1) FRY CPC guarantees defence counsel access to the case records and to the physical evidence that has been gathered.[12] As a practical matter this must include the police file which may contain investigatory leads and impeachment material.[13] Where it is in the interests of the proceedings, the investigating judge is also under a duty to disclose to the defendant and defence counsel, before the close of the investigation, all important evidence gathered in the investigation.[14] On the basis of the examination of such evidence, defence counsel may, for example, make motions for the presentation of fresh evidence. These disclosure provisions must be interpreted broadly, consonant with defence counsel's watchdog function and the need to ensure the proper preparation of the defence at trial.

(c) The Guiding and Assisting the Investigation Function

The FRY CPC envisages an active role for defence counsel in guiding and assisting the conduct of the investigation and challenging the basis for an indictment. Before reaching a decision to initiate an investigation, the investigative judge may request an oral hearing with the prosecution and the defence in order to clarify relevant matters.[15] The defence may appeal, to the panel of judges, against a decision to conduct a preliminary investigation.[16]

According to FRY CPC Article 167 (1) and (2), defence counsel may, during the conduct of the investigation, file motions with the investigating judge or the relevant law enforcement agency for certain investigatory actions to be taken. Moreover, according to FRY CPC Article 168 (8),

> "Persons who attend investigatory proceedings may propose that the examining magistrate put certain clarifying questions to the accused, witness or expert witness, and with the permission of the examining magistrate they may also put questions directly. Such persons have the right to have their remarks concerning the performance of certain actions entered in the record and they may also propose that certain evidence be presented."

Finally, the domestic provisions outlined above are not only important because of their potential effect upon the defence at trial, but also because once an indictment has been brought, the accused and/or defence counsel may challenge that indictment within 8

days.[17] The grounds upon which an indictment may be dismissed include, for example, insufficiency of evidence or other circumstances precluding criminal responsibility.[18]

II. The Right to Adequate Time and Facilities to Prepare a Defence

(a) Access to Legal Representation

LSMS interviewed one-hundred and ninety-six detainees on various access-to-counsel issues in Kosovo's five regions.[19] Of the detainees asked, *none* reported that they had access to defence counsel whilst in detention, prior to the first detention hearing. They indicated a lack of basic facilities (*i.e.* telephones are not made available to them and they are not permitted to have pens, pencils or other writing materials), which presents an immediate barrier to contacting a lawyer prior to the first detention hearing. In Pristina/Prishtine and Pec/Peje detainees have reported that they are not permitted visitors during the first 72 hours or prior to the first detention hearing. These restrictions also apply to family members, who otherwise may have been able to assist them in securing counsel during that time period.[20] In Pec/Peje, detainees have consistently reported that family members need authorisation from the investigating judge before they are permitted to visit.[21]

For the vast majority of those detainees interviewed, the problem of access-to-counsel appears to be caused, at least in the first instance, by a lack of procedural mechanisms by which to *appoint* or *authorise* defence counsel prior to the first detention hearing.[22] Furthermore, in Pristina/Prishtine, in the few reported cases where detainees were able to retain counsel, either prior to turning themselves over to the police, or whilst in police custody through family members, only one had access to that lawyer at the detention facility prior to the first hearing**.** In that case the Pristina/Prishtine detainee reported that, at the first hearing, he requested that the investigating judge appoint counsel and permit the detainee to speak with the lawyer, in confidence, before continuing the hearing. The investigating judge granted the request and sent the detainee back to the detention centre where he was permitted to meet with counsel. He then was returned to court the same day and the hearing was conducted with the lawyer present**.**

For the Kosovo Serb detainees, these problems are further exacerbated by the scarcity of Kosovo Serbian lawyers available to take court appointments. This may give rise in the future, to potential conflict of interest issues. It has also been alleged that the Courts fail to actually appoint the Serbian lawyers that are available. In the Pristina/Prishtine region, there are reportedly four known Kosovo Serb lawyers available to take court appointments[23]; only two are actually being appointed. In Mitrovica/Mitrovice, eight Kosovo Serb lawyers are reported to be available for appointment; only one is actually being appointed. In the Gnjilane/Gjilan region, only one Kosovo Serb lawyer is available for appointment.[24] No Kosovo Serb lawyers are reportedly available for appointments in either Prizren or Pec/Peje.

The failure to provide procedures and facilities by which a detainee, who so desires, may contact counsel and the stark scarcity of Kosovo Serb defence counsel, highlights the

failure of the relevant authorities to fulfil their positive obligation to provide access to counsel.

(b) Physical Access Issues

Adequate Facilities and Access to Defence Counsel

In cases where detainees had secured authorised or appointed counsel, they continued to report a lack of basic facilities to communicate freely with counsel other than through lawyer visits (*i.e.* telephones are not made available to them and they are not permitted to have pens, pencils or other writing materials). Some detainees in Pristina/Prishtine reported that they are, however, able to get messages to their lawyers through family members.

Authority Restricted Access

In Mitrovica/Mitrovice, the Kosovo Serb lawyers interviewed reported that (i) they are not permitted to speak with their clients prior to the first detention hearing; and (ii) they are not permitted any confidential communications with their clients until after the conclusion of the investigation and after the indictment has been issued. These lawyers reported that, before each and every visit with their client, they must obtain a written "permission slip" from the investigating judge. The permission slip sets forth the date and length, in minutes, of each visit. [25] The provisions of the FRY CPC which allow the court to regulate access of defence counsels to their clients are incompatible with international human rights standards as they negatively impact the ability of defence counsels to adequately and effectively represent their clients.

Defence counsel in Gnjilane/Gjilan reported that, whilst they are theoretically able to visit their clients without restriction, the entry procedures for Camp Bondsteel frequently take from one to three hours. The length of these entry procedures reduces the time counsel is able to spend with his or her client and have resulted in a decrease in the frequency of the visits.

(c) Confidential Communications

In Gnjilane/Gjilan, twenty-three out of thirty-five detainees interviewed indicated that their meetings with defence counsel took place in the presence of a detention facility representative or supervising officer.

In Mitrovica/Mitrovice, the Kosovo Serb lawyers interviewed indicated that each visit with their clients must be conducted in the presence of either a member of the investigating judge's staff, or a detention officer. These lawyers have made clear that it is the District Court, and not the detention center, that is imposing these requirements. One of the lawyers interviewed believes that the penalty for attempting to communicate confidentially with his client, without the permission of the investigating judge, would be the court-ordered cessation of all of his attorney visiting privileges. The District Court

has not confirmed this. In Lipjan/Lipljan Detention Centre, the acting head of the facility, an international, insisted on sitting in during the communication between counsel and client.

(d) Access to Court Files

The information gathered by the police both prior to and after arrest is critical to the conduct of the defence. It may provide, for example, investigatory leads and impeachment material. A public prosecutor in Pristina/Prishtine reported that defence counsel are provided access to the police file after the investigating judge has authorised or appointed them to the case. By contrast, in Mitrovica/Mitrovice, the Kosovo Serb lawyers interviewed by LSMS, in April 2000, reported that they are **never** given access to the police file, not even after the indictment has been issued. These defence counsel report that they are permitted to copy only those pages of the court files approved by the investigating judge, but that *all police documents are "sealed."*

The Department of Justice has, on 26 May 2000, issued Circular Justice/2000/7 dealing with access to court files. The circular confirms the critical nature of defence counsels' access to court files in order to prepare the defence and challenge pre-trial detention.[26] Defence counsel is also entitled to copy the case files and court appointed counsel may do so without charge. The relevant authorities should ensure that adequate facilities are available for copying to take place.

III. The Right to Effective Legal Representation

During the EJS, the trials being conducted were held in the Prizren District Court and a significant number were for relatively minor offences. There was insufficient evidence to draw any broad conclusions as to the effectiveness of defence counsel in Kosovo. However, between 1 February 2000 and 31 July 2000, the total number of completed trials is **one hundred and sixteen**, and range from assault to rape and aggravated murder. Of these trials, **LSMS has monitored seventy-seven cases, some sixty-six percent (66%) of all district court trials.**

(a) International Fair Trial Standards

Although international human rights standards form part of the applicable law in Kosovo, LSMS can recount only two occasions in which either a trial panel or counsel made reference to them.[27] The evidence seems to suggest that defence counsel are entirely unaware of these standards.[28]

The principle of "equality of arms," between state and defendant, ensures that both parties are treated procedurally equally. For example, a defendant should not be placed at a disadvantage simply because he does not have, as the prosecution do, adequate funding for a forensic expert. To date, this principle seemingly has no place in the legal culture in Kosovo, despite the fact that the FRY CPC makes provision for an active defence. As a result, in trials monitored by LSMS, defence counsel seem more like bystanders than

lawyers who should be actively engaged in the effective representation of their client. Although this failure may be to some extent historical, it may also be financial. The **maximum** monthly salary for court-appointed counsel is 500 DM.[29]

Of the seventy-seven cases monitored, LSMS has not observed any case in which the defence requested the court to provide funds for forensic or investigatory assistance.[30] Moreover, with the exception of *Muriuki et al*, LSMS has not identified any case in which the defence introduced forensic or investigatory evidence.[31] It seems that this failing is predominately a result of a lack of knowledge or understanding of the "equality of arms" principle.

(b) The Conduct of Defence Counsel and Effectiveness

Many of the detainees interviewed reported that they are rarely visited by counsel during the investigation phase; that counsel engages in little, if any, discussion about their cases; and that they are not kept apprised of what is happening in the investigative proceedings. Indeed, many claim that they have never been told, or are confused about, what precise crime they are alleged to have committed.

For example, in Gnjilane/Gjilan, twelve of the detainees interviewed reported that they had never received a visit by their retained or court appointed defence counsel. In Pristina/Prishtine, a detainee charged with murder and represented by a court appointed lawyer reported that he had *one* attorney visit in *7 months*; another reported that he had *one* attorney visit in *6 months*.[32] Even in cases where detainees are visited by counsel more frequently, the overwhelming majority of detainees reported that, on average, the lawyer's visits were for 10 to 15 minutes.

The brevity of the attorney visits is, in some cases, driven by restrictions placed upon defence counsel by the authorities. For example, the brevity of the lawyer visits in Mitrovica/Mitrovice is a direct result of the time restrictions imposed by the Court and the Court's prohibition on confidential communications between defence counsel and detainees. Similarly, in Gnjilane/Gjilan, time restrictions are also being placed on attorney visits, although it is unclear as to whether these restrictions are imposed by the Court or the detention authorities.[33]

In other cases, the brevity of the attorney visits appears to be directly related either to what is perceived to be inadequate pay by UNMIK or to attorney misconduct. Eight defence counsel in Gnjilane/Gjilan reported that, due to the low levels of pay in court appointed cases, they cannot afford to invest the same time into those cases and are thus less proactive in their conduct of the defence. Detainees in Pristina/Prishtine, Gnjilane/Gjilan, and Pec/Peje have reported that certain court appointed lawyers have demanded that the detainee pay them money to continue visiting and/or working on the case. Thirteen detainees in Gnjilane/Gjilan have reported that every visit by their defence counsel was conducted in a "group" setting with the lawyers other clients. These "group" meetings with clients are of concern in that, as to the individual detainees, communications in those meetings clearly are not confidential.

Detainees in Mitrovica/Mitrovice and Pristina/Prishtine have also reported similar group meetings. The issue in Mitrovica/Mitrovice is of great concern since a large number of detainees, charged with war crimes related offences, are represented by the same counsel. This counsel informed LSMS that he was prepared to go to trial in 20-odd cases, although he conceded he was without an office, car or any administrative, investigatory or forensic assistance whatsoever.

(c) Monitored Cases

Of the seventy-seven cases monitored, LSMS has detected a common pattern, namely, defence counsel's:

i. failure to request any forensic analysis;
ii. failure to adequately investigate, prior to trial, the prosecution and defence case;
iii. failure to adequately question witnesses;
iv. failure to present any supporting evidence at trial; and,
v. failure to object at trial to inadmissible evidence.

The cases set out below are not an exhaustive list, but rather examples of the broad problems in Kosovo.

Pec/Peje

Defence counsel was appointed by the court to represent a juvenile charged with murder (both the victim and defendant were former KLA soldiers).[34] Defence counsel informed LSMS that, prior to trial, the victims' family had threatened him not to represent the juvenile. Although he ignored their request, he informed LSMS that during his representation of the juvenile, he felt "*psychologically threatened*." The defendant alleges that, prior to trial, defence counsel had visited him on four to six occasions over a period of nine months. Although the defendant allegedly tried to commit suicide and on occasion was heavily sedated whilst in detention, defence counsel failed to request a psychiatric report. Defence counsel informed LSMS that he would not get paid more money for visiting more often. As for trial preparation, counsel stated that he would prepare once he heard what the witnesses testified to.

During the trial, defence counsel presented no defence and spoke rarely. As a result, the defendant, aged 17, took it upon himself to make objections to aspects of the trial. At one stage, the defendant even requested the court to call a number of witnesses in order to support his defence of self-defence and/or accident. The court denied the request. The majority of the trial was seemingly conducted by the victim's counsel. The public prosecutor played no role in the procedure and was even absent during the verdict. The defendant was convicted and sentenced to seven years imprisonment.

Following the trial, a psychiatric evaluation of the defendant was conducted. It concluded that, prior to the offence, the juvenile was suffering from chronic post-traumatic stress

disorder caused by his involvement in the war and that it required intensive psychotherapy. Thus, what may have been a crucial issue at trial, namely, the defendant's mental state at the time of the offence, was never raised by defence counsel.

Edin Gusinac, a Bosnian-Muslim*,* was indicted for fraud and faced a possible sentence of five years imprisonment. Although counsel informed LSMS that he had been appointed by the court to represent *Gusinac*, he failed to attend the trial. The case proceeded with the defendant unrepresented. The defendant was convicted and sentenced to two-years and four months imprisonment. The verdict was reversed on appeal. The appellate court stated that the defendant was unrepresented at trial and this was in violation of the ECHR. It then emerged that the same lower court had earlier failed to appoint counsel to another defendant, *Ismet Krusha*, a Kosovo Roma, who was charged with sexual assault. He was convicted and sentenced to twelve months custody. Following the conviction, LSMS was informed by the court, that the trial judge was of the view that *Krusha* did not understand the proceedings and may be suffering from a mental illness. His appeal is pending.

In the trial of *Shaqir Dobrani*, indicted for Attempted Murder and Illegal Weapons Possession, defence counsel was present for the reading of the indictment and then left court, only to return for his closing speech. The defendant was acquitted.

Gnjilane/Gjilan

In *Besim Emini*, defence counsel attended the questioning of the alleged rape victim before the Investigative Judge. However, due to another engagement he left before the end of her testimony and failed to question the victim. This witness then failed to attend the trial and her statement before the Investigating Judge was admitted into evidence, over the objection of the defence counsel. The defendant was convicted and sentenced to six years imprisonment.

In *Selman Fejza et al,* indicted for Attempted Murder, one defence counsel also represented the victim. During the trial defence counsel withdrew from representation and the court appointed one of the co-counsel for the other defendants to represent *Fejza*.

In *Hyr Marovci,* defence counsel arrived some five minutes into the trial of a defendant he had not met before. In *Halim Halili*, court-appointed defence counsel was observed reading the court file some twenty minutes prior to trial. He was then introduced to the defendant, whom he had not met previously. A similar problem was identified in the trial of *Fatmir Mehmetit*, where counsel was granted five minutes to introduce himself to his client and discuss the case.

In *Faredin Shabani*, indicted for Rape, the victim failed to attend the trial. No explanation was provided for her absence. In any event, defence counsel did not object to the trial proceeding and nor did he object to the reading of her statement, which was the only evidence implicating the defendant in the crime. This was a statement that had been given to UNMIK police, as a result the defendant was never given the opportunity to

examine the witness. This statement was the primary evidence against the defendant. The defendant was convicted and sentenced to five years imprisonment.

Prizren

A trial of three juveniles, charged with aggravated theft, proceeded in the absence of the defence counsel that represented two of them. The court stated for the record that the defence counsel had telephoned, advised that he was running late and that the court should proceed with the questioning of the third juvenile (whose counsel was present) in his absence. Because of prior delays and the fact that one defendant had been in custody for more than three months, the court conducted the entire proceeding against all three in the absence of the lawyer. The alleged victims did not appear at trial to provide testimony, nonetheless the court admitted into evidence the statements that the victims gave to the investigating judge, reportedly without objection by the parties. Two juveniles were convicted and one was acquitted. LSMS later spoke with defence counsel, who explained that he missed the trial due to "an unavoidable family obligation." He informed LSMS that he failed to communicate this to the court.

Pristina/Prishtine

In the pre-trial investigation hearing of a Kosovo Serb charged with war crimes, defence counsel left the hearing, informing his client to answer the judges questions. In another such hearing, when a defendant requested counsel, the court typist was sent out to look for one. None was found and the hearing continued.

The lawyer representing *Moses Omweno* was also representing his co-defendant although there was a clear conflict of interest since the co-defendant had implicated *Omweno* in the offence. In another case a lawyer represented all three co-defendants in the pre-trial stage despite the fact that their defences directly conflicted.

Nazime Hamiti, killed her new born child five hours after giving birth and was charged with murder, not infanticide. The defendant claimed, and the prosecution did not challenge, that the pregnancy was the result of a rape. During the investigation hearings and the trial, *Hamiti* was constantly crying and in distress. There was a psychiatric report in the case. Although it was in the court file, defence counsel failed to obtain a copy of this document. The report concluded that *Hamiti* was not suffering from any mental illness at the time of the offence. Inexplicably, the report relied on *Hamiti's* husband's comment, made during the investigative hearings, that she had "betrayed" him on previous occasions and that during the war "*people saw her with a lot of men,"* the clear inference being that the husband did not believe her claim of rape.

Defence counsel informed LSMS that she did not request an independent psychological evaluation because she did not have the money and that she expected an acquittal. The UN Prizren Detention Facility apparently concluded that *Hamiti* was "borderline competent" and suffers from a mental illness that pre-exists the criminal offence. Defence counsel failed to adduce this report into evidence.

At trial, defence counsel was mostly passive, asking few questions and failing to adduce any supporting evidence. For example, *Hamiti's* brother had provided a statement to the police stating that the husband had informed him that the pregnancy was the result of a rape and that he, the husband, did not want the child. Since the verdict, the court has informed LSMS, that the conviction was partly based on the husband's testimony to the investigating judge (although summonsed he failed to attend the trial). *Hamiti* was convicted and sentenced to five years imprisonment.

In *Afrim Hasani*, indicted for Aggravated Rape, defence counsel was appointed three days prior to trial and informed LSMS that he was ready for trial. At trial, the prosecution proposed the reading into the trial record statements of two US KFOR soldiers, one of which was extremely prejudicial to the defendant. In this statement, the witness claimed to have found the defendant in the process of assaulting the victim and the victim exclaiming, in the defendant's presence, "he raped me," an allegation the defendant denied. Defence counsel failed to object to the admission of this statement, informing LSMS that he was against a further delay in the proceedings and that it was quite common for such statements to be read. The KFOR statements were central to the prosecution, in that the victim failed to identify the defendant. The defendant was convicted and sentenced to three and a half years imprisonment.

IV. Training

In order to develop and facilitate the training of judges, public prosecutors and other relevant legal personnel, the OSCE established the Kosovo Judicial Institute. Training seminars have been conducted for judges and public prosecutors, the first being in November 1999.[35] In May 2000, practitioners received training, in a joint Council of Europe/OSCE seminar, on Articles 5 and 6 of the ECHR. Similar training is due to take place in September 2000. Despite these training efforts, and bearing in mind the problems outlined in this section of the report, there is a clear continuing need for intensive training on human rights within the criminal law context for all court actors, particularly including defence counsel.

The problems facing the defence bar are complicated by the fact that with each round of judicial appointments, the number of defence lawyers is dwindling. As of 1 September 2000, there are approximately seventy "qualified" defence lawyers remaining in the province. This figure may be misleading because anecdotal evidence suggests that a significant number of these lawyers are either not practising or will not take on criminal cases.

Given this problem, there is an urgent need to develop a larger pool of defence counsel. For example, Pristina/Prishtine University could develop a clinical program for law students to represent defendants charged with minor offences.

In September 2000, the Institution-building Pillar, in co-operation with the American Bar Association and the Council of Europe, conducted a pilot-project seminar for defence

counsel called "*Effective Representation of a Criminal Defendant in the Kosovo Courts*."[36]

LSMS RECOMMENDATIONS

1. KFOR, UNMIK police and UN Penal Management should equip detention centres and police stations with adequate facilities for the accused to exercise his/her right to counsel, such facilities may include, for example, access to telephones or to a relative or friend.

2. KFOR, UNMIK police and UN Penal Management must ensure that the accused and his/her defence counsel are able to communicate freely, without time or other restrictions, at all stages of the criminal process. The accused and his/her defence counsel must be guaranteed confidential communications, whether written or oral, at all stages of the criminal process. Oral communications may take place within the sight, but not the hearing, of others. UNMIK and the courts must provide all necessary facilities for such communications. Provisions of the domestic law in violation with international standards, specifically article 74 (2) FRY CPC, must be amended or abolished.

3. The courts must provide sufficient notice to defence counsel of any relevant hearings or investigative actions, particularly involving the taking of witness testimony. The failings of defence counsel must not be attributed to the accused, and in cases where counsel fails to attend such hearings, whether with or without good reason, the relevant part of the investigation must be re-opened, if the interests of justice require. In exceptional cases involving, for example, repeated failures of counsel to attend without good cause, the court must appoint new counsel.

4. The relevant authorities must disclose *all* evidence, both favourable and unfavourable, to the accused or his counsel within a reasonable time of receipt.

5. The courts must ensure that defence counsel has free access to relevant court documents and evidence, including the police file, at all stages of the criminal process. Adequate facilities must be made available for defence counsel to copy all relevant files and evidence at no cost.

6. All relevant personnel, including judges, public prosecutors and defence counsel, must be provided practical training on their roles and responsibilities and the rights of the accused during the investigative proceedings. UNMIK could obligate all court-appointed counsel to take part in on-going legal education.

7. An office of criminal defence should be established and be made available to act as a resource and assistance centre for defence counsel.

8. A Code of Ethics providing guidance as to the conduct and responsibilities of prosecution and defence counsel, particularly court-appointed defence counsel, should be issued. A Draft Law Advocates Code of Ethics is currently under review by representatives of the Kosovo Bar Association, with the assistance of OSCE.

9. The Disciplinary Council of the Bar Association should be empowered so as to properly address complaints made by defendants, judges and other relevant authorities, regarding allegations of misconduct on the part of defence and prosecution counsel. Accused persons must be fully informed as to their right to bring complaints and procedures. The appropriate procedures for filing a complaint must be must disseminated and easily accessible. The composition of this body should be representative of Kosovo's advocates and legal community.

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[1] *See* Biondo v Italy No. 8821/79, 64 DR 5 (1983) Com. Rep.; Kamasinski v Austria A 168 (1989).
[2] Artico v. Italy (1981) 3 EHRR 1.
[3] Kamasinski v. Austria (1991) 13 EHRR 36. *See also* Daud v. Portugal (1998) EHRLR. These cases refer to court-appointed counsel.
[4] Article 15 (1) and (2) FRY CPC.
[5] Article 157 (2) FRY CPC.
[6] Article 218 (5) FRY CPC, see also Article 4 (2) FRY CPC.
[7] *See* Article 218(9) FRY CPC. Mandatory defence cases are defined by Article 70 (1) and (2) FRY CPC as those cases where the accused is mute, deaf or incapable of effectively defending himself, or if proceedings are being conducted for a crime for which the death penalty may be pronounced [the death penalty is no longer applicable in Kosovo] or where an indictment is brought for a crime carrying a sentence of ten years or more.
[8] But, in the case of indigence, *see supra* n.11.
[9] *Ibid. See* also Article 67 (2) FRY CPC. Article 168 (5) and 73 (2) FRY CPC envisage the exclusion of defence counsel and the accused from certain investigatory actions where the interests of domestic defence or national security require. Whilst Article 73 (2) limits exclusion to the examination of certain documents or items of physical evidence, it is not clear that Article 168 (5) is also so limited. In any event, any exclusionary provisions must be given an extremely restricted reading.
[10] Article 218 (10) FRY CPC.
[11] Article 181 (1) FRY CPC.
[12] FRY CPC Article 73 (2) provides that in exceptional cases involving issues of national security defence counsels' access to evidence may be *temporarily* restricted.
[13] The decision to initiate an investigation and to continue detention is largely based upon the police file. *See* generally *LSMS Report No.7 Id*. n.1.
[14] Article 173 (1) FRY CPC.
[15] Article 159 (3) FRY CPC.
[16] Article 159 (5) FRY CPC.
[17] Article 267 (1) FRY CPC.
[18] Article 270 FRY CPC.
[19] LSMS interviewed more than sixty detainees in Pristina/Prishtine, fifty-two in Mitrovica/Mitrovice, thirty-five in Gjilane, thirty in Pec/Peje, and nineteen in Prizren (where the monitor reported that additional interviews on these issues where suspended because of a lack of co-operation from the detainees).
[20] The practice of denying visits with family members until after the first detention hearing violates Principles 16 (1) and 19 of the *UN Body of Principles* and Rule 92 of the *UN Standard Minimum Rules for the Treatment of Prisoners*.
[21] Authorisation must be obtained pursuant to Article 203 (1) FRY LCP.
[22] LSMS monitors have reported that the detention centers in Gnjilane/Gjilan, Mitrovica/Mitrovice, and Pec/Peje are refusing to grant defence counsel access to their clients unless the defence counsel proves that

he or she is appointed or authorised counsel in the case. In general this does not occur until the first hearing.

[23] Two of the four may presently be refusing to accept appointments.

[24] It is unclear as to the scope of the area within which this lawyer is available to work.

[25] A copy of the permission slip is in the possession of LSMS.

[26] FRY CPC Article 131 and 73 deals with access to records and evidence.

[27] *See* Pec/Peje and Gnjilane/Gjilan cases.

[28] In May 2000, a trial judge informed LSMS that he was unaware of international human rights standards. When shown a copy of the ICCPR, he expressed total ignorance of the document (it was entered into force in 1976).

[29] Judges are also underpaid: minor offence court judges are paid approximately 480DM/mth, municipal court judges approximately 600DM/mth, district court judges approximately 720 DM/mth and Supreme Court judges approximately 840DM/mth.

[30] State forensic testing is currently performed by the Bulgarian authorities.

[31] The *Muriuki and others* trial took place in August 2000. Defence counsel was supported by international counsel hired by *Care International*, who hired their own investigator.

[32] Not all detainees reported these types of extremes. In Pristina/Prishtine, seventeen detainees reported that they are visited at least one time per week. Nine detainees reported lawyer visits at least every 2 weeks. By contrast, in Gnjilane/Gjilan, the best case scenario was visits every two weeks.

[33] In four cases, the visit was restricted to less than 5 minutes; in 8 cases to between five and ten minutes, in 8 cases between ten and fifteen minutes, and in 2 cases between fifteen and twenty minutes or more.

[34] LSMS policy is not to name juveniles, convicted or otherwise, in public documents.

[35] Seminars and workshops for the newly appointed judges and public prosecutors took place in March, July and August 2000. All participants were provided with ECHR basic texts and case-law material (text of the Convention, Short Guide to the Convention, Case-summaries and Key Extracts, all in Albanian).

SECTION 6: WAR AND ETHNICALLY MOTIVATED CRIMES THE IMPARTIALITY OF THE COURTS

I. Impetus to Expedite the Trials

On 10 April 2000, 32 Kosovo minority detainees held in Mitrovica/Mitrovice detention centre began a hunger strike. By 3 May 2000 this number had risen to around 36. The majority of the hunger strikers were of Serbian ethnicity and were facing allegations of war crimes or serious ethnically motivated crimes. According to statistics available to LSMS, on 3 May 2000 approximately 25 of the hunger strikers had been arrested and/or detained between August and September 1999, the majority of whom remained un-indicted.

By a letter to the SRSG dated 21 April 2000, the hunger strikers indicated that they were reacting to a lack of due expedition of their cases through the courts and a lack of impartiality on the part of the courts. The strike was sparked, at least in part, by the perceived bias of the courts in their release of a Kosovo Albanian male alleged to have thrown a grenade into a crowd in Mitrovica/Mitrovice. The hunger strike, combined with the imminent expiry of the maximum custody time-limits, led to the encouragement of the judiciary to schedule serious war crimes and ethnically motivated crimes trials. Additionally *UNMIK Regulation 2000/34* provided the power to appoint international judges and prosecutors throughout Kosovo.[1]

The expedition of the trials has not, however, taken place with full regard to the existing capacities and competence of the judicial system to conduct serious criminal trials of this nature fairly and properly. Moreover, a long and continuing climate of ethnic conflict, has severely impacted upon the objective impartiality of the courts and raised concerns as to actual bias on the part of certain judging panels. The response of the relevant authorities has been reactive and *ad hoc* – resulting in the unequal treatment of defendants before the courts and the denial of basic facilities by which to adequately prepare and present the defence.

II. The Right to an Impartial Tribunal

Article 6 (1) ECHR and Article 14 (1) ICCPR guarantee the right to a fair and public hearing by an independent and impartial tribunal established by law. Principle 2 of the *Basic Principles on the Independence of the Judiciary* reinforces these provisions:[2]

> "The judiciary decides matters before them impartially, on the basis of facts and in accordance with the law, without restriction or undue influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reasons."

This guarantee has been interpreted broadly, in recognition of the fact that independence and impartiality are preconditions to the overall fairness of judicial proceedings. The *UN*

Human Rights Committee has found that the right to an impartial tribunal under article 14 (1) ICCPR is "absolute" and "may suffer no exception."[3]

The ECHR does not prescribe any particular form that domestic criminal proceedings must take. However, the relevant authorities are under a positive obligation to ensure that any and all such proceedings guarantee the independence and impartiality of the courts. This positive obligation is confirmed in Principle 1 of the *Basic Principles*.[4]

The European Court of Human Rights has rendered many decisions involving the issue of impartiality. In *Hauschildt v Denmark*, the Court ruled that to comply with the impartiality requirement of article 6(1), a tribunal must respect both a subjective and objective test:

> "The existence of impartiality for the purpose of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."[5]

The subjective test proceeds on the presumption that members of the judiciary are impartial. A judge must be shown to act on the basis of personal bias to fail the subjective test. Given this presumption and the need to prove partiality, the Court has rarely, if ever, found a tribunal in breach of the subjective test.[6]

The objective test is not as strict and draws from the common law doctrine that *"justice must not only be done: it must be seen to be done."*[7] The European Court's emphasis on appearance stems from the need for the judiciary in a democratic society to promote public confidence.

The objective test has been broadened to include more than the accused's view:

> "[...] any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. […] the standpoint of the accused is important but not decisive. What is decisive is whether the fear can be held objectively justified."[8]

When faced with the appearance of racial bias, the Court has established a very high threshold. In *Remi v France*,[9] the Court found that a tribunal had failed the objective standard by refusing to consider the out-of-court racist remarks of a juror. More recently, *Sander v The United Kingdom*[10] deemed that the trial judge's instruction to the jury was not sufficient to alleviate the objective appearance of partiality following an anonymous note from one juror alleging racist bias on the part of some of his peers. The unanimously signed letter of the jury that followed as well as a letter from one of the jurors admitting and apologising for uttering racial "jokes" were insufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court. The judges

should have responded to the defence's request and dismissed the jury.[11] In *Sander*, the Court also explicitly stated that when dealing with alleged racist bias, it:

> "considers this to be a very serious matter given that, in today's multicultural European societies, the eradication of racism has become a common priority goal for all Contracting States (see, *inter alia*, Declarations of the Vienna and Strasbourg Summits of the Council of Europe)."[12]

III. Current Application: Failing the Impartiality Test

Kosovo has successively been the theatre of political and ethnic repression by the Belgrade authorities, the rise of the KLA, reported egregious acts perpetrated during the NATO intervention and current heightened ethnic tensions and revenge crimes. Moreover, many of the present members of the judiciary either left their positions in 1989-90 or joined the so-called parallel government system. Many have also suffered, directly or indirectly, by the brutality and repression of the Belgrade regime. Since the emergence of the newly created justice system in Kosovo, both judges and public prosecutors have expressed concerns over their security, due to their public positions.[13] Under international human rights standards, as set out above, the obligation is on the authorities to ensure an environment in which public officials are free to make decisions impartially.

(a) The Perception of the Defendant and the Public

In the light of a continuing climate of ethnic intolerance, the less stringent objective impartiality standard may arguably be violated in cases where a mono-ethnic tribunal tries a member of the Kosovo Serb, Bosnian-Muslim or Roma minorities.[14]

The objective impartiality test is essentially concerned with third party perceptions - whether those of the accused or the public in general. Potential violations of the objective standard under article 6 (1) ECHR *do not necessarily involve direct criticism of the professional integrity, or personal ethnic or individual bias of members of the Kosovo judiciary.* They are in fact more closely a consequence of the wider political and social climate existing in Kosovo and the continuing concerns surrounding the treatment of minorities.

Bozur Bisevac and Miroslav Vuckovic

The case of *Bozur Bisevac* and *Miroslav Vuckovic* is a good illustration of the impartiality issue. *Bishevac* and *Vuckovic* are Kosovo Serbs indicted by the Mitrovica/Mitrovice District Court for genocide. On 13 July 2000, following a number of adjournments in the case, defence counsel for *Bishevac* applied for the exclusion of the judging panel, including the international judge, President of the Mitrovica/Mitrovice District Court and the President and judges of the Kosovo Supreme Court. The grounds for the application included, amongst other things, a failure to guarantee the panel's impartiality. The defence argued that, in the light of the fact that the Kosovo Albanian judges are from the

same ethnic group that the defendant was alleged to have "intended to destroy in whole or in part", they could not be impartial arbiters of the case. More specifically, the defence stated that the presiding judge was an "injured party" in that his offices and home had been burgled and burned during the conflict. The apartment of the President of the District Court had also reportedly been broken into twice during the conflict. In August 2000 the Kosovo Supreme Court rejected the application of the defence. On the advice of the Kosovo Supreme Court, LSMS approached the Mitrovica/Mitrovice District Court for a copy of the decision on appeal. The presiding judge rejected the request. According to information currently available to LSMS, the trial is due to proceed before the same panel of judges.

The FRY CPC provides for the disqualification of judges from a panel in cases where "circumstances obtain which engender *doubt as to his impartiality*."[15] (emphasis added) The Code envisages that disqualification will take place either on an application of the parties or by motion of the judge himself. *UNMIK Regulation 1999/7* established the AJC with responsibility for advising the SRSG on the appointment of, and receiving complaints in relation to, judges and public prosecutors.[16] Bearing in mind the concerns as to impartiality outlined above, Section 5(2) of the Regulation states that, in assessing applications, guidance should be taken from "UNMIK's goal to establish a professional, independent, impartial and multi-ethnic judiciary and prosecution service." Moreover, pursuant to Section 7, judges and public prosecutors may be removed from office by the SRSG, in consultation with the AJC. The grounds for removal include, amongst other things, "serious misconduct" or where they have been "placed, by personal conduct or otherwise, in a position incompatible with the due execution of office."

Despite the domestic law provisions and *Regulation 1999/7*, there is no effective system for the investigation and removal of judges and public prosecutors. LSMS is unaware of any judge recusing him/herself or having been removed from office. LSMS would argue that the oath of office and self-regulation by the judges are wholly insufficient safeguards by which to remedy the objective perception of bias in relation to the judging panels for war and ethnically motivated crimes trials.

(b) The Actual Bias of the Courts

Whilst bearing in mind the presumption of subjective impartiality, there are a number of significant cases that have raised real concerns as to the actual bias of the courts.

Pre-trial Detention

The unequal treatment of minorities with regard to pre-trial detention has arisen in a number of cases. On 12 July 2000 three Kosovo Serbs, including two priests, were injured after having been attacked by an armed group in Gnjilane/Gjilan. That same day two Kosovo Albanian males were arrested and detained in connection with the attack and charged with attempted murder. The original detention order is based upon all four grounds for detention provided under Article 191(2) FRY CPC. A panel of judges extended detention on 11 August 2000 for thirty days, on the ground that the defendants

may interfere with, or destroy, evidence in the case. The other grounds for detention involving a risk of flight and repeat offending were, without providing reasons, deemed no longer to apply. The fourth public order ground was not cited.

On 14 August 2000 one of the victims failed to attend an investigative hearing. He informed the court that, amongst other things, he was concerned for his security and he wished an international judge to be appointed to the case. On 18 August 2000 both defendants were released by order of the investigating judge, although the investigation continues. The President of the Gnijlane/Gjilan District Court informed LSMS that the reason for the release was "that the witness was uncooperative."

LSMS has not yet been able to gain access to the case files in order to make a detailed assessment of the basis for detention or release. However, on information presently available, the court has apparently failed to provide any reasoned basis for release and has acted on grounds entirely irrelevant to the issue of detention.

There are other cases that appear to show a lack of impartiality on the part of the courts regarding pre-trial detention decisions. On 10 March 2000, "*X",* a Kosovo Albanian, was arrested by KFOR after being recognised by KFOR soldiers as the perpetrator of a grenade attack in Northern Mitrovica/Mitrovice during a period of serious inter-ethnic violence in February 2000. *X* was charged under Art. 157(3) KPC with "causing general danger" an offence under the jurisdiction of the district court. However, the case was passed to the municipal court. On 10 April 2000 the public prosecutor proposed to extend *X's* detention on the basis that the investigation was not concluded and there were several witness statements remaining to be taken. The investigating judge disagreed and terminated the detention on the basis that despite the on-going investigation "releasing of the suspect cannot destroy the clues to the crime and he cannot influence during the investigation phase." However, the FRY CPC mandates that a disagreement between the public prosecutor and the investigating judge regarding the termination of pre-trial detention should be decided by a panel of judges. There was never a decision by the panel of judges and *X* was released. The release of *X* sparked a prolonged hunger strike by Serb detainees on the grounds that the Mitrovica/Mitrovice judiciary was biased against them.

The release of the defendants in the above cases are in stark contrast to the treatment of Kosovo Serb defendants. *Dragan Sekulic* was detained on 14 October 1999 in relation to the murder of his son, he has remained in detention from that date. Despite an indictment having been issued by Pristina/Prishtine District Court on 7 January 2000, no trial date has yet been set. The President of the District Court is reported to have stated that the delay is due to a lack of judges. Approximately twelve defendants who were indicted between October 1999 and January 2000, for murder or murder related offences, have been tried or released by the Pristina/Prishtine District Court. Moreover, a further thirteen defendants, indicted for similar offences between February and April 2000, have also been tried or released. *All* of these cases involved Kosovo Albanian defendants.

The Zymer Thaci Case

On 16 November 1999 *Zymer Thaci*, a Kosovo Albanian, was indicted for the murder of a Kosovo Serb. An autopsy report stated that the victim "Y" had suffered asphyxiation and fractures to the skull and ribs. The body appeared to have been burnt alive. The body was found in front of a Kosovo Serb house, within which was found a medical certificate. It was believed that the name on the certificate was that of the victim. *Thaci* was suspected of having acted in complicity with a 14 year old Kosovo Albanian "Z", against whom, because of the age of criminal responsibility, no charges were brought.

In a statement made to UNMIK police, apparently in the absence of parents, guardians and legal representation, Z confessed to having assisted *Thaci* in the murder. In *Thaci's* statement to UNMIK police, he raised the defence of alibi and indicated that two individuals had witnessed Z, at the relevant time, attacking the victim. There are significant discrepancies between this statement and the statement given before the investigating judge. During the investigative hearings Z also retracted her original statement and indicated that *Thaci* had not been present during the killing and that Z had acted alone and in self-defence.

The trial took place on various dates in April, May and June 2000 before an all Kosovo Albanian panel of the Pristina/Prishtine District Court. On the request of the public prosecutor the autopsy report was read into the record in order to identify the victim. Defence counsel had objected to this request.

On 2 June 2000 the public prosecutor dropped the indictment. The public prosecutor stated that, "according to witness statements there were no Serbs in the village at that time, since all had left. It is therefore unclear who the victim is. Since the body was burned it is impossible that the certificate was found on the body. On the other hand there is no proof that the victim was the owner of the house. That is why I have decided to drop the charge against *Thaci*."

LSMS spoke with the public prosecutor who confirmed that she had dropped the indictment, in accordance with Article 262 (1) (2) FRY CPC, because the body could not be identified. According to the public prosecutor, other grounds for dropping the indictment included a general lack of evidence, stemming primarily from the retraction of Z's statement. Notably, these additional grounds were not raised by the public prosecutor on dropping the indictment at trial.

Article 262(1)(2) FRY CPC deals with the requirements for a bill of indictment. The bill of indictment must contain, amongst other things, "a description of the act…*the object of which* and the means with which the crime was committed, and other circumstances necessary to provide as precise a definition of the crime as possible." In most criminal systems, where a charge is brought for murder, the identification of the body is not essential for the conduct of a prosecution. The FRY CPC is no exception to this. Whilst Article 262 FRY CPC requires the public prosecutor to provide as detailed information as

possible in the bill of indictment, it does not require the identification of the victim in every case. Moreover, despite the retraction of Z's original statement, there were significant inconsistencies in the evidence such that the panel may reasonably have considered the murder charge.

It is apparent that, either through ethnic bias or incompetence:

i. The relevant authorities have failed to conduct the case with all due diligence, particularly in failing to call relevant witnesses and to examine inconsistencies in the evidence;

ii. The public prosecutor, with the acquiescence of the panel, dropped the charge on grounds unsubstantiated by law and entirely contradictory in the light of the fact that the public prosecutor had requested the autopsy report to be admitted into evidence for the purposes of identifying the victim.

The Besim Berisha Case

On 20 March 2000 *Besim Berisha* was acquitted, by an all Kosovo Albanian panel, of the murder of a Kosovo Serb male. The defendant had been identified in an identification parade by two family members of the victim, who were present at the murder. The defendant had also "confessed" to having committed the crime to a cell-mate, "X."

Berisha's defence was one of alibi. The offence was alleged to have taken place on 2 August 1999 at approximately 20:45. The defendant claimed that, at the relevant time, he had been detained by Italian KFOR in Pec/Peje, while on route to a KLA meeting. He called two witnesses to support this claim, including X. Furthermore, the defence relied on the fact that fingerprints, taken from a tablecloth that was used to strangle the victim, did not match those of the accused.

The case against the defendant essentially collapsed due to the failure of the public prosecutor to challenge the defendant's alibi and the non-attendance of prosecution eyewitnesses.

On 13 August 1999, in testimony before the investigating judge, the defendant claimed that on 2 August 1999 he was stopped and arrested by international police in Pec/Peje, where he was detained for two to three days. Assuming the court had no evidence contradicting this assertion, the investigating judge was obligated to dismiss the investigation on the basis that "there is no evidence that the accused committed the crime."[17] But he did not. Nor did he apparently take steps to investigate the issue of arrest and detention. For instance, he failed to request that the arresting officer be called and questioned. In any event, it was a central issue that could have been easily resolved.

On 22 November 1999, the public prosecutor proposed an indictment charging *Berisha* with murder, committed on 2 August 1999. What information did he possess that led him to conclude *Berisha's* alibi was false? LSMS was informed by KFOR, that in 1999, they

provided the public prosecutor with documents indicating that *Berisha* was not in detention on 2 August 1999. The question is what evidence did the public prosecutor possess and was it passed with the file to the newly appointed public prosecutor in February 2000? One assumes it was, or why else proceed with a prosecution of *Berisha* in March 2000?

When questioned by, the newly appointed public prosecutor provided differing explanations as to the KFOR documentation. Initially, he claimed that the documents were in a language he could not understand. He then claimed that he never saw such documents because they were "sealed" by the court. He then asserted that he might not have proposed such an indictment "where all the evidence…indicated innocence." He could not explain why he waited two months to disclose this. He then claimed that from his experience, information compiled by law enforcement authorities was unreliable.

As for the non-attendance of the witnesses, the public prosecutor stated that a summons had been served on the witnesses old address in Pristina/Prishtine, but they had now moved to Belgrade and he did not know how to locate them. He stated that UNMIK police had advised the court, in writing, that because of the severed relationship with Serbia, they were unable to assist in bringing the witnesses to trial. UNMIK police court liaison officers wrote conflicting memorandums on this issue. In any event, the judges and public prosecutor took wholly inadequate measures in inquiring as to what, if any, steps had or could be taken to locate and call the witnesses. The public prosecutor did request that the witness statements be read into the record. The court rejected this proposal.

Following the acquittal, LSMS made a number of enquiries with the public prosecutor for information. The public prosecutor then filed an appeal against the decision of the court. Despite this, in the light of the fact that crucial and readily available evidence was not gathered for the trial, there are grounds to suspect that the court made little or no effort to properly investigate and prosecute the case against *Berisha.* In April 2000, LSMS submitted a report on this case to the Department of Justice with a recommendation that an investigation be undertaken. LSMS is unaware of the outcome, if any, of this investigation.

The Momcilovic Case

Background

On 8 August 2000 the Gnjilane/Gjilan District Court acquitted three Kosovo Serb males, *Mirolub, Boban and Jugoslav Momcilovic* of murder and attempted murder, the alleged victims were both Kosovo Albanian. They were convicted of illegal weapons possession (one automatic rifle, one semi-automatic rifle, two handguns and one rifle) and sentenced to twelve months imprisonment. Notwithstanding the verdict, LSMS produced a report "*Justice on Trial: The Momcilovic Case*", dated 16 August 2000. The report outlined a catalogue of breaches of international human rights laws, which included concerns as to the impartiality of the court.

On 10 July 1999 four Kosovo Albanian males approached the *Momcilovic* family residence. The defendants were present inside the house. Part of the events were captured on a security video.

The video shows that the four Kosovo Albanian males were armed and that they approached the *Momcilovic* residence and called for one of the *Momcilovics* to come outside. A gunshot is heard that apparently comes from the *Momcilovic* residence. At this stage it seems that none of the Kosovo Albanian males is injured. This is followed by a heavy exchange of gunfire. KFOR snipers were present at the scene and they engage the Kosovo Albanian males. As a result of the gunfight, two Kosovo Albanian males were shot dead and two others were injured. The *Momcilovics* were indicted for the murder of one Kosovo Albanian male and the attempted murder of another. One Kosovo Albanian was charged with the Attempted Murder of KFOR soldiers.

The first trial began on 25 April 2000 in the Gnjilane/Gjilan District Court before an all Kosovo Albanian panel. Following requests for further evidence, the case was adjourned on 27 April 2000. After a significant delay, a new trial was set for 20 July 2000 before a different panel including one international judge. It was during this second trial that the statements of the KFOR soldiers that were present during the gun fight came to light. These statements indicated that most of the soldiers involved in the gunfight had, between 10 and 17 of July 1999, actually provided written or oral statements to the US Army Criminal Investigations Department (CID), claiming that they, not the *Momcilovics*, were responsible for the injuries to the two men named on the *Momcilovic* indictment. To-date no explanation has been provided as to why this information was not disclosed to the court earlier.

Pre-trial Detention

The *Momcilovics* were detained on 10 July 1999. The Gnjilane/Gjilan District Court began hearing criminal cases on 17 February 2000, some seven months after their initial detention. Of the eleven trials heard prior to the *Momcilovics* first trial on 25 April 2000, all defendants were Kosovo Albanian. Six of these defendants were held in pre-trial detention, although none had been held longer than the *Momcilovics.* Because apparently all relevant evidence had been collected prior to the indictment of 7 January 2000, there can be no justification for delaying the trial date until April 2000.

This delay was further exacerbated by the adjournment of the first trial on 27 April 2000, pending the introduction of other evidence. The failure of the court to resume the hearing within thirty days resulted in the first trial being abandoned. The new July trial date was set at the end of June 2000.

Malicious Prosecution Motivated by the Ethnicity of the Defendants

The public prosecutor was appointed on 18 January 2000. By the middle of February 2000 the public prosecutor was certainly aware of the existence of the video - he had

been visited by numerous international media asking questions about it. The public prosecutor informed LSMS that he viewed the video for "four hours" in late April 2000 and that he saw "nothing of interest." This remark is surprising since, at the very least, the video clearly shows four armed males approaching the *Momcilovic* residence. Moreover, in the first trial, the public prosecutor saw fit to motion that because the video had been tampered with it should therefore be excluded. In most criminal law systems, in the absence of clear expert evidence to challenge authenticity, a video of this nature would have had significant evidential value.

The KFOR statements were read into the trial record on 24 July 2000. LSMS has been informed that the statements were in fact served on the court on 18 July 2000 and that the contents were known to the trial panel, and one assumes the public prosecutor, by 20 July 2000. Indeed, during the hearing on 24 July 2000, the public prosecutor thanked the KFOR for providing the new evidence, since it, "brought new light on the case."

The KFOR statements were pivotal to the defence and completely undermined the prosecution case. It was abundantly clear at this stage that the murder and attempted murder charges were without foundation. Nevertheless, the public prosecutor elected to proceed with the indictment and requested, amongst other things, a reconstruction of the crime scene. This caused a further significant delay in the case. Moreover, he opposed the application for bail, which was then denied by the court.

Failure to Prevent the Malicious Prosecution

The investigative judge in 1999 and the trial panel in April 2000 failed to properly consider the evidence in the case. In April 2000 two members of the trial panel viewed the video prior to trial. Neither panel member saw fit to raise their concerns as to the foundations of the prosecution.

By 20 July 2000, the new panel of judges, including one international judge, ruled that the admissibility of the video would be decided after it was played in open court. The video was in fact played twice. The video and accompanying audio evidence was in blatant contrast to the testimony of two central prosecution witnesses.[18] Despite these critical contradictions, only one of these witnesses was asked cursory questions regarding their previous testimony.

The submission of the KFOR statements also failed to alter the panel's conduct of the case. The statements exonerated the defendants of the charges of murder and attempted murder, however, following the admission of the statements, the panel acquiesced to the request of the prosecution for further evidence (relating to drugs and weapons) and for a reconstruction of the crime scene. This caused further delay to the case and prolonged the *Momcilovics* detention.

It is LSMS's assessment that the public prosecutor failed to properly conduct the case in such a manner as to violate his oath of office. The combined effect of the video and the KFOR statements was to provide clear and cogent evidence in support of the

Momcilovics' defence. This evidence flew-in-the-face of the crucial "evidence" presented by the two prosecution witnesses, neither of whom were indicted for conspiracy to kidnap or weapons possession. Despite these facts, the prosecutor pursued the murder and attempted murder charges, which resulted in a further adjournment in the case and a prolongation of detention. It appears that the pursuit of these charges was malicious. It is difficult to find an explanation for this, other than ethnic bias.

The Sentence

The *Momcilovics* were sentenced to twelve months imprisonment for illegal weapons possession. On reviewing sentencing practice for this offence, LSMS found that, in Gnjilane/Gjilan and other regions, the possession of a minor amount of weapons is often not subject to criminal charge and that the majority of cases result in sentences well below twelve months imprisonment. LSMS is aware of only two cases where a similar sentence was imposed, although LSMS is unaware of the amount of weapons involved in those cases.

Juvenile Z

On 23 December 1999 a juvenile, "Z", was indicted by the Mitrovica/Mitrovice District Court for genocide. The indictment alleged that, together with an adult and "with the intention of displacement of the Albanians and to destroy them partly or generally," *Juvenile Z* burned approximately one hundred houses. *Juvenile Z* was arrested and detained on 29 September 1999 and has remained in custody from that date.

Some eleven months after *Juvenile Z's* arrest and detention, and approximately eight months after indictment, the trial of Z began on 15 August 2000 in Mitrovica/Mitrovice District Court. An all Kosovo Albanian panel is hearing the case, whilst the prosecution is being conducted by an international prosecutor. LSMS made a request to be present during the trial, a request that was supported by the international prosecutor, defence counsel and the President of the Mitrovica/Mitrovice District Court. On 24 August 2000, LSMS also made a formal request to the presiding judge. This request was rejected on the grounds that there is no express provision in the FRY CPC for the presence of OSCE monitors.

LSMS considered the charge of genocide to be inflated and not supported by the evidence. Indeed, according to information made available to LSMS, at the commencement of the trial the international prosecutor reduced the charge to "causing a general public danger."[19]

Pivotal to the case against *Juvenile Z* is an alleged confession. Because LSMS was denied access to the hearing, LSMS is unable to conclude whether the "confession" was lawfully obtained.

On 13 September 2000, *Juvenile Z* was convicted. Both the international prosecutor and defence counsel proposed his release. This was rejected by the panel who sentenced the

juvenile to "corrective educational measures" with the proposal to send *Juvenile Z* to a correctional institution.

The Trial of Zvezdan Simic

Zvezdan Simic was indicted on 6 January 2000 for the aggravated murder of two Kosovo Albanians in the village Oslane/Oshlan on 27 September 1998. He was also charged with illegal weapons possession. The trial commenced on 1 August 2000 and was completed on 8 August 2000. *Simic* was convicted and sentenced to eight years and six months imprisonment.

The evidence against *Simic* consisted of weapons found in his premises and witness testimony. LSMS believes this testimony was unreliable because the main witnesses offered confusing and speculative testimony about *Simic's* presence at the murder scene. One witness stated that the defendant was seen heading in the direction of the area where the victims were killed. Another witness first stated that he was at the crime scene and recognised the defendant's voice, followed by the sound of shooting. He then changed this testimony and stated that he did not hear the defendant talking and that he does not even know the defendant. He added that he had been told by another witness that the defendant was present.

IV. Attempts to Secure the Right to an Impartial Tribunal

(a) International Judges: A Necessary but Insufficient Remedy

In response to public unrest and ethnic violence in Mitrovica/Mitrovice in February 2000, the SRSG passed *Regulation 2000/6* providing for the appointment of an international judge and an international prosecutor to Mitrovica/Mitrovice.[20] On 29 May 2000, following pressure from hunger strikers in Mitrovica/Mitrovice, the SRSG passed *Regulation 2000/34* that extended the power to appoint international judges and prosecutors to the whole territory of Kosovo.[21] At the time of writing this report, six international judges have been appointed – two for Pristina/Prishtine, one for Mitrovica/Mitrovice, two for Gnjilane/Gjilan and one for Prizren. Two public prosecutors have also been appointed – one to Mitrovica/Mitrovice and one to Prizren. Pursuant to section 1(2) of the Regulations, the international judges and prosecutors may "select and take responsibility for new and pending cases within the jurisdiction of the court to which he or she is appointed."

The appointment of international personnel to the courts goes some way to alleviate the concerns with respect to impartiality. In this regard, a significant increase in their numbers and a more comprehensive and systematic allocation of such personnel to the courts is to be strongly supported. However, to-date the limited number of international judges, their sporadic distribution and the restricted scope of their powers still fail to adequately address the impartiality concerns. The source of these inadequacies falls into two main categories.

First, the limited number of international judges and prosecutors, the timing of their appointment and their subsequent allocation to the cases has resulted in unequal treatment of the defendants. Defendants that have been charged with ethnically motivated crimes of a similar nature and seriousness, have been tried before panels of varying composition. Some have been composed of all Kosovo Albanian judges, others have included international judges and, in one case, Kosovo Serb lay judges. With regard to completed trials, before 31 July 2000, involving Kosovo Serb defendants indicted for the murder of Kosovo Albanians: on 26 May 2000, immediately prior to the enactment of *Regulation 2000/34*, *Sasa Maksimovic* was sentenced to thirteen years and six months imprisonment, after a trial before an all Kosovo Albanian panel. On 3 July 2000, *Dragan Nikolic* was sentenced to twelve years and six months imprisonment, after a trial before an all Kosovo Albanian panel. The Nikolic trial had commenced prior to the enactment of Regulation 2000/34. Conversely, on 28 July 2000, *Nenad Radulovic* was sentenced to 2 years and six months imprisonment, after a trial before a panel of four Kosovo Albanian judges, including the Presiding judge, and one international judge. With regard to the two completed trials involving Kosovo Albanians indicted for the murder of Kosovo Serbs: on 3 March 2000 *Besim Berisha* was acquitted of aggravated murder after a trial before an all Kosovo Albanian panel. This was followed on 10 May 2000 by the acquittal of *Ali Emini,* again after a trial before an all Kosovo Albanian panel.

With regard to on-going trials and investigations, the allocation of international personnel is again insufficient, at least partly due to their limited numbers. While the allocation visibly follows a golden thread as far as it goes, covering interethnic cases, there remain Kosovo Serb defendants facing similar charges who continue to be prosecuted by Kosovo Albanian public prosecutors. Indeed, according to the international prosecutor for Prizren the 7 August 2000 indictment of seven Kosovo Serbs in Prizren, containing allegations of war crimes involving the murder of more than 100 Kosovo Albanians, is to be prosecuted by a Kosovo Albanian public prosecutor. The reasoning provided for this by the President of the District Court was that the international prosecutor would not have sufficient time to prepare for trial. The trial date has not, however, yet been set.

Second, according to Article 23 FRY CPC district court trial panels are to be composed of two professional judges, one of whom will act as the presiding judge, and three lay judges. Verdicts are by a majority and each judge carries an equal vote.[22] At the time of writing this report, only two international judges have been appointed to the position of presiding judge. In any event, the equal distribution of voting powers to all judges severely reduces any real impact that the international judge may have upon a potential verdict motivated by ethnic bias. In this regard, the current role played by the international judges is still insufficient to remedy, at the very least, the lack of an objective appearance of impartiality that currently casts a shadow over trials involving allegations of serious ethnically motivated crimes.

(b) Additional Measures: Unequal Protection of the Law

Additional measures to ensure objective impartiality were taken in the trial of *Vuckovic* and *Bishevac*. Both defendants were indicted for genocide and *Bisevac* was to be tried *in*

absentia. In addition to the presence of the international judge, two Kosovo Serbian lay-judges were appointed to the panel, thus balancing the distribution of votes so as to seek to alleviate the lack of the appearance of objective impartiality. This trial was postponed on 12 June 2000 when, amongst other things, the Kosovo Serb lay judges failed to attend. The trial is still pending.

Whilst additional measures for impartiality were taken in the *Vuckovic* and *Bisevac* case, such measures have not been taken in other cases of equal seriousness involving mixed ethnicities. On 20 July 2000 the trial *in absentia* of *Lulezim Ademi* began before a panel composed of one international judge and four Kosovo Albanian judges, including the Presiding judge. *Ademi* is a Kosovo Albanian and is indicted for, amongst other things, war crimes against the Kosovo Albanian population, involving the murder of a Kosovo Albanian male. Similarly, on 1 August 2000 the trial of *Zvezdan Simic* commenced before a panel composed of one international judge and four Kosovo Albanian judges, including the presiding judge. *Simic* is a Kosovo Serb indicted for the murder of two Kosovo Albanians.

Overall, the distribution and role of international judges and public prosecutors is still insufficient to properly address concerns relating to objective impartiality, or to remedy cases involving actual bias. Moreover, the manner and timing of appointment and the *ad hoc* composition of the judging panels has resulted in the unequal treatment of defendants before the courts in cases of a similar nature and seriousness.[23]

V. The Kosovo War and Ethnic Crimes Court (KWECC)

The Technical Advisory Committee on Judiciary and Prosecution Service (the "TAC") was established in September 1999 to advise the SRSG on the structure and administration of the judiciary and prosecution service in Kosovo.[24] In its final report dated 13 December 1999, the TAC recommended, amongst other things, the establishment of an extraordinary domestic tribunal with jurisdiction over war crimes and other serious violations of international humanitarian law and serious ethnically motivated crimes. The proposed court has been dubbed the "Kosovo War and Ethnic Crimes Court" (the "KWECC").

The KWECC was intended to have concurrent jurisdiction with domestic courts, although with more limited temporal jurisdiction. Similar to the ICTY and the ICTR, the KWECC was to be constituted by The Office of the Prosecutor, The Chambers and The Registry. Personnel would be domestic and international and judging panels composed of at least one international judge and two domestic judges. An appeals structure forms part of the overall framework, which would also have received appeals from the domestic courts.

In order to ensure greater equality between the prosecution and the defence proposals were also made to establish an "Office of the Defence." It was envisaged that the Office would be composed of international and domestic defence counsel and would offer resources and professional assistance to defence counsel. An Office of such a nature would be essential in order to ensure greater equality of arms between the prosecution and the defence, particularly in relation to serious criminal trials.

The establishment of the KWECC was significantly delayed by, amongst other things, finding suitable premises and raising a budget. Moreover, the Regulation, by which the KWECC will be established, has undergone a number of reviews, by the relevant UN legal offices in New York and Pristina/Prishtine, and presently remains in its draft form.

According to statistics available to LSMS on the 31 July 2000, of the cases that would have fallen within the jurisdiction of the KWECC, five trials have been completed involving five defendants and two cases have been dropped. Approximately seventeen cases are currently due to go to trial before the regular domestic courts in the forthcoming months and, as more indictments are brought, it is likely that this figure will increase. Furthermore, whilst investigations into war and ethnically motivated crimes are on-going and serious ethnically motivated crimes continue to be committed, it is unlikely that the number of cases that go to trial will significantly increase. Moreover, the appointment of international judges and prosecutors to Kosovo's courts has had the effect of removing the sense of urgency for the cases to be transferred to a distinct and separate jurisdiction.

Bearing in mind the difficulties outlined above, on 11 September 2000 the Department of Justice stated that the KWECC project would not be pursued and that efforts would be concentrated on providing international judges and prosecutors to the domestic courts. It is important to recall the basic motivation behind the KWECC to, amongst other things, ensure that adequate material and professional resources were made available to the courts to conduct serious criminal trials properly and to ensure that trials were not consumed by partiality and bias. Whilst the institution of the KWECC has been overtaken by events, these basic needs continue to exist. Furthermore, whilst the number of war and ethnically motivated crimes may not significantly increase, recent events have begun to focus attention on other forms of crime, such as politically motivated crimes. Should trials of this nature take place, it will place a significant burden upon the present capacity of the courts and require special logistical resources and expertise.

The basic framework behind the KWECC continues to have relevance. However, such framework need not exist outside the existing judicial institutions. The KWECC framework could, in relevant part, be effectively transferred to the courts using, for example, judging panels composed of international judges and an international prosecutor. The appellate systems could also be reformed accordingly. An effective office of the defence would also be imperative, in order to avoid the perpetuation of inequalities of arms. A collateral effect of this approach would be to direct resources with a view to the longer-term capacity building of the courts.

VI. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

Whilst LSMS does not monitor the activities of the ICTY, for the sake of the completeness of this section, and to address existing confusion, there follows a brief outline of the scope of the present ICTY mandate.

On 29 September 1999 the chief prosecutor for the ICTY outlined the role and responsibilities that the ICTY would undertake with regard to the events in Kosovo.[25] The main focus of the work of the ICTY was to be the investigation and prosecution of the five leaders of the Federal Republic of Yugoslavia and the Republic of Serbia, who were indicted for war crimes and crimes against humanity. The prosecutor also indicated that the ICTY would investigate other "high level civilian, police and military leaders, of whichever party to the conflict who may be held responsible for crimes committed during the armed conflict in Kosovo." Beyond this, the prosecutor stated that investigations may, on a case by case basis, be conducted in relation to other individuals who may have committed "particularly serious crimes [including sexual violence] during the course of the armed conflict."

The prosecutor reinforced that the mandate and resources of the ICTY would not allow it to act as the primary investigative and prosecutorial agency for Kosovo, such "is properly the responsibility of UNMIK, through UNCIVPOL and the newly formed civilian police in Kosovo, assisted by KFOR." Bearing in mind the significant resources and investigative capacity of the ICTY, guidelines were drawn-up to assist in the disclosure of information by the ICTY to the relevant authorities within UNMIK. The essence of the guidelines is that disclosure of information must take place on a case-by-case basis, stemming from a specific request made by the relevant authorities.

War Crimes and Ethnically Motivated Crimes

*** Based on statistics available to LSMS on 31 July 2000.**
*** Ks/Ka = ethnicity of defendant/victim**
Ka: Kosovo Albanian; Ks: Kosovo Serb; Kr: Kosovo Roma; Cr: Croat

Status	Genocide[1]	War Crimes[2]	Murder[3]	Rape[4]	Other[5]
Indicted	**10** Ks/Ka - 10	**3** Ks/Ka – 2 Ka/Ka – 1	**16** Ka/Ks – 5 Ks/Ka – 11	**0**	**8** Ka/Ka - 2 Ks/Ka - 1 Ka/Kr - 2 Kr/Ka - 1 Ka/Cr - 2
Unindicted	**2** Ks/Ka - 2	**16** Ks/Ka – 13 Kr/Ka – 3	**2** Ks/Ka – 2	**0**	**2** Ka/Ks - 2
In-Custody	**11** Ks/Ka - 11	**15** Ks/Ka – 12 Kr/Ka – 3	**14** Ks/Ka –11 Ka/Ks – 3	**0**	**1** Ka/Kr - 1
Escapee	**0**	**3** Ka/Ka – 1 Ks/Ka – 2	**0**	**0**	**0**
Fugitive	**1** Ks/Ka - 1	**0**	**2** Ks/Ka – 2	**0**	**0**
Completed Trials	**0**	**0**	**5** Ka/Ks – 2 Ks/Ka – 3	**2** Ka/Kr - 2	**1** Ka/Kr - 1
Guilty	**0**	**0**	**3** Ks/Ka – 3	**2** Ka/Kr - 2	**1** Ka/Kr - 1
Not Guilty	**0**	**0**	**2** Ka/Ks – 2	**0**	**0**
Charges Dropped	**0**	**1** Ks/Ka – 1	**1** Ka/Ks – 1	**0**	**0**
Total *Remaining* Cases	**12**	**19**	**18**	**0**	**10**

1 Article 141 FRY CPC.
2 Article 142 FRY CPC.
3 Incl. Aggravated Murder, Murder and Attempted Murder.
4 Incl. Rape and Aggravated Rape.
5 Incl. Theft, Robbery and Threats.

LSMS RECOMMENDATIONS

1. It is recommended that the SRSG appoint two international prosecutors to the prosecutor's office of the Kosovo Supreme Court. The international prosecutors should be authorised to:

   i. review all war and ethnically-motivated criminal cases and genocide charges in order to ensure the sufficiency of evidence to support the indictment. Where appropriate, the charges must be amended;

   ii. review the cases raised in this report to consider whether any amount to "serious misconduct" on behalf of judges and public prosecutors meriting an investigation or whether there is a legal basis to re-instate the prosecution.

2. Cases involving allegations of war crimes, serious ethnically motivated crimes or other politically charged offences must be prosecuted by international prosecutors and presided over by a single international judge or a panel with a majority of international judges.

3. The concept of the KWECC should be re-conceived bearing in mind the immediate failing capacities and competence of the courts. The original rationale for the KWECC remains alive – the provision of material and professional resources for the conduct of certain serious war, ethnically motivated or politically motivated criminal trials and the presence of international personnel to ensure the impartiality of the proceedings. These basic features should be transposed, in strength, to the existing courts, without the need for an elaborate KWECC premises and framework. The central features of this approach must include a strong security commitment, international judicial panels (which may take the form of single judges or a majority of international judges), international prosecutors and strong support to the defence.

4. An Office of the Defence should be empowered to provide material and substantive support to the defence in criminal cases. The Office should include international defence counsel capable to appear in court at least in trials with the participation of an international judge or prosecutor.

5. It is recommended that the SRSG institutionalise the functions of the Advisory Judicial Commission by abolishing the commission and establishing an Office of Judicial Investigation (OJI) within the Department of Justice. The OJI should create procedures for the review and investigation of complaints directly. As a result of investigations, the OJI should be empowered to discipline or remove judges and public prosecutors from individual cases or office.

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[1] UNMIK Regulation 2000/6 *On the Appointment and Removal from Office of International Judges and Prosecutors*, 15 February 2000, provided for the appointment of one international judge and one

international prosecutor to Mitrovica/Mitrovice. This regulation was extended by UNMIK Regulation 2000/34 *Amending UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors*, 29 May 2000.

[2] The *Basic Principles* were adopted by the Seventh Congress on the Prevention of Crime and the Treatment of Offender*s* held in Milan from 26 August to 6 September 1985 and endorsed by GA Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Principle 1 states that the "independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution of the law of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary."

[3] *Gonzalez del Rio v Peru* (1993) 2 Report of the HRC, p. 20. See also *Amnesty International Fair Trial Manual*, Chap. 12 (available at www.amnesty.org).

[4] Principle 1 states that the "independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution of the law of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary."

[5] (1990) 12 EHRR 266, para. 46. See also D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, Butterworths, 1995, p. 235.

[6] *Id.,* p. 234.

[7] *Delcourt v Belgium* (1979-80) 1 EHRR 253.

[8] *Hauschildt v Denmark* at Para. 48.

[9] (1996) 22 EHRR 253.

[10] 9 May 2000 (3rd Section).

[11] The Court distinguished its decision in *Sander* from that of *Gregory v. The United Kingdom* (1997) 25 EHRR 253, where a complaint of racist bias of one of the jury was vague and imprecise and the defence never requested that the jury be dismissed (see para. 34).

[12] Para. 23.

[13] LSMS notes all international judges and prosecutors are offered close-security protection.

[14] The likelihood of a Kosovo Albanian being tried by a panel of non-Albanians is remote under the prevailing situation.

[15] Article 39(6) FRY CPC. The translation in the compilation of laws uses the word "disinterestedness."

[16] Regulation 1999/7 *On Appointment and Removal from Office of Judges and Prosecutors*, 7th September 1999.

[17] Art. 171 (1) para.4. FRY CPC.

[18] The video clearly contradicted the witnesses denial of having been in possession of weapons or of having acted in an aggressive manner towards the Momcilovics.

[19] Article 157 Kosovo Penal Law.

[20] Regulation 2000/6 *On the Appointment and Removal from Office of International Judges and Prosecutors*, 15 February 2000.

[21] Regulation 2000/34 Amending UNMIK Regulation 2000/6 *On the Appointment and Removal from Office of International Judges and International Prosecutors*, 29 May 2000.

[22] Article 116 FRY CPC.

[23] Articles 16 and 26 of the *International Covenant on Civil and Political Rights* provide the defendant with the right to recognition before the law and equal protection of the law.

[24] UNMIK Regulation 1999/6 *On Recommendations for the Structure and Administration of the Judiciary and Prosecution Service*, 7 September 1999.

[25] Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo, The Hague, 29 September 1999 at http//www.icty.org.

SECTION 7: SEXUAL OFFENCES

The Convention On the Elimination of All Forms of Discrimination Against Women (CEDAW) forms a part of the applicable law in Kosovo through *Regulation 1999/24.* CEDAW obligates UNMIK and all public authorities to "[t]o establish legal protections of the rights of women on an equal basis with men and to ensure through competent domestic tribunals and public institutions the effective protection of women against any act of discrimination."[1] Additionally, CEDAW requires UNMIK to take "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[2]

The preamble to *UN Declaration on the Elimination of Violence Against Women* recognises that:

> "*violence against women* is a manifestation of historically unequal power relations between men and women, which have let to domination over and *discrimination* against women by men, and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."

Accordingly, Article 4 (c) of the *UN Declaration* places an affirmative obligation on governmental authorities to "exercise *due diligence* to prevent, *investigate* and, in accordance with domestic legislation, *punish acts of violence against women*, whether those acts are perpetrated by the State or by private person" (emphasis added). This obligation is particularly heightened where the victim is a juvenile, as public authorities are required under Article 36 of the Convention on the Rights of the Child (CRC) to "protect the child against all . . . forms of exploitation prejudicial to any aspects of the child's welfare."

Under the FRY CPC, where a woman has alleged that she has been raped or sexually assaulted, and "there are grounds to suspect that the crime has been committed," the relevant authorities are obligated to investigate and take all steps to preserve evidence relating to the commission of the crime.[3] Where "there is evidence that a crime has been committed," the public prosecutor is obligated to undertake the prosecution.[4] The relevant authorities are then under a general duty to truthfully and completely establish the facts important to the rendering of a lawful decision with respect to the case and, with equal attention, to establish those facts both for and against the accused.[5]

LSMS monitored select cases involving violence against women, particularly sexual assault, to observe the police's, prosecution's and judiciary's attitude towards and treatment of the alleged victims and to identify special issues or concerns arising in these cases.

I. Duty to Investigate and Prosecute

LSMS has identified two cases involving minority women in the Pec/Peje region in which, according to the police investigation, sufficient evidence appears to exist for the public prosecutor and the investigating judge to initiate an investigation into an alleged sexual assault, but where no such investigation was conducted. LSMS will continue to monitor reports of sexual assault to determine whether this is also occurring in other regions and, if so, whether it is occurring in contravention of authorities' obligation under FRY CPC and international standards to "investigate" and "punish acts of violence against women."

In one case, a 60-year-old Kosovo Roma female reported to the police that her neighbour had sexually assaulted her on 24 November 1999. She claimed he entered her house, pulled her into one of the rooms, stripped her and attempted to sexually assault her. He then allegedly demanded that she pay him 3,000 – 4,000 DM. She reportedly called her son, who is abroad, and told him to send money to save her life.

The victim further reported that on the 28 November 1999, the same man returned to her home with a friend (who was later identified by the police). When the victim failed to open the door, they broke the window, came into the house, chased her down and held her at gunpoint. She alleged they also held a knife to her throat. They again demanded money. They stole some jewellery and a mobile telephone. She reported that she was forced to give them 3000 DM at a later date. That same day, the victim reported the case to KFOR.

On 9 April 2000, the victim reported the case again to UNMIK police, complaining that KFOR had done nothing after one attempt to locate the suspect. She further stated that the suspect's father threatened her not to report the case to the police. On 10 April 2000, UNMIK police reported the case to the public prosecutor. The public prosecutor initiated an investigation into the burglary, but reportedly refused to take further steps with respect to the alleged sexual assault, advising LSMS that too much time had passed since the original assault and that escalating the situation may put the victim at further risk. The public prosecutor told LSMS that he told UNMIK police to attempt to resolve the money matter and issue a warning to the suspects. Subsequently, there was some resolution of the stolen property matter.

Another case also involves an elderly minority woman, a 71-year-old Kosovo Bosnian-Muslim. She reported to the police that on 7 May 2000, three men broke into her house, tied her up, and raped her. A medical report indicates that, immediately following the rape, the woman was medically examined and forensic evidence, that may support the claim of rape, was found. The woman also identified two of the alleged perpetrators. The public prosecutor did not deny that a rape occurred, but nonetheless claimed that police had failed to sufficiently investigate the case. He requested additional information before issuing arrest warrants even though there appears to be a sufficient grounded suspicion that a crime was committed to forward the matter to the investigating judge as required by the FRY CPC. As of the date of this report, as far as LSMS is aware, no arrests have

been made. UNMIK police have informed LSMS that one of the alleged perpetrators was a prominent figure in the KLA.

II. The Need for Court Advocates, Safe Houses and Court Security for Victims of Sexual Violence.

The CRC requires the authorities to take all steps to "protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse . . ."[6] The following cases involve juveniles who have alleged rape or other acts of violence designed to compel intimate sexual relations. In these cases, the conduct towards the victim by judicial officers and the public prosecutor raise concerns as to discrimination and call into question their commitment to the prosecution of such crimes. The FRY CPC obliges the court to treat juvenile victims, as witnesses, with special care in the conduct of such proceedings. Under the FRY CPC, the court is obligated to take "caution… in interrogating a minor, especially if [she] has been injured by a crime, so the interrogation does not have a harmful effect on the minor's mental state. If necessary, the minor shall be interrogated with the help of a teacher or other professional."[7] In addition, the court may exclude the public from the questioning of such witnesses both "to protect the interests of a minor" and/or "to protect morality."[8] Both the ICCPR and ECHR similarly provide for the exclusion of the public in such cases and the CRC provides for the special protection of a juvenile's privacy.[9]

In the cases outlined, concerns as to the treatment of the alleged victim by the court are particularly heightened in that no court advocate was present to represent the victims' interests. Although the FRY CPC provides for an active role for victim legal representation, the majority of victims of sexual violence do not appear to have the financial means or family support to retain a court advocate. This is in contrast to a significant number of cases that do not involve allegations of sexual violence, monitored by LSMS, where a victim's advocate has been present and played an active role in the proceedings.

(a) Conduct Suggesting Discrimination Against Victims of Sexual Violence.

Pristina/Prishtine

A male was indicted in Pristina/Prishtine for allegedly raping his daughter when she was 14 years old. She also alleged that he attempted to rape her again when she was 15 years old, which prompted her to report to the police. At trial, the victim's mother and sister accompanied her to court, but were removed from the courtroom during the victim's testimony because they were to be called as witnesses. The only family member remaining in the courtroom during the victim's testimony was her father, the defendant. There was no victim advocate present in the courtroom. The entire trial, including the victim's testimony, was open to the public.[10]

The victim was questioned for approximately 2 hours, without a break. She testified standing 2 meters away from her father. She broke down and cried at a number of points

in her evidence and appeared harassed and drawn. She seemed to be having difficulty remaining standing.

She testified that after the attempted rape, she escaped from her father and ran away to her grandmother's house. The presiding judge asked the victim "when you went to your grandmother did you inform your father because under [customary] Albanian law you must tell your father?" The victim replied "I was running away from him." The presiding judge questioned the victim repeatedly on this point – as to why she did not seek her father's permission before going to see her grandmother. At one point, the victim started to tell the judge that what the judge was saying was untrue, but the judge cut her off and told her not to speak. Inexplicably, the presiding judge also asked the girl a number of questions as "why" her father had raped her. The victim replied, "[A]ll my sisters know about this but they say nothing. They know my father's place is in a hospital but they do nothing."

One of the forensic experts present in the courtroom was permitted by the presiding judge to question her directly about whether she resisted her father, and about her gynaecological condition.

During the lunch break, the victim was left in the courtroom, unattended, with the defendant, her father. At the conclusion of the trial, the defendant was acquitted.

The questioning and comments by the presiding judge, and his tone and demeanour toward the victim in the courtroom, raise serious concerns as to his bias towards the victim in this case and violate domestic and international standards relating to the questioning of juveniles. The public prosecutor did little to attempt to prevent the harassing treatment of the victim. No suggestion was made to close the proceeding to the public during the victim's testimony to protect her privacy. She had no victim advocate present in the courtroom.

Mitrovica

In the case of 7 defendants charged with the rape of a juvenile, *Victim M*, the presiding judge also did not exclude the public from the hearing of the victim's testimony. *Victim M*, who is 16 years old and allegedly 15 at the time of the offence, testified for around 3 hours in open court with only a few short breaks. Her testimony consisted of describing being beaten and multiple sexual intercourse, which, although not consensual, she did not fight due to fear. *Victim M,* who was standing during the testimony, was visibly pregnant so that the presiding judge questioned her regarding her pregnancy. *Victim M* stated that her pregnancy was the result of a brief marriage that ended because of the alleged rape charges.

During her extensive public testimony, *Victim M* was required to stand approximately a meter and one half away from 6 of the defendants on trial for raping her. The questioning of *Victim M* by the presiding judge over the course of 3 hours was done in a rather harsh manner. The demeanour of the presiding judge suggested insensitivity towards *Victim M*

and the content of her testimony and even impatience with her despite the fact that she was a juvenile witness. On the contrary, when one of the defendants testified as to his impotency, the judge displayed particular sympathy toward the defendant and ensured him that his testimony would be confidential. The public prosecutor did not intervene on behalf of *Victim M*. There was no victim advocate or family of *Victim M* present to support her.

During one of the breaks in testimony, *Victim M* and one of the defendants began an argument outside the courtroom, despite the fact that the court had cautioned both the parties not to initiate contact with each other.[11]

The defendants were found guilty. The "ring-leader" defendant was sentenced to one year and 6 months. The other defendants were sentenced to one year.

Prizren

In the case of *Defendant M*, charged with Compellation for Contraction of Marriage[12] in relation to the assault upon and kidnapping of a 15 year-old girl, the Municipal Court public prosecutor failed to appear at trial.

In that case, the victim claimed that the defendant and two accomplices stopped her vehicle, forced the driver out of the car with threats, beat her sister (also a passenger in the vehicle), forced the victim into a separate car, and took her, without her consent or the notification of her family, to Pristina/Prishtine. She was held in Pristina/Prishtine for 3 days, during which time the defendant and his family threatened to send her to Albania if she did not agree to marry *Defendant M*. She was subsequently released to her family, and filed charges. The day before trial, UNMIK police asked LSMS to monitor the trial, claiming that the victim was being pressured by *Defendant M's* family to withdraw her charges.

The trial was closed to the public. The public prosecutor did not appear and the trial was conducted without his presence. The victim's father was present, but she had no victim advocate. As a consequence of the public prosecutor's absence, details about the type of force used against the victim were not fully presented. Neither the victim nor her sister were questioned about whether any of the defendants had used a weapon during the kidnapping, notwithstanding that police statements indicated that one defendant had a weapon. A witness that could have corroborated the victim's testimony – the driver of the vehicle – was never called to testify. Given the public prosecutor's absence, the victim was asked if she wanted to make a closing statement. She stated only that she supported the indictment. *Defendant M* was convicted and sentenced to 3 months imprisonment.

Following the trial, the public prosecutor advised LSMS that he did not appear at trial because he was the only municipal court public prosecutor for the entire region and thus was physically unable to travel to many of the municipalities to attend trials.

In the case of *Defendant C*, charged with the attempted rape of a 15 year-old girl, the presiding judge asked the victim if she wanted her father, who was present in the courtroom, to remain with her during her testimony. She said "yes." Nonetheless, the presiding judge excluded the father from observing the trial, as well as the public. After her father left the courtroom, the judge explained that he wanted her to feel free to be completely truthful with him. This was despite the fact that the FRY CPC provides that while the public can be excluded from the trial where a juvenile is involved, this exclusion "shall not include . . . the injured party [or] their representatives."[13] The victim had no other advocate.

The victim then testified that during the attempted rape, the defendant beat her and threatened to kill her. Despite this, the public prosecutor argued in his closing statement that while the defendant should be convicted, he should receive no sentence because he purportedly *demonstrated his "compassion" for the victim by not completing the act*. *Defendant C* was convicted and sentenced to 3 months imprisonment.

(b) Victim Intimidation Issues

Prizren

On 26 May 2000, *Victim X*, a 16-year-old girl, reported to KFOR that on 14 February 2000, the accused raped her at his aunt's home. She claimed he dragged her into his aunt's house by the hair, punched her in the head and abdomen, and she lost consciousness. When she awoke, he raped her and burned her with cigarettes. Following the rape, she went home, took a shower, but kept the clothes she was wearing. The clothes allegedly show cigarette burns and blood – her nose was bleeding.

On 29 May 2000, the investigating judge took the preliminary statement of the accused, who was not in detention. The accused refused a lawyer and, among other things, stated that he was innocent of the rape.

A medical report states the victim overdosed on pills on 1 June 2000. She was admitted to the hospital and released on 5 June 2000. That same day, *Victim X* testified before the investigating judge. She explained the rape, consistent with her statement to KFOR. She advised the judge, as she had KFOR, that she had kept the clothes that she was wearing the night of the alleged rape, which corroborated her allegations. She claimed the accused threatened to kill her and her brother if she persisted in pursuing charges. She explained that she wished to proceed with the charges, but was afraid, because she had no support from her mother.

On 16 June 2000, the accused was questioned again by the investigating judge and continued to assert his innocence. That same day, *Victim X* was again questioned and claimed that the accused told her that if she did not withdraw her statement against him, he would rape her worse than the first time and then kill her. She said that the accused had told her that even if he is sent to prison, when he gets out he will track her down and punish her, and that she never will escape him. She said her mother is afraid of him, and

is urging her to drop the charges. She further stated that the previous day the accused threatened to kill her and said he would kill the judge if he is sent to prison. She stated that she would like to confront the accused.

The same day, 16 June 2000, the accused was arrested and placed in detention. He was subsequently charged with rape and endangering security for threatening the judge.

A KFOR report states that ten days later, on 26 June 2000, *Victim X* arrived at the KFOR base at 23:15 "in bad condition." Her clothes were burned in different areas and she was very emotional. She was treated by a KFOR doctor and taken to the hospital. The report further notes that the girl told Italian KFOR that three men kidnapped her the previous day. These men restrained her, took her to a village, isolated her, beat her and burned her with cigarettes. These men then told her that she had to drop her accusations against the accused. She was freed at 23:00 on 26 June 2000 and went immediately to KFOR. She was shown photos and reportedly was able to identify two of the men who beat and burned her. A medical report dated 27 June 2000 reports injuries to the victim's face and other injuries. She was sent to the neuro-psychiatric ward, and released the next day. A KFOR report states that, for safety reasons, she was placed in the hands a humanitarian organisation.

The trial was set to begin on 18 August 2000 and *Victim X* was present. The trial was postponed until 25 August 2000. On 20 August 2000, *Victim X* left the protection of the safe house, reportedly without discussing it with the staff there. A Non-Governmental Organisation (NGO) providing counselling services to her for some months reported her missing. On 24 August 2000, the victim arrived at the OSCE Regional Centre with UNMIK police stating that she had been threatened again. The humanitarian organisations that had aided the victim in the past advised OSCE that they had received threats and were concerned about again housing the victim. UNMIK police advised OSCE that UNMIK police would transport *Victim X* to her cousin's house with whom she claimed she would be safe, and escort her to court the next day.

On 25 June 2000, *Victim X* did not appear at the trial, and the trial was postponed until 1 September 2000.[14] That evening, the victim reported by telephone to the NGO that she had attempted to go to court (having reportedly refused a police escort), believed she was being followed, so stayed on the bus until she reached Italian KFOR. The NGO representative reported that she spoke to the girl, that the girl was frightened, but wanted to testify. The representative stated that the girl was under "tremendous threat" and confirmed that the girl had burns "all over her body."

On 1 September 2000, LSMS appeared in the district court to monitor the trial. The victim arrived at the courthouse accompanied by her mother and the *defendant's brother and sister*. Other members of the defendant's family were in the hallway outside the courtroom. Two UNMIK police officers and an officer with Italian KFOR were at the courthouse, and immediately pulled the victim aside and waited with her until she was called to testify.

The trial was closed to the public. During the trial, *Victim X* was quite emotional. The presiding judge asked her several times if she was well enough to continue; she was sobbing uncontrollably; she was at times doubled over in her chair; she was looking over her shoulder to see who was present in the courtroom; she had difficulty speaking and started her testimony by claiming that her life has been destroyed. She then asked, and was granted permission, to take a five-minute break. During the break, LSMS observed the victim sitting with UNMIK police and the court advocate in a police vehicle, clearly extremely emotionally distraught. When she returned to the courtroom, she testified that that she had not been raped and that, although she had been beaten by three men, they did not tell her to withdraw her accusations against the defendant.

There was no real effort by the court, and no effort by the public prosecutor to question her as to *why* she was changing her account of the events. The clothes she said she was wearing the night of the alleged rape -- which she testified during the investigation, show burns from cigarettes and blood from her nose, and which she said she *kept* – were not referred to by the prosecution at trial. The prosecution proposed that the indictment be dropped. The panel dropped the indictment. The defendant was immediately released from custody.

Pec/Peje

The case of *Defendant R* also presents possible victim/witness intimidation issues. *Defendant R*, who is reportedly a former KLA member, was charged with two counts of rape and one count of Unnatural Sexual Acts with a Person under 14 years. For each alleged crime, the minimum sentence upon conviction is 3 years.

The three victims (*Victim A, Victim B, and Victim C* – a 14 years old girl) are Kosovo Romas. On the first day of trial, on 21 June 2000, *Victim A* appeared to testify but *Victim B* and her daughter, *Victim C*, did not. *Victim B* and *C* reported that they attempted to enter the court building on another scheduled trial date, 30 June 2000, to give their testimony, but reportedly were denied access to the courtroom until the trial was concluded. The presiding judge reportedly was informed that they were outside the courtroom while the hearing was still ongoing, but stated later that it was too late for them to testify. The family of *Victims B* and *C* requested to speak with presiding judge. The judge met them in his office, opened the trial record, and took their testimony, outside of the presence of the defendant and defence counsel. However, an alleged member of the KLA was present during the testimony. *Victim B* testified that she forgave the defendant and "for the sake of his parents, he should be set free…"

The defendant was convicted and sentenced to 4 years and 6 months imprisonment. He is free pending appeal.

Gnjilane/Gjilan

On 22 June 2000, the trial was conducted of 5 Kosovo Albanian men charged with rape. According to the indictment, on the night of 4 April 2000 and continuing to the early

morning of 5 April 2000, 5 defendants brought the victim to a café, took her into a back room, where some of the defendants allegedly beat her and some of the defendants allegedly told her to take off her clothes. One told her "don't cry, either you will be willing or you will be forced." Two of the defendants then had sexual intercourse with her.

In *Defendant D's* police statement of 5 April 2000, he claimed that he had been informed by *Defendant T* that defendant *T* would bring a girl to the café and that he planned to rape her there. When she arrived at the café, *Defendant T* allegedly said to *Defendant Z* "go and rape her." His statement continues: "So he [*Defendant Z*] entered and started to scream to the girl, he was saying take off her clothes, and she said you can kill me but I will not take my clothes off…While she was screaming [*Defendant T*] was forcing [*Defendant H*] to enter and beat her and then to rape her."

The victim told the police that her neighbour told her that one of the defendants had threatened to do "the same" to the neighbour's daughter as he had done to the victim. Some days later, the victim told the police that the father of one of the suspects had asked her to withdraw her accusations.

At trial (the public was excluded), *Defendant D* testified – inconsistent with his prior statements, claiming that he had been intimidated by the international police to make the statement. He admitted, however, that he gave the same statement he had given to the police to the investigating judge. The remaining defendants denied rape or assault. *Defendant T* testified that he had a previous sexual relationship with the victim.

When called to testify, the victim declared that she wanted to apologise to all 5 defendants because they had been detained for "nothing." She then told the court that "nothing" happened that night. She claimed she reported to the police because she was angry with *Defendant T* for leaving her alone on the street late that evening. She stated that she and *Defendant T* had sexual relations in the past. This was inconsistent with her prior police and court statements that she had never had sexual relations with *Defendant T* prior to the rape.

The public prosecutor continued to support the indictment. At the public prosecutor's request, the presiding judge read into the record the victim's prior testimony to the investigating judge, which confirmed the allegations set forth in the indictment. The five defendants were acquitted.

III. The Need for Adequate Counselling/Treatment

In the case of *Defendant S*, the defendant admitted to have sexual relations with the victim, a juvenile, but claimed they were consensual. The victim testified at the trial on 29 June 2000 that the defendant threatened her at gunpoint, forced her into his vehicle, slapped her face, tore her hair, and hit her with a handgun until she lost consciousness. When she awoke, they were driving and she asked him where he was taking her, and he said that he had already "dug a lot of holes" for women there. She lost consciousness

again. The victim further testified that the defendant released her and she walked home. When her mother and her sisters asked her what had happened, and she lost consciousness again. At that point, her father and her brother took her to a doctor where she lost consciousness again.

During the testimony, after being asked a question by defence counsel, the victim broke into tears and then collapsed completely, going in to what appeared to be a seizure. The trial was suspended; the victim was not brought back to testify.

According to a medical report contained in the court file, the victim was examined on the same day as the alleged rape. The report indicates that, at the time of the examination, she had a number of injuries and, in addition, was suffering from post-traumatic stress and required treatment, which she did not receive.[15] She had no victim advocate present with her in the courtroom. The defendant was found guilty and sentenced to six years imprisonment.

The need for UNMIK and the Kosovo judicial system to provide appropriate treatment and counselling extends not only to victims of sexual violence but also to women defendants who encounter the criminal justice system as a result of intra-family violence. Although not covered in depth in this report, the cases of women defendants highlighted in earlier sections, such as *Nazime Hamiti*, raise these concerns. The case of *Kada Haziri*, however, provides the most sobering example.

On 31 May 2000, *Haziri*, 44 years old, was arrested for the attempted murder of her husband and detained in the Mitrovica/Mitrovice Detention Centre. In the beginning of June 2000, the Detention Centre Commander informed LSMS he believed that *Haziri* posed a serious danger to herself. At the detention centre, *Haziri* attempted to commit suicide. On 14 July 2000, a report for the UNMIK Regional Health Officer confirmed an earlier KFOR psychiatrist report that *Haziri* was "in a state of psychosis," and should be transferred to [a] psychiatric hospital. Although there were attempts, *Haziri* was never transferred to Pristina/Prishtine Hospital for a review. During an interview with the United Nations High Commissioner on Human Rights, *Haziri* reported that she had been severely beaten by her husband. On 18 August 2000, the administrative officer of the detention centre informed LSMS that *Haziri's* health was deteriorating and that she should be in a special hospital for the mentally ill, but since such an institution did not exist in Kosovo, there was no place for her except the detention centre. On 22 August 2000, the investigating judge released *Haziri* from detention into the custody of her family, including her husband. Three days later, *Kada Haziri* committed suicide.

LSMS RECOMMENDATIONS

1. Allegations of sexual violence against women, in particular cases involving juveniles, the elderly, or claims of intra-family sexual violence, must be promptly and diligently investigated. Where reasonable grounds exist, such cases must be prosecuted. Failure to diligently investigate, and where appropriate, prosecute such cases should be a disciplinary offence.

2. A working-group must be established to formulate guidelines for the courts regarding the treatment of victims in the courtroom, such as the introduction of video-link or screens.

3. The Department of Justice in co-ordination with UNMIK police should develop a witness protection programme for all vulnerable witnesses.

4. It should be made a disciplinary offence for a public prosecutor not be present at all trials relating to any claim of sexual violence, including attempts to forcibly compel a woman into marriage.

5. In co-operation with women's NGOs, UNMIK should create a *Victims Advocacy Programme* to provide legal, psychological and social assistance to all victims of sexual assault.

6. UNMIK must provide *secure* accommodation for any victim of sexual and domestic violence.

7. The recently established Forensic Institute should create, in conjunction with UNMIK police, protocols for the collection and preservation of evidence in cases of sexual violence.

8. UNMIK should equip all hospital and clinics with modern rape evidence collection kits. Special personnel should be trained in the appropriate use of such kits and appropriate treatment of victims of sexual violence.

9. The Kosovo Judicial Institute should provide further training for judges, public prosecutors, defence counsel and law enforcement authorities on the appropriate treatment and questioning of victims/witnesses in cases involving sexual violence.

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[1] Art. 2 (c) CEDAW.
[2] Art. 2 (f) CEDAW.
[3] Arts. 148-151, FRY CPC.
[4] Art. 18, FRY CPC; see Art. 45 (1), FRY CPC, providing that the "[p]rosecution of perpetrators of crimes is the basic right and basic duty of the public prosecutor."
[5] Art. 15 (1) and (2) FRY CPC.
[6] Article 19(1) CRC.
[7] Article 231 FRY CPC.
[8] Article 288 FRY CPC.
[9] *See*, for example, Article 16 CRC.
[10] *See* Art. 288 FRY CPC (permitting judges to exclude the public from proceedings to "protect the interest of a minor.")
[11] Due to the confusion, it was unclear whether it was the defendant or *Victim M* who initiated the contact during a break in the trial proceedings.
[12] *See also* Art. 16 (b) CEDW, recognising that a woman has the "right freely to choice a spouse and to enter into marriage only with [her] free and full consent."
[13] Art. 289 of the FRY CPC.

[14] When reviewing the court file, LSMS noted a letter, addressed to the presiding judge from an individual using only her first name, stating, among other things, that the defendant was innocent but that members of the victim's family were attempting to have her killed.

[15] Article 4 (g) of the UN Declaration provides that to the "maximum extent feasibly in the light of their available resources" states should establish treatment and counselling programs for victims of sexual violence.

CONCLUSION

The cases discussed in this report highlight that in seeking to establish a functioning judicial system, capable of fairly prosecuting serious criminal cases, there still exist significant gaps between the required logistical capacity of the courts, the experience and competence of relevant court actors, and the reality on the ground. Whilst a focus of attention has been on the treatment of minorities in the justice system, the gaps in the existing system have impacted upon all individuals, including victims and witness.

With regard to the applicable law, courts require further guidance as to the manner in which international human rights can impact upon the criminal procedures, to guarantee fairness. In the context of arrest and detention, it is essential for law enforcement authorities and the courts to adopt a consistent approach, particularly to pre-trial detention, which complies with domestic and international laws and marks the exceptional nature of any interference with the individuals right to liberty. Central to the protection of the rights of the defendant is the role of defence counsel. This is an active role, which applies throughout the criminal proceedings, and which requires greater understanding and facilitation by all court actors. The cases involving war and ethnically motivated crimes have brought into stark focus the issues of bias, necessitating greater efforts to ensure impartiality. The prosecutions of allegations of sexual violence have highlighted a lack of facilities for victims and witnesses and understanding on the part of the courts.

An effective and fair judicial system is fundamental to any society. In the Kosovo context, this is of even greater importance, in the light of the existing political and social climate and the vital nature of such a system for the success of other components of UNMIK. Bearing in mind the fact that there was no judicial system in Kosovo immediately following the conflict, the current system has been forced to undergo a rapid evolution and to undertake the conduct of a large number of complex and serious criminal cases. Now that a justice system has been established, adequate resources and attention should be focussed upon filling the gaps, with the provision of concrete measures to secure the fairness of all proceedings.

II. GLOSSARY

OSCE	Organisation for Security and Cooperation in Europe
UNMIK	United Nations Mission in Kosovo
SRSG	Special Representative to the Secretary-General
LSMS	Legal Systems Monitoring Section
UN DJA	United Nations Department of Judicial Affairs
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
FRY CPC	Former Republic of Yugoslavia Criminal Procedure Code
KPC	Kosovo Penal Code
EJS	Emergency Judicial System
JAC	Joint Advisory Council on Provisional Judicial Appointments
AJC	Advisory Judicial Commission
NATO	North Atlantic Treaty Organisation
COMKFOR	Commander of Nato-led Kosovo Force
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
KPS	Kosovo Police Service
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CRC	Convention on the Rights of the Child

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