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Mission in Kosovo

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OBSERVATIONS AND RECOMMENDATIONS OF THE OSCE LEGAL SYSTEM MONITORING SECTION

REPORT No. 7: ACCESS TO EFFECTIVE COUNSEL[1]

STAGE 1: ARREST TO THE FIRST DETENTION HEARING

I. Issue

This report will analyse access-to-counsel and effectiveness-of-counsel issues at two stages of the criminal process: first, during the period from arrest until the first detention hearing; and second, during the first detention hearing.

Article 5 and 6 of the European Convention for the Protection of Human Rights (the "ECHR") and Article 9 and 14 of the International Covenant for Civil and Political Rights (the "ICCPR") provide a framework for the protection of the rights of detainees. These provisions form part of the applicable law in Kosovo and seek to secure to detainees access to counsel and to provide adequate facilities and procedures in order to ensure that defence counsel is able to effectively represent the detainee. These instruments provide *minimum standards* for the treatment of suspects and detainees and they do not proscribe any particular methods by which the relevant authorities are to implement their obligations.

With regard to the right of access to effective counsel, LSMS has identified a number of breaches of international human rights laws. These breaches stem from both direct

[1] This report is the first in a series of reports that will deal with the issue of access to counsel and effectiveness of counsel. In referring to "defence counsel" this report includes both public and private counsel who represent defendants.

inconsistencies with the provisions of the applicable domestic law and the practices and procedures adopted by the relevant authorities. This report will highlight:

i. The systematic denial of access to defence counsel prior to the first detention hearing;

ii. The systematic denial of access to defence counsel during interrogation prior to the first detention hearing;

iii. The failure to provide minority defence counsel, particularly Serbian counsel, which has exacerbated the problem of access to counsel in cases involving Kosovo Serbian defendants; and,

iv. The restriction or prevention of defence counsels' access to interview clients, review police files and other evidence and to present evidence to challenge an order for detention such as to deprive defence counsel of the facilities necessary to effectively represent the defendants.

II. Access to Effective Counsel Prior to the First Detention Hearing[2] under the Applicable Law

Pursuant to the FRY LCP, and where an individual has been detained, the detainee must be brought before the investigating judge, within 72 hours, and the investigating judge must determine: (i) whether to initiate an investigation; and (ii) whether to continue detention. This report will analyse access to counsel issues in the light of the fundamental nature of the decisions being made by the investigating judge at this initial stage in the proceedings.[3]

International Human Rights Law

(a) The Right to Legal Representation

The right to legal representation applies at all stages of the criminal process and is a fundamental pre-condition by which to safeguard the rights of a detainee.

Where an individual is arrested or detained they must be given access to a lawyer. In determining a time-frame for access, the European Court of Human Rights in *Murray v UK* held that a delay of 48 hours was excessive.[4] The UN Human Rights Committee has

[2] For the purposes of this report, the first hearing before the investigating judge is construed as the first detention hearing.
[3] This report does not address access to counsel issues during the investigative stage; those issues are the subject of LSMS Report No.8.
[4] (1996) 22 EHRR 29. Consideration was given in *Murray v UK* to the potential impact of the inferences that could be drawn from the defendant's silence during the police interview. The 48 hour time period is, however, also reflected in Principle 7 of the *Basic Principles on the Role of Lawyers*.

stated that access must be *immediate*.[5] The need for immediate access to counsel stems, at least in part, from the fact that consequences flow from the *uninformed* actions of the defendant which may influence the course of the initial investigation by the police and the preservation or location of evidence, the decision as to whether or not to initiate an investigation and to order detention, the conduct of the investigation and, ultimately, the presentation of the defence at trial. Moreover, immediate access to counsel is an important safeguard against the abuse of other rights, such as the prohibition against torture or inhuman or degrading treatment under Article 3 ECHR.[6]

As an imperative to the exercise of the right to counsel, the defendant must be *notified* of the right and must be provided with the practical means by which to exercise it. Principle 17(1) of the *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* demands that such notification must be given *promptly* after arrest. Principle 5 of the *Basic Principles on the Role of Lawyers* goes further to demand *immediate* notification of the right to legal assistance upon arrest or detention.

(b) The Right to Effective Legal Representation

Article 5(3) of the ECHR and Article 9(3) of the ICCPR demand that anyone who has been arrested and/or detained must be brought promptly before a judicial officer in order to determine the lawfulness of their arrest and/or detention. Furthermore, Article 5(4) of the ECHR and Article 9(4) of the ICCPR effectively incorporate a *habeas corpus* dimension to the relevant authorities obligations and demand that persons deprived of their liberty are able to challenge the lawfulness of their detention. Following the decision of the European Court of Human Rights in *Toth v Austria* it is clear that such hearings must be *adversarial* in nature and that the authorities must secure for the detainee *equality of arms*.[7]

Where legal representation is provided, the authorities are under a positive duty to ensure that such legal assistance is effective.[8] A dual obligation is imposed: first, the legal representation provided must be adequately qualified and experienced[9]; and second, adequate time and facilities must be provided in order to ensure the proper preparation of the defence.[10] At a minimum, in order to effectively challenge a detention order or the decision to initiate an investigation, the defendant, or his lawyer, must be able to make representations, he must be able to have private communications with his legal

[5] Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add/74, 9 April 1997, para. 27.
[6] See HRC General Comment 20 para 11 (E/CN.4/1992/17) 17th December 1991. Where an individual has been arrested and/or detained and they cannot afford to pay for a lawyer they must, where the interests of justice demand, be provided with counsel free of charge. In the light of the considerations discussed above (at pg.3) it is in the interests of justice that a detainee be allowed immediate access to defence counsel.
[7] (1992) 14 EHRR 55. Similar provisions can be found in Article 9(3) and (4) and Article 14 of the *International Covenant on Civil and Political Rights* (1966).
[8] *Artico v Italy* A 37 (1998) and *CCPR General Comment 3*, 31 July 1981.
[9] See, for example, *Biondo v Italy* No. 8821/79, 64 DR 5 (1983) Com. Rep. and *Kamasinski v Austria* A 168 (1989).
[10] *Can v Austria* A 96 (1985).

representative and to have access, prior to the hearing, to any evidence relied upon by the prosecutor or the investigating judge.[11]

Domestic Law

(a) The Right to Legal Representation

Article 11(1) of the FRY Law of Criminal Procedure (the "FRY LCP") provides,

> "The accused has the right to present his own defence or to defend himself with the professional aid of defence counsel, whom he shall himself select from among professional attorneys."

Similarly, Article 67(1) FRY LCP states that,

> "The accused may have defence counsel *throughout the entire course of the criminal proceedings*." [emphasis added]

The FRY LCP is not explicit as to when *criminal proceedings* are deemed to begin. However, Article 147 defines the "accused" as "a person against whom an investigation is being conducted." If access to legal representation is construed so as to require the commencement of a formal hearing, then there is a conflict with the international provisions outlined above.

Article 74(1) of the FRY LCP seeks to restrict a defendants access to legal representation.

> "If the accused is in custody *and has been examined*, defence counsel may correspond and talk with him." [emphasis added]

The commentary to Article 74(a) makes clear that *examined* means the first formal examination before the investigating judge.[12] In practice, this first formal hearing will be the first detention hearing – a delay that brings Article 74(1) into conflict with the demands of the international human rights provisions.

Conversely, Article 67(2) of the FRY LCP states that,

> "*Before the first examination* the accused must be instructed that he has *the right to engage defence counsel* and that his defence counsel may attend his examination." [emphasis added]

In cases of indigence, however, the FRY LCP does not provide for the appointment of counsel prior to the first detention hearing. The Code envisages the appointment of

[11] See, for example, *S v Switzerland* A 220 (1991) on private communications and *Lamy v Belgium* (1989) 11 EHRR 529 on adequate facilities and disclosure. For a discussion of the right to an adversarial hearing in relation to UNMIK Regulation 1999/26, see LSMS Report No.6 *Extension of Custody Time Limits and the Rights of Detainees: The Unlawfulness of Regulation 1999/26*.

[12] See *Guide Through The Procedures*, Belgrade 1985, p. 782.

counsel, from the first hearing, in cases involving mandatory defences, or cases involving crimes carrying a prison sentence of 5 years or more. In cases where private counsel has been retained, there are no provisions granting counsel access to the detainee prior to the first detention hearing.[13]

Article 196(3) of the FRY LCP provides that pre-trial custody of a detainee ordered by a law enforcement agency, as opposed to the investigating judge, may not last longer than 3 days and that the detainee has the right to appeal the custody order within 24 hours. This provision also imposes a positive obligation on the law enforcement agency to "…see that the person detained receives the necessary professional aid in submitting the appeal."[14] Thus, for the purposes of appealing against the order for custody within 24 hours, the relevant law enforcement authorities must provide the detainee with access to an appropriately qualified person who can render *professional aid*.

(b) The Role of Defence Counsel at the First Detention Hearing

The FRY LCP does not contain any express provision granting the defendant the right to call witnesses and to present evidence at the first hearing. However, Article 4(2) of the FRY LCP provides that, at the first examination[15]:

> "The accused must be given an opportunity to state his position concerning all facts and evidence against him and to present all facts and evidence in his favour."

In addition, Article 218(5) provides:

> "In the examination the accused should be allowed to present without hindrance his position concerning all the circumstances tending to incriminate him and to present all facts in his favour."

In the light of these provisions, the domestic law provides a basis by which the "first examination" may be *adversarial* in nature. If, however, in practice, the accused is restricted to making a personal statement and prevented from presenting other evidence[16] to support his arguments as to why detention should not be continued, then there would be a violation of the international standards outlined above.[17] The language of these provisions must, therefore, be construed broadly, so as to guarantee a proper effective hearing on the issue of continued detention.

[13] See FRY LCP Arts. 70, 71 and 193.
[14] See FRY LCP 196(3).
[15] Article 218(1) FRY LCP outlines a number of questions that the investigating judge must ask the accused at the first examination. These questions refer, for example, to the accused's family background, residence, financial situation and previous convictions and may be relevant to the decision as whether or not to order detention. These questions are, however, in themselves insufficient to ensure an adequate consideration of the need for continued detention.
[16] In some cases this may require the ability to call witnesses.
[17] Article 159(3) provides that, at the first examination, the "principals," who are defined in Article 146 as the "prosecutor and the accused," "may present their motions orally."

III. The Current Practice: Denial of Access to Legal Representation Prior to the First Detention Hearing

(a) Access to Legal Representation

LSMS interviewed detainees on various access-to-counsel issues in Kosovo's five regions.[18] 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 and Peja 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.[19] In Peja, detainees have consistently reported that family members need authorisation from the investigating judge before they are permitted to visit.[20]

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.[21] Furthermore, in Pristina, 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 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 Serbian lawyers available to take court appointments. It has also been alleged that the Courts fail to actually appoint the Serbian lawyers that are available. In the Pristina region, there are reportedly 4 known Serb lawyers available to take court appointments[22];

[18] LSMS interviewed more than sixty detainees in Pristina, fifty-two in Mitrovica, thirty-five in Gjilane, thirty in Pec/Peja, 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).

[19] 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*.

[20] Authorisation must be obtained pursuant to Article 203(1) FRY LCP.

[21] LSMS monitors have reported that the detention facilities in Gnjilane, Mitrovica, and Pec/Peja 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.

[22] Two of the 4 may presently be refusing to accept appointments.

only 2 are actually being appointed. In Mitrovica, 8 Serbian lawyers are reported to be available for appointment; only 1 is actually being appointed. In the Gnjilane region, only one Serbian lawyer is available for appointment.[23] No Serbian lawyers are reportedly available for appointments in either Prizren or Peja.

The failure to provide procedures and facilities by which a detainee, who so desires, may contact counsel and the stark scarcity of Serbian defence counsel, highlights the failure of the relevant authorities to fulfil their positive obligation to provide access to counsel under the international provisions outlined above.

With respect to the detainee's right to appeal police-ordered detention within 24 hours of arrest – it is unclear as to whether detainees are able to exercise this right or are even being advised as to its existence.

LSMS has been advised that law enforcement authorities interrogate detainees whilst they are in custody, prior to the detainees' first appearance before the investigating judge. Both UNMIK police and KFOR have confirmed this information. LSMS does not know how often detainees are interrogated during this time period, or whether records are kept documenting the date and time of each interrogation.[24] By way of example, an international employee of an international NGO in Kosovo was detained on the 7th April 2000 by UNMIK police for theft. He was released on the 11th April 2000 and has been rearrested and under renewed detention from the 13th April 2000. Prior to his initial release he was unable to secure counsel and his employer was not initially notified of his arrest. He was interrogated on a number of occasions and given a number of polygraph tests. In Peja, the Carabinieri reportedly obtained a signed "confession," written in Italian with no written Albanian translation, from an Albanian detainee prior to the detainees' first appearance.[25] Interrogations such as these, where the conduct of the interrogation may seriously prejudice the defence or otherwise impact upon a decision to continue detention, or impact upon the investigation and the trial, conflict with the requirements of the ECHR and the ICCPR, outlined in this report, which seek to ensure speedy access to legal representation, particularly during interrogation, in order for a defendant to make an informed decision as to the exercise of his rights.[26]

b) Effectiveness of Legal Representation

The information gathered by the police prior to arrest and during the first 72 hours (or until the first detention hearing) provides the basis by which the prosecutor and the investigating judge determine: (i) whether to initiate an investigation; and (ii) whether to continue detention. Defence counsel is, however, unable to interview his/her client in

[23] It is unclear as to the scope of the area within which this lawyer is available to work.
[24] A Kosovo prosecutor stated that it is the *duty* of the police to question the detainee during this time period. The prosecutor then reviews the police file, including any statements made by the detainee, to determine whether or not charges are justified and further detention required. Similarly, the investigating judge, who makes the detention decision, reviews the police file and the prosecutor's recommendations.
[25] The interpreter who translated the statement to the detainee is reported to have signed the statement.
[26] The need to ensure access to counsel during the 72-hour period is particularly heightened in the light of reports that, in some cases, the 72-hour rule is being violated.

preparation for that detention hearing, or to review the police records upon which the judge and prosecutor rely in making the detention order. In Pristina, defence counsel can be provided access to the police file only after the investigating judge has *authorised* or *appointed* them to the case. By contrast, in Mitrovica, the Kosovo Serb lawyers interviewed by LSMS reported that they are not given access to the police file, even after the indictment has been issued.[27]

Whilst acknowledging that the investigating judge has a mandatory obligation to ensure that all evidence both for and against the accused is fully and fairly presented, the effect of restricting access to the police file, restricting access by defence counsel to their clients before the first detention hearing and of limiting or preventing the presentation of evidence in order to rebut an application for detention, is to render entirely devoid of meaning the detainees right to *effective* counsel and to ensure that the decision to continue detention is properly reached.[28] Where an adversarial forum cannot be provided at the first instance, the detainee must be given speedy access to such a forum to challenge his detention.

RECOMMENDATIONS

LSMS has presented a letter outlining its concerns as to the treatment of suspects on arrest and prior to the first detention hearing to KFOR and the UN Civil Adminstration and attached a Draft Civilian Administrative Instruction on Arrest and Initial Detention by Law Enforcement Authorities.[29] This Draft Instruction outlines basic procedural

[27] These lawyers also reported that they are not permitted to speak with their clients outside the presence of a court supervisor or a detention officer *until after the indictment is issued.* LSMS is preparing a separate report on issues that arise from the investigation to the indictment phase of the criminal process.

[28] Pursuant to Article 191(2) of the FRY LCP, the prosecutor has the discretion to recommend continued detention, and the investigating judge has the discretion to order it, *only if*:

(1) "there are grounds for suspicion that an individual has committed a crime"; and

(2) one or more of the following:

a) circumstances exists "which suggest the *strong* possibility of flight";

b) a "warranted fear" that he [the defendant] will obstruct or interfere with the investigation by destroying evidence or influencing witnesses;

c) "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" ;

d) the crime carries a potential term of imprisonment of 10 years or more and, 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 unhindered conduct of criminal proceedings or human safety."

[29] LSMS *Draft Civilian Administrative Instruction 2000/1 on Arrest and Initial Detention by Law Enforcement Authorities.*

requirements on arrest and detention, in order to ensure compliance with international human rights laws, some of which are detailed in the following recommendations. LSMS strongly urges relevant law enforcement authorities to follow the principles outlined in the Draft Instructions.

i. Law enforcement authorities must advise detainees immediately upon their arrest or detention that they have:

    a. the right to remain silent; and,

    b. the right to consult with defence counsel prior to interrogation; and,

    c. the right to have defence counsel present during any interrogation.

ii. In the absence of a written waiver, law enforcement authorities must not question any person who invokes any of the rights outlined in recommendation 1 above. Furthermore, where the arrested or detained person is under the age of 18 or exhibits signs of mental illness or handicap, law enforcement authorities shall not question the person without the presence of a legally responsible adult, in addition to authorised or court-appointed counsel.[30]

iii. Any waiver of the rights outlined in recommendation 1 above must be made by the detainee in writing and must be the result of a fully informed decision and free from coercion. The statement should be made in the arrested and/or detained persons native language and include the admonishment that the statement can be used in criminal proceedings.[31]

iv. Juveniles or mentally ill/handicapped persons cannot waive the rights outlined in recommendation 1 above.[32]

v. Law enforcement authorities must provide reasonable means for the detained person to contact a lawyer, if he so desires, prior to any waiver of his rights and any interrogation.

vi. Law enforcement authorities must provide the detainee an opportunity to consult confidentially with defence counsel, if he so desires, prior to interrogation and the first detention hearing.

vii. Law enforcement authorities must prepare and keep a contemporaneous custody record for each detainee documenting, at a minimum, the date and time of questioning or interrogation; the names of any individual questioning or interrogating; a contemporaneous record of the questioning or interrogation; details of any searches conducted; details of any fingerprinting, photographing or blood and

[30] *Ibid* at Section 5(3).
[31] *Ibid* at Section 5(4).
[32] *Ibid* at Section 5(5).

other samples taken from the detainee; details of any medical examinations; records of visits and access to counsel and a periodic record of the detainees physical/medical condition.

viii. The courts must ensure that the detention hearings are effective and that the detainee has access to an adversarial forum to properly challenge any order for continued detention. Defence counsel must be granted the facilities necessary to effectively represent the detainee. These facilities include, for example, access to the police file and any other evidence relied upon by the prosecutor or the investigating judge as a basis for initiating an investigation or for issuing an order for detention, the opportunity to make representations and a fully reasoned written decision as to the reasons for detention. Where, however, an adversarial forum cannot be provided at the first instance, the detainee must be given speedy access to challenge his detention in such a forum, and any delay should be no longer than 7 days.

ix. The Department of Judicial Affairs must immediately issue a directive to the judiciary, prosecution, and law enforcement authorities to enforce Recommendations (i) to (viii) above.

x. The Department of Judicial Affairs should consider devising a duty-lawyer system for the detention facilities to ensure available legal representation to: (a) assist detainees wishing to exercise their right to appeal police ordered detention within the first 24-hours of detention; and (b) assist detainees wishing to secure legal advice prior to any interrogation and the first detention hearing.

xi. All courts and relevant personnel, particularly defence counsel, must be provided with material resources, including official translations of relevant international human rights instruments.

xii. All relevant personnel, including judges, prosecutors and defence counsel, must be provided practical training on the rights and issues relevant to the period between arrest and the first detention hearing.