MISSION IN KOSOVO

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Organization for Security and Co-operation in Europe
MISSION IN KOSOVO

Department of Human Rights and Rule of Law

KOSOVO

REVIEW OF THE CRIMINAL JUSTICE SYSTEM
October 2001

THEMES:

LEGAL REPRESENTATION

DETENTION

TRAFFICKING & SEXUALLY RELATED CRIMES

MUNICIPAL & MINOR OFFENCE COURTS

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GLOSSARY

ABA-CEELI	American Bar Association's Central and Eastern European Law Initiative
ADoJ	Administrative Department of Justice
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
COMKFOR	Commander of Nato-led Kosovo Force
CSW	Centres for Social Work
CRC	Convention of the Rights of the Child
DCPC	Draft Criminal Procedure Code
DHSW	Department of Health and Social Welfare
ECHR	European Convention on Human Rights
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
fYROM	Former Yugoslav Republic of Macedonia
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
JAC	Joint Advisory Council on Legislative Matters
JIU	Judicial Inspection Unit
KFOR	Kosovo Force
KJPC	Kosovo Judicial and Prosecutorial Council
KLA	Kosovo Liberation Army
KPC	Kosovo Penal Code
KPS	Kosovo Police Service
LMO	Law on Minor Offences
LSMS	Legal Systems Monitoring Section
MOC	Municipal Minor Offences Court
MTA	Military Technical Agreement

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

EXECUTIVE SUMMARY

This review is the third public report on the criminal justice system by the Legal Systems Monitoring Section (LSMS). LSMS is part of the Human Rights Division of UNMIK Pillar III (Organisation for Security and Co-operation in Europe – OSCE). The present review covers the period from March through August 2001. Vested with all executive and legislative powers by United Nations Security Council Resolution 1244, the United Nations Interim Administration Mission in Kosovo (UNMIK) – through the Special Representative of the Secretary General (SRSG) – has the mandate to administer the justice system in Kosovo. This mandate was previously fulfilled by the Administrative Department of Justice (ADoJ). However, since the last review, UNMIK has established a new Pillar I structure called the Police and Justice Pillar, which has brought together the departments of law enforcement and judicial affairs to facilitate co-ordination internally and also co-operation between OSCE, KFOR and other international organisations deployed in Kosovo. The administration of justice was previously managed under Pillar II (Civil Administration). Under UNMIK Regulation 2001/09 on a Constitutional Framework for Provisional Self-Government in Kosovo, (the Constitutional Framework, promulgated on 15 May 2001), some of the administrative control of the judicial system will pass to the new Provisional Institutions of Self-Government to be set up after the elections on 17 November 2001. However, the essential responsibility for the judicial system will remain with Pillar I.

According to its mandate, the OSCE shares, within UNMIK, the responsibility *to ensure that human rights protection and promotion concerns are addressed through the overall activities of the mission.* In line with the mandate of UNMIK to develop mechanisms to ensure the compliance of law enforcement agencies and the judicial system with international standards of criminal justice and human rights, LSMS's monitoring capacities have continued to focus on identifying human rights concerns at all levels of the justice system. Accordingly, this review is intended as an instrument to assist in comprehensively addressing the multi-faceted challenges facing the criminal justice system in order to enhance the development of a culture of respect for human rights and rule of law.

As expressed in previous reports, LSMS understands the obstacles that UNMIK has confronted in establishing a justice system in a society lacking both a coherent legal framework and a core of experienced professionals within the local judiciary due to the disenfranchisement of a significant part of the local community prior to the establishment of UNMIK. However, a functioning judicial system has been established and any emergency type situation is over, and therefore, compliance with international human rights standards should now be assured. In terms of human rights protection and promotion, the enactment of the UNMIK Regulation 2001/09 on a Constitutional Framework for Provisional Self-Government in Kosovo (signed on 15 May 2001) is a recognition at highest level of the direct applicability of human rights instruments within the legal framework in Kosovo. Any breach of these basic standards by any authority should be thoroughly scrutinised and immediately addressed, as it may create adverse precedents on the future development of the judicial system and the society as a whole.

Scope of the Report

With its first two reviews of the criminal justice system LSMS presented a broad and comprehensive overview of the justice system from a human rights law perspective. The concerns expressed in these reports referred to various structural and substantive aspects of the activity of the judiciary and its administrators, and also of the law enforcement agencies. In conjunction with the last review, LSMS suggested a strategy to comprehensively address the challenges facing the justice system, the Strategy for Justice document, which was presented to the public on 21 June 2001. This strategy recommended a collaborative and multi-agency framework to address specific areas of concern within the system as a whole.

Considering that the concerns and the corresponding recommendations identified in the previous reviews are still valid, LSMS provides in this review an analysis of specific substantive areas of the criminal justice system that raise the most pressing human rights issues. Certain areas of concern identified in previous reports, such as detention, defence issues and trafficking and sexually related violence, mandate an exhaustive review highlighting the continuing barriers to conformity with international human rights standards.

Furthermore, in this report, LSMS addresses for the first time the activity of the Municipal Courts and the Municipal Courts of Minor Offences in Kosovo in an extensive fashion. The overview consists of background and statistical information, including a review of the structure and procedure of these lower courts, but will also provide an analysis of the structure, procedure, performance and challenges within the lower courts from a human rights perspective.

Defence Issues

In May and July 2000, LSMS issued two reports on access to effective legal representation and the previous LSMS reviews have also addressed various aspects of the access to adequate defence.[1] An UNMIK Regulation, On The Rights of Persons Arrested by Law Enforcement Authorities, was under discussion during the period covered by this report, and was promulgated as Regulation 2001/28 in October 2001. The OSCE, in collaboration with the Kosovo Bar Association, has launched an NGO, the Criminal Defence Resource Centre, to offer assistance to defence lawyers in defending cases involving crimes against international humanitarian laws and other ethnically motivated crimes, as well as cases involving serious violations of international human rights standards. Although both developments represent positive steps forward, there are still numerous defence-related issues, which are adversely affecting the right to a fair trial. For example, it has been observed that it is the rule rather than the exception that defence counsel is appointed at the outset of the main session, giving defence counsel little, if any, time to prepare the defence. Defence counsel are also frequently changed during the

[1] Reports No. 7 & 8: Access to Effective Legal Counsel. All previously published reports are available under http://www.osce.org/kosovo/documents/reports/justice/

course of proceedings, due to lack of planning by either the court or the defence lawyers involved in the case. Furthermore, lawyers are generally not actively and effectively pursuing the defence of their clients in accordance with what is in fact foreseen in the applicable law.

Detention

The prohibition of arbitrary arrest and detention is a fundamental part of international human rights law. LSMS has previously pointed out that the supposed conflict between security and justice cannot be used as a justification for the interference by the executive in the judicial sphere, particularly in the detention of persons outside the law and without any judicial review. Instead what is needed is a comprehensive and well co-ordinated strategy to address the long-term challenges of the judicial system, including security needs. However, extra-judicial detention has continued in Kosovo, with the SRSG ordering executive detention outside judicial scrutiny[2], and KFOR still detaining over a hundred persons extra-judicially under the authority of COMKFOR. The detention of persons beyond lawful custody time limits also continues despite efforts made by ADoJ to ensure availability of judges and court clerks whenever detention hearings needed to be held. The roster of judges on duty in the courts has, on occasion, failed to prevent unlawful detention beyond the expiration of the initial police custody.

An area where some positive steps have been taken is the detention of the mentally ill, although over 200 persons still remain unlawful detained within the Shtime/Stimlje Special Institute. The close co-operation within UNMIK and with other relevant actors in this area reflects a successful multi-agency strategic planning approach, which should be applied in other areas of common concern as well.

Trafficking and Sexually Related Crimes

The criminality related to trafficking in persons remains an issue of serious concern, both from a legal and a humanitarian perspective. Although the trafficking regulation, UNMIK Regulation 2001/4, came into force in January 2001, its effects are only starting to become visible. Despite efforts to explain the scope of this novel legal framework, the judiciary expresses difficulties in understanding and properly applying the legal mechanisms and remedies provided for in the regulation. On the victims' side, the assistance and protection package envisaged in Regulation 2001/4 has hardly been applied, while the Victim Assistance Co-ordinator, designed as a coherent structure for the implementation of the Regulation, has not been appointed by the SRSG. In the present report LSMS will analyse some of the major challenges facing the justice system in dealing with trafficking cases.

[2] UNMIK Regulation 2001/18 established a Detention Review Commission for Extra-judicial Detentions based on Executive Orders and this Commission was envisaged as a judicial control over executive detention. In its Special Report No. 4, the Ombudsperson concluded that the body envisioned under UNMIK Regulation 2001/18 cannot be considered to be a court in the sense of paragraph 4 of Article 5 ECHR.

Since the last report, developments have been documented in many of the areas of concern that LSMS reported on. Either by isolated *ad hoc* initiatives or by comprehensive policies, issues such as training for the local judiciary, provision of legal aid for trafficking victims, creation of disciplinary mechanisms for scrutinising the activity of local judges and prosecutors (Judicial Inspection Unit of the ADoJ and the Kosovo Judicial and Prosecutioral Council) have been addressed through efforts of UNMIK. However, in the area of sexually related offences, which LSMS has reported on previously, there has been little, if anything, achieved. LSMS has identified over the past six months recurring concerns stemming from the same sources. Improper forensic analysis and poor evidence gathering during initial stages of the investigation, conduct suggesting biased attitudes of the judiciary towards rape victims and the lack of support or advocacy for victims throughout the criminal proceedings represent a failure of UNMIK to adopt viable solutions to these issues.

Minor Offences and Municipal Courts

In the past, LSMS has concentrated its monitoring capacities primarily on the District Courts. Only on an ad-hoc basis, and especially in cases concerning juveniles, have trials in Municipal Courts been monitored. As a consequence, LSMS has not reported extensively and systematically on the activity of these courts, and even less information has been available on the functioning of the Municipal Courts of Minor Offences (Minor Offence Courts).

For the past six months however, LSMS has shifted part of its focus to both Municipal and Minor Offences Courts. Monitoring their activities has highlighted concerns of breaches of human rights standards, similar and with comparable consequences as the ones identified in the District Courts. Issues related to access to defence counsel, right to fair trial, free assistance of an interpreter are only a few of the areas of concern monitored by LSMS and addressed in this report.

LSMS has also documented that little scrutiny and administrative capacity is focused on the activity of these courts. Whereas, at district court level, there are international legal officers, appointed within the ADoJ to facilitate the work of the international judges on an administrative level, with an in depth knowledge of the cases, there is no corresponding function for the municipal and minor offences courts. Furthermore, the court administrators appointed by ADoJ for each region in Kosovo cannot effectively and specifically account for the activity of all courts in the respective region. Therefore, the appointment by ADoJ of administrative legal officers to have an overview specifically and at all times of the activity and the challenges, logistical or otherwise, within these lower courts is highly desirable.

Although the priorities for LSMS remain the same, the special focus on Municipal and Minor Offences Courts in this report is not an isolated attempt. Rather, LSMS will continue to identify various human rights concerns hampering the activity of these courts and impacting the compliance of the whole criminal justice system with international human rights standards.

SECTION 1: MONITORING

I. THE MANDATE OF THE LEGAL SYSTEMS MONITORING SECTION

In *United Nations Security Council Resolution 1244* (SCR 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) should 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, the OSCE, should develop mechanisms to ensure that the courts, administrative tribunals and other judicial structures operate in accordance with international standards of criminal justice and human rights. Moreover, pursuant to UNMIK Regulation 2000/15 'On the Establishment of the Administrative Department of Justice', dated 21 March 2000, confirmation was received from the Administrative Department of Justice that the OSCE is an organisation responsible for the independent monitoring of the judicial system and correctional service.

A Justice Circular (2001/15) issued on 6 June 2001 reaffirmed the OSCE human rights monitors' access to court proceedings and court documents. The Circular is expected to enhance the understanding of the judiciary with regard to the LSMS mandate, and ensure the complete coverage of all stages of criminal proceedings by LSMS monitors.

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 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).

The Department endorses a close co-operation with the newly established Pillar I on Police and Justice, as the objectives set out by the latter fall within the sustainable goals of institution and capacity building envisaged by the OSCE. At the level of the criminal justice system, Pillar I is set to consolidate "a law and order structure that is functionally logical, and in particular establish an unbiased judicial process through initial international participation and reform of the judicial system."[3] Along these lines, the Department promotes the development of a society based on the rule of law and guaranteeing full respect for human rights and fundamental freedoms of every individual, and these goals can only be achieved by a well-functioning judiciary with a clear structure and strategy in place.

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.[4] It receives requests from the ADoJ 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).

The 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 or taking public office in Kosovo to uphold internationally recognised human rights standards and more recently through the

[3] See article "New Police and Justice Pillar established" in *UNMIK News* no. 93, 21 May 2001.
[4] i.e. OHCHR, UNHCR, UNICEF and ICRC.

Constitutional Framework.[5] 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 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, through trial and appeal until a final decision is reached. 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 the information by reviewing the file, when accessible, and by interviewing the suspect/detainee, police/KFOR, defence lawyer, public prosecutor, investigating judge and others. LSMS monitors attend trials and report on the practices in pre-trial and trial proceedings in the light of domestic and international standards.

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.

War Crimes

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

[5] UNMIK regulation 2001/9 on the Constitutional Framework for Provisional Self-Government, adopted 15 May 2001, Chapter 3, Section 3.3.

Trials in Municipal and Minor Offence Courts

LSMS monitors detention centres only as they relate to “access to justice ”issues. LSMS does not monitor the conditions of detention or ill-treatment as these areas fall within the mandate of the OSCE human rights officers and the ICRC.

SECTION 2: THE APPLICABLE LAW

I. SIGNIFICANT DEVELOPMENTS IN THE APPLICABLE LAW

In the six months that have passed since the last review there have been several significant developments in the applicable law, some of which are outlined below.

UNMIK Regulation 2001/07 On the Authorisation of Possession of Weapons in Kosovo was enacted on 21 February 2001 to strictly control ownership, possession and use of weapons with the scope of enhancing public safety and order in Kosovo.

UNMIK Regulation 2001/08 On the Establishment of the Kosovo Judicial and Prosecutorial Council, enacted on 6 April 2001, establishes the Kosovo Judicial and Prosecutorial Council, responsible for advising the SRSG on matters related to the appointment, extension of contracts, and removal from office of judges, prosecutors and lay-judges. The Council is also called to decide upon disciplinary measures against members of the local judiciary, upon investigations conducted by the Council itself or by the Judicial Inspection Unit within ADoJ. The Council is mandated to adopt a Code of Ethics for the judiciary.

UNMIK Regulation 2001/09 On a Constitutional Framework for Provisional Self-Government in Kosovo, signed on 15 May 2001, sets up the structure of the future institutions in Kosovo and also the mechanism of inter-action among these institutions. The Constitutional Framework explicitly states that a number of international human rights instruments are directly applicable in Kosovo.

UNMIK Regulation 2001/10 On the Prohibition of Unauthorised Border /Boundary Crossings (24 May 2001) penalises persons found crossing or having crossed a border or boundary of Kosovo at an unauthorised crossing point.

UNMIK Regulation 2001/12 On the Prohibition of Terrorism and Related Offences, enacted on 14 June 2001, penalises the activity of persons and organisations who intend to create a serious threat to public order, to coerce a government or international organisation or to intimidate a civilian population, for example in cases of murder, grave bodily injury, kidnapping, poisoning of food or water, causing general danger, making or procuring weapons hijacking of aircraft.

UNMIK Regulation 2001/18 On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders was enacted on 25 August 2001. The Regulation provides for a mechanism to review detentions ordered by the SRSG.

II. RECURRING ISSUES FROM THE LAST LSMS REVIEW

Whereas LSMS in its previous reviews addressed the issue of direct applicability of internationally recognised human rights standards in Kosovo and argued on legal techniques available for their implementation, any confusion over the application of these standards should finally be over. The Constitutional Framework states (Article 3.1) that "All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms", and also states that human rights laws as set out in the major international instruments, are directly applicable in Kosovo.[6] The soon to be elected or appointed provisional institutions are obliged to observe and ensure internationally recognised human rights and fundamental freedoms. Consequently, it is now clear that every institution, administrative body, organisation or "presence" in Kosovo, be it local or international, is bound by the requirements of international human rights law.

LSMS has also expressed concerns regarding undue delays to deliver written verdicts. Domestic law stipulates that written verdicts shall be delivered within eight, or exceptionally fifteen days from the announcement of the verdict. According to statistical information made available to LSMS, delays are varying from region to region. In Prizren for example, there are delays of up to two months for delivering verdicts announced this year, in Gjilan/Gnjilane delays vary between one day and six months, and in Mitrovicë/Mitrovica there have been delays of up to eight months. These delays raise concerns from a twofold perspective. First they may amount to a breach of the right to have the decision timely reviewed by a higher court, thus amounting to a denial of justice. Second it creates a climate of legal uncertainty which is detrimental for the creation of a society based on the rule of law and respect for human rights.

The last LSMS review of the criminal justice system noted a number of deficiencies in forensic support to the justice system in Kosovo. One area of concern was the limited capacity of the police to gather and analyse forensic evidence and the unsatisfactory service provided by the Institute of Forensic Medicine, particularly the gathering of forensic evidence in cases of sexual violence. Recommendations were made at OSCE level and within UNMIK police as well to address these problems through major projects, such as creating a fully equipped Police Forensic Laboratory and the restructuring and re-equipping of the Kosovo Institute of Forensic Medicine. Over the last six months however, neither of these projects has developed beyond the planning stage, and the problems highlighted during the last report remain largely the same. Independent initiatives have been taken by the Police Forensic Unit to enhance the existing service, including the creation of units dealing with ballistic comparison and fingerprint analysis. The Police Forensic Unit have established a small "Scene of Crime" team and is training a number of KPS officers in relevant crime-scene evidence-gathering techniques. However, the lack of an accessible forensic laboratory continues to hamper the work of the Forensic Unit.

[6] See Constitutional Framework, 3.3 "The provisions of rights and freedoms set forth in these instruments shall be directly applicable in Kosovo…"

Another recurring issue on which LSMS focused in its previous reports has been the untimely translation and distribution of UNMIK regulations. Whilst monitoring the activity of the courts, LSMS has documented numerous situations where judges or prosecutors have not been aware of the changes in the applicable law brought by UNMIK regulations. A related issue is that members of the Bar frequently report that they are not able to get access to new regulations. Of the 18 UNMIK regulations passed as of August 2001, only eight were translated to Albanian (and thus made available) and only one was translated and made available in Serbian language.[7] According to information available to the OSCE there are also regulations passed last year that have not yet been translated.

III. DEVELOPMENTS WITHIN THE JUSTICE SYSTEM AND STATUS OF IMPLEMENTION OF THE LSMS RECOMMENDATIONS

Kosovo Judicial Institute

In previous reports, LSMS recommended relevant training for judges and prosecutors. The Kosovo Judicial Institute (KJI) is now offering introductory courses on the Federal Republic of Yugoslavia Criminal Procedure Code, as well as seminars and roundtable discussions for judges and prosecutors on international human rights law. An important development has been the initiation of regular seminars and round table discussions to provide guidelines on the application and interpretation of newly adopted legislation. However, LSMS recommends more in depth discussions on every piece of important new legislation, since a general presentation of the scope of a particular regulation is insufficient for ensuring that members of the judiciary really understand all its theoretical and practical aspects. This recommendation is especially designated for those UNMIK regulations, which are referring to but are not accompanied by appropriate technical norms regarding their applicability.

Similar training initiatives should also include international judges and prosecutors appointed for Kosovo. Beyond the indubitable experience acquired in their respective home countries, these members of the Kosovo judiciary are - understandably - not familiar with the applicable law in Kosovo and could therefore make use of an introductory training providing them with at least an overview of the legal system in place in Kosovo.

Criminal Defence Resource Centre

It has been recognised that, whereas extensive efforts have been made by the international community, in particular by the OSCE, to provide training for judges and prosecutors, similar efforts have not been directed to members of the bar. With a view on providing immediate legal expertise on international human rights standards in individual cases and strengthen the capacity of local defence lawyers, the OSCE, in collaboration

[7] Information made available by UNMIK. According to comments made by ADoJ, the shortcomings in the timely distribution of UNMIK regulations are mainly attributable to the fact that the regulations are issued prior to having been translated.

with the Kosovo Bar Association, established the Criminal Defence Resource Centre (CDRC). The Centre is also envisaged to develop a roster of international defence lawyers and legal clinics to provide research and drafting assistance via email or fax and to develop a database of international and local experts for training assistance and recruiting qualified staff.

The Judicial Inspection Unit and The Kosovo Judicial And Prosecutorial Council

In May 2001, a new unit was established within Prosecution Services and Court Administration Section of ADoJ, the Judicial Inspection Unit (JIU), tasked with analysing and evaluating the functioning of the courts and public prosecutor's offices and to investigate the activities of individual members of the judicial system, whether or not such individuals have been the subject of a complaint.[8] LSMS has in previous reports recommended the creation of a disciplinary investigating and advisory body, and considers that the newly established unit has a significant role in adjusting the overall approach of the judges and prosecutors towards the high responsibility of their office. LSMS has established a good working relationship with JIU by providing feedback on monitored cases, which might be used by JIU in their investigating actions.

The positive impact of the JIU on judicial accountability is further strengthened by the establishment of the Kosovo Judicial and Prosecutorial Council (KJPC). Its activities are expected to promote even further the sense of self-discipline and responsibility within the judiciary and, if otherwise, to provide the kind of independent disciplinary review of the conduct and activity of individual judges or prosecutors.[9]

Plans for a Restructured Forensic Institute

ADoJ has been working on a Budget and Terms of Reference for a new Kosovo Forensic Institute. The new institute will be taken out of the control of the Department of Health, and will most probably be placed within Pillar I. This long-awaited restructuring is intended to "make possible the full integration of the Kosovo Forensic Institute in the administration of justice, the identification of negative factors in health related issues, and in the education and training of present and future forensic professional and para-professional personnel". LSMS welcomes and fully supports the initiative, as it may address some of the major concerns raised by LSMS in relation to cases of sexual violence.

Implementation of LSMS Recommendations

Recommendations made by LSMS in previous reports have been addressed within a working group, including the OSCE and ADoJ representatives, established after the first six-month review. The working group has had the mandate to analyse recommendations

[8] As of October 2001, 49 complaints alleging acts of misconduct by judges and prosecutors have been referred to JIU for investigations. Of these, 25 complaints have been investigated. 13 cases have been submitted to KJPC and 12 have been dismissed as unfounded.

[9] As of October 2001, the KJPC adjudicated two of the cases submitted for disciplinary proceedings; one judge was removed from office and another one was reprimanded and warned.

and draft policy proposals directed to the relevant authorities. With the establishment of Pillar I, new structures have been set up to implement recommendations both from within Pillar I and from other sources, including the OSCE - and to give advise to the decision makers on strategies and policies designed to fulfil the objectives of the new pillar. The management structure of Pillar I include a Steering Board, advising on critical policy issues and reporting directly to the SRSG, and six panels determined by the Steering Board, to conduct work across a broad policy spectrum.

Despite its capacity building dimension within the judicial and law enforcement areas, and its monitoring of human rights dimension, the OSCE has not been included on the Steering Board. Of the six panels, OSCE sits on three, covering areas of law enforcement, judicial affairs and legislative development. These panels bring together the executive authorities, capacity-building authorities and implementing agencies and as a result recommendations for improving the criminal justice system may be followed by the panels throughout their implementation and assessed for their effectiveness. Hopefully, this process will prove efficient and transparent, so that the concerns identified in various sectors of the judicial system can be expeditiously addressed and, if found relevant, effectively transposed into applicable norms. Due to its mandate and detailed knowledge of the system, it is crucial that OSCE is involved in the process of providing a comprehensive and workable structure for the judicial system.

SECTION 3: THE RIGHT TO EFFECTIVE LEGAL REPRESENTATION

I. OBLIGATIONS ON THE AUTHORITIES

The basic right to legal representation for detainees and persons charged with criminal offences is laid down in Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and in Articles 9 and 14 of the International Covenant for Civil and Political Rights (ICCPR). Other relevant international documents are the Standard Minimum Rules for the Treatment of Prisoners and the Basic Principles of the Role of Lawyers. As pointed out in previous reports, the right to legal representation applies at all stages of the criminal process and is of particular relevance where a person is detained, to ensure that the principle of fairness and equality of arms is respected.[10] It is also a safeguard against abuse of other rights, such as the prohibition against torture or inhuman or degrading treatment. When legal assistance is provided, relevant authorities are under the obligation to ensure that such assistance is effective.[11]

Access to Counsel in Police Custody

According to the domestic law, the accused may have defence counsel throughout the entire course of criminal proceedings, but an accused who is in custody has the right to communicate with counsel only *after* he or she has been [formally] examined by a judge.[12] This may be a consequence of the fact that an *accused* is defined as a person against whom a [formal] investigation is carried out and that the applicable law does not foresee that the law enforcement authorities interrogate a person as *a suspect* before bringing that person before a judge.[13] Under these circumstances, the need for access to counsel was of less importance, than it would have been under a system where the police had independent investigating authority.[14] Although this reduces the risk of negative consequences flowing from uninformed actions by the defendant which could influence the investigation; it is still in conflict with the international provisions outlined above.

After the war in 1999, and under the responsibility of the international UNMIK police force, a system has developed where the police investigate crimes and interrogate suspects more or less independently before bringing the cases to court. Under these circumstances it is critical that the suspect has access to counsel from the outset of the police investigation, in particular in cases where the suspect is in custody. It is also critical that as soon as a person is identified as a suspect, he/she is informed about his/her

[10] *John Murray v UK, 8 February1996, para. 66.*
[11] *Artico v Italy, 13 May 1980,* para. 33.
[12] Articles 67 (1) and 74 (1) FRY CPC.
[13] For a definition of the accused see Article 147. According to Article 151 FRY CPC, the police are under the obligation to take necessary steps to locate the perpetrator of a criminal act that is prosecuted ex officio (para.1) and can in this respect request information from citizens (paras. 2, 3 & 5), but the criminal charge drafted on the basis of such investigation should not contain the content of statements from individual citizens.
[14] About criminal investigations in general see Articles 151, 152, 153 (2), 155 and 161 FRY CPC, and about persons who have been detained, see articles 192, 195 and 196 FRY CPC.

rights to counsel. Under domestic law, the police have no obligations to inform the suspect of his or her rights, probably due to the concept of a person not being a *suspect* before formal initiation of an investigation by decision of a court.

It has been argued that even under the domestic law, there is a right to counsel for persons in police custody when the person is detained under the exceptional circumstances foreseen in Article 196 of FRY CPC.[15] According to Article 196 FRY CPC detention shall be ordered in a written order, which can be appealed within 24 hours, and *the law enforcement agency* shall ensure that the detained person receives the necessary *professional aid* in submitting the appeal.[16] The wording of the provision is unclear, but according to the Commentary on the Law on Criminal Procedure there are persuasive arguments supporting a reading allowing the suspect to arrange for defence counsel to assist in the filing of an appeal.[17] Hence, since it has become a rule rather than an exception that UNMIK police keeps persons in police custody for 72-hours before presenting the suspect before a judge, the police are under a definite obligation to ensure that the arrested person is given access to counsel already in police custody.[18]

Draft Regulation on Access to Counsel for Persons Arrested by the Police

Following lengthy discussion, a regulation entitled On The Rights of Persons Arrested by Law Enforcement Authorities was promulgated on 12 October 2001.[19] The drafting process on this began in 2000, with a drafting group consisting of OSCE, UNMIK ADoJ and UNMIK Police. The draft regulation produced by this group was, however, abandoned, and a new drafting group was set up, excluding OSCE. Eventually, during the period covered by this report, the OSCE was twice given the opportunity to provide comments on the drafts of this regulation. OSCE then provided extensive comments pointing out the flaws in the draft, and areas which were in breach of international standards. Unfortunately, it appears that the comments concerning the major human rights concerns were not accepted by the drafters of the regulation, and few changes were made. The final version of the regulation therefore, like the drafts seen by OSCE, has substantial provisions that are in breach of international standards.

The regulation grants persons who have been arrested the right to be informed of the reasons for the arrest, the right to remain silent and the right to assistance of defence counsel, either at his or her own expense, or free of charge if the person lacks the financial means to pay for it. Although the regulation partially resolves the problem of access to counsel for persons detained by the law enforcement authorities, a number of

[15] Commentary on the Law on Criminal Procedure (Komentar Zakona o krivcnom Postupku); Branko Petric, Belgrade 1986.
[16] Article 196 (3) FRY CPC.
[17] Commentary on the Law on Criminal Procedure (Komentar Zakona o krivcnom Postupku); Branko Petric, Belgrade 1986.
[18] For further details on the situation regarding detention conditions, please revert to the Section on Detention.
[19] This report covers the period between March and September 2001, and therefore refers to the draft versions of the regulation seen by OSCE at that time, which, however were essentially the same as the final version.

problems remain. One problem is that the Regulation would appear to have no effect on the extra-judicial detentions by the SRSG and COMKFOR.

A further problem that the regulation creates is that, under certain circumstances, it allows the law enforcement authorities to interrogate detainees in the absence of defence counsel, without an express waiver of the right to counsel. For example, if defence counsel fails to appear after having been informed about the hearing, and the law enforcement authorities deem that further delay would seriously impair the conduct of the investigation, they may proceed with the hearing in the absence of defence counsel.[20] This provision appears to effectively punish the detainee for the failure of his/her lawyer to comply with what may be a restrictive time limit on his/her arrival at the place of detention.

A key problem in the regulation that the OSCE has commented on is that the prosecutor or investigating judge are given the power to delay access to counsel for up to 48 hours, in cases where the arrested person is suspected of terrorism or organised crime, if the prosecutor or judge determines that the delay is required by the "exceptional needs of the investigation".[21]

These two provisions suggest that access to lawyers can be restricted to meet the "needs of the investigation", and most importantly, that persons under suspicion of the most serious offences have a more limited right of access to lawyers than persons under investigation for minor offences. Such major limitations on access to lawyers are almost certainly in breach of international human rights law, in particularly ECHR Article 6(3)(c), taken together with 6(1). The European Court of Human Rights has addressed the issue of the necessity of access to a lawyer in the early stages of detention and investigation, in a series of cases, culminating most recently in *Averill v UK* and *Magee v UK*. In the latter case, the ECHR stated its view that *"to deny access to a lawyer for such a long period [24 hours] and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6"*.[22]

Indeed similar provisions in other countries attempting to restrict access to lawyers in terrorism cases have already been condemned by international organisations, including the European Committee for the Prevention of Torture (CPT), in a recently published

[20] Section 3.4 of the Draft Regulation on Rights of Persons Arrested by the Law Enforcement Authorities states (hereafter Access to Counsel Regulation): An arrested person has the right to the presence of defence counsel during all interviews by the law enforcement authorities. If defence counsel does not appear within two hours of being informed about the arrest, the law enforcement authorities shall arrange for alternative defence counsel for the arrested person. Thereafter, if the alternative defence counsel does not appear within one hour of being contacted by the law enforcement authorities, the arrested person may be interviewed only if the law enforcement authorities determine that further delay would seriously impair the conduct of the investigation.

[21] Section 3.6 Access to Counsel Regulation, which allows access to counsel to initially be delayed for 24 hours, which can be extended by a further 24 hours.

[22] Magee v UK, 6 June 2000, para.44, see also John Murray v UK, para 66.

report.[23] The CPT analysed provisions in the UK legislation in Northern Ireland that were almost identical to those in the regulation, allowing the prohibition of access to any lawyer for the first 48 hours of detention in cases of terrorism. The CPT pointed out that in terrorism cases, there might be justification to exclude a particular lawyer from attending an interview, but that this does not justify restricting access to all lawyers. The CPT also addressed the question of access to lawyers in an earlier report on Northern Ireland, where it recognised that, in order to protect the interests of justice it may exceptionally be necessary to delay a detained person's access to a particular lawyer (chosen by the detainee). However, it stressed that this should not result in the right of access to any lawyer being totally denied during the period in question. The Committee recommended that, in such cases, access to a second, independent, lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be arranged.[24] The OSCE therefore recommended that in order to comply with international human rights standards, alternative counsel should be arranged for the detainee by the law enforcement authorities if there was a pressing need to delay access to a particular lawyer. Unfortunately OSCE's recommendations were not taken into account, and the final version of the regulation retains the 48 hour limitation on access to any counsel.[25]

Implications of the Regulation on Access to Counsel for Juveniles

Juveniles, as a vulnerable group, particularly need the protection of access to counsel. According to the draft regulation, the right to assistance of defence counsel may be waived, if such a waiver is made in an informal and voluntary manner. This applies to adults and juveniles alike, with the exception that juveniles may waive their right only with the consent of a parent or guardian – except where the parent or guardian is involved in domestic violence against the juvenile - or representative of the Centre for Social Work (CSW).[26] Juveniles, even with consent of a parent, should not be able to waive their right to counsel as it is unlikely there will be situations where a juvenile could make a fully informed decision to waive this right. Moreover section 3.7, which was discussed above, allows denial of access to counsel for up to 48 hours also for juveniles, and none of the discussed provisions require the presence and assistance of the parent or other appropriate person or defence lawyer during the police interview. For obvious reasons, international human rights standards prevent juveniles from being interviewed alone by law enforcement authorities.[27]

[23] European Committee for the Prevention of Torture, visit to Northern Ireland in 1999, 21/07/2000, CPT (2000) 23.

[24] European Committee for the Prevention of Torture, visit to Northern Ireland in 1993, 17/11/1994, CPT/Inf (94) 17, para.58.

[25] In fact, the final version of the regulation further limits access to counsel by providing in 3.5 that a person can be interviewed without a lawyer if "there are reasonable grounds for concluding that a person's life could be saved." This vague criterion is open to widespread restriction on access to lawyers.

[26] Section 3.5 Access to Counsel Regulation.

[27] See e.g. Article 40 (ii) & (iii) of Convention of the Rights of the Child (CRC), or the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Bejing Rules), Rules 7.1 & 15.2.

Access to Counsel During Pre-Trial Investigations

Applicable Law

According to the applicable law, before the first examination in front of the investigating judge, a *suspect* shall be informed of his or her right to engage defence counsel, and that counsel may attend the examination.[28] If a suspect is mute, deaf, mentally incapable, or incapable of effectively defending himself or if proceedings are being conducted for a criminal act for which the death penalty may be pronounced, he or she must have defence counsel from the first examination.[29] Juveniles *must* have defence counsel from the beginning of the preparatory proceedings if suspected of a crime carrying a prison sentence exceeding five years or when the juvenile judge deems that the suspect needs counsel. In other cases a juvenile may have defence counsel from the beginning of the preparatory proceedings, the equivalent of the pre-trial investigation in adult cases.[30]

Regarding the provision *obliging* juveniles to have counsel when suspected of serious crime, the Draft Regulation on access to counsel represents a setback in comparison with domestic law as it allows a juvenile to be interviewed in the absence of defence counsel and or a legal guardian when the right to counsel has been waived or when deemed necessary by law enforcement authorities.[31] If conditions are not met for mandatory defence and the suspect is financially unable to pay for counsel, counsel *shall* be provided upon request from the first examination for any impending penalty of at least six months. And finally, if the suspect is charged with a lesser offence, counsel *may* be appointed upon request from the first examination if the interests of justice so require.[32] These provisions are in accordance with the requirements under international law.

However there are several provisions severely limiting the right to effective assistance by counsel. More than one accused person may have the same defence counsel if this does not affect the defence negatively.[33] Defence counsels only *may* attend the hearing of the accused, but can exceptionally be suspended if particular reasons of national defence or security so require.[34] Where the right to counsel has not been waived and is not mandatory by law, a detainee may during *the investigation* be heard in the absence of counsel if counsel fails to appear after having been informed about the hearing, thus affecting the detainee negatively on grounds out of his or her control; or if the suspect has not provided counsel within 24 hours after having been informed about this right.[35] Defence counsel may communicate with a detainee *only* after the examination.

[28] Article 67 (2) FRY CPC. The English translation wrongly uses the term the accused, not suspect, although Article 147 defines the accused as the person against whom an investigation is conducted.
[29] Article 70 FRY CPC, as explained by UNMIK Circular Justice/2000/17, para. 2. Capital punishment was abolished by UNMIK regulation 1999/24.
[30] Article 455 FRY CPC.
[31] Articles 3.5 & 3.6 Access to Counsel Regulation.
[32] Article 71 FRY CPC, as amended UNMIK Circular Justice/2000/17.
[33] Article 68 (1) FRY CPC.
[34] Articles 67 (1), 73 (2) and 218 (9) FRY CPC.
[35] Article 218 (9) FRY CPC.

Communications between defence counsel and detainee *may* be supervised by order of the court until the indictment has been brought.[36]

A trial may be held in the absence of counsel, if the circumstances indicate that it would not be detrimental to the defence, and where counsel has failed to appear although duly summoned, and the defendant has not been able to immediately engage other counsel. In cases of mandatory defence, where it is not possible for the defendant to immediately engage other counsel or for the court to appoint counsel without being detrimental for the defence *the trial* shall be postponed.[37] The same arguments that were forwarded against restricting access to counsel for persons in police custody are valid here. And as argued above, any restrictions on access to counsel must be strictly proportionate and not, as here, left to the discretion of the courts.

Court Practice

There are still concerns about the actual provision of legal assistance. Before appearing at a detention hearing, arrested persons have often not been able to secure counsel, as under applicable law, they have neither had the right to counsel, been informed about the right to counsel, or been provided with the means to contact anyone. It is generally only at the outset of the detention hearing that the suspect is informed about the right to counsel. A court clerk is then asked to verify whether there is any defence attorney available in court that could assist at the detention hearing. LSMS has observed that, frequently, the counsel appointed at the detention hearing does not take any further action on behalf of the detainee, thus making his/her appointment of little value to the detainee.

As the name of the appointed defence counsel is not written on the decision to detain, or on any other document handed to the suspect, it is also common, especially in Mitrovicë/Mitrovica, that detainees do not remember the name of the person introduced as their defence attorney.[38] LSMS has proposed that suspects be provided with a written notification of their defence counsel including name and contact details. This has not been implemented as it has been argued that it is not required under domestic law. Moreover, there are still police stations where no phones are available for the use of detainees, making it difficult for them to contact either their defence counsel or a family member or other person in order to inquire about their counsel.[39]

> In a Pejë/Pec Municipal Court case against a juvenile defendant charged with illegal woodcutting, counsel was appointed at the outset of the *main* hearing, following which the trial started immediately, without giving counsel any chance to familiarise himself with either the juvenile or the case file. The lawyer informed LSMS that he was not aware of whether the juvenile defendant was detained or not. During the trial defence counsel was passive and left before the verdict was announced. Neither the juvenile, nor

[36] Article 74 FRY CPC.
[37] Article 301 FRY CPC.
[38] See Articles 158 (3), 159 (1) and 192 (2) FRY CPC, regarding what data a decision to initiate an investigation or an order to detain shall contain. Name of defence counsel is not required.
[39] LSMS is informed that in the holding facilities managed by Penal Management Section there are telephones available for the use of detainees.

> his father had previously met the attorney and they were not aware of his name. The juvenile pleaded guilty, and educational measures consisting of raised parental observation were pronounced against the juvenile.

In cases monitored by LSMS, defence counsel have been changed throughout the proceedings, sometimes several times. Change of counsel may benefit the defendant, where incompetent or passive lawyers are replaced by qualified counsel who provide effective assistance. However, in many cases, it appears that counsel is appointed only to fulfil formal requirements under domestic law with little consideration given to the obligation on authorities to provide *effective* assistance of counsel.

> In a trial in Prishtinë/Priština District Court against a Kosovo Albanian male, indicted in relation to a "hit and run" incident killing of one and seriously injuring three Kosovo Serb children, the defendant was found guilty and sentenced to eight years in prison. According to the psychiatric report - which was never added to the file - the intellectual level of the defendant was below average. His trial testimony was confused and he seemed not to understand questions put to him. Defence counsel was changed five times during the course of the proceedings, twice during the investigation and three times at trial. The first attorney resigned during the investigation and the second never acted on behalf of the defendant. The third, who was appointed ex officio, attended the first session, but then failed to attend the second session due to personal reasons. Instead of postponing the hearing, at the outset of the second trial day, the majority international panel appointed a fourth lawyer to represent the defendant. This lawyer informed the panel that due to other commitments she would not be able to attend the following day. This, again, did not result in the trial being postponed. At the third trial day, new counsel was appointed and the lawyer did assist the defendant through to the completion of the main session, together with the attorney who had attended the first session. At trial defence counsel seemed unprepared to question witnesses and simply repeated questions that had already been put by the panel.

Under domestic law it is foreseen that more than one defendant may be represented by the same counsel. Although allowed under domestic law, and not automatically a violation of the right to effective defence, it may violate the right to a fair trial under international standards when a conflict of interests is impacting the effectiveness of the defence in a negative way, and the court does not take measures to prevent such a negative impact. If conflict arises during trial, a defendant may be disadvantaged even when the conflict of interest is resolved and new counsel is appointed. According to the Draft Criminal Procedure Code, defence counsel may represent more than one defendant in a case only when the defendant, after having signed a written acknowledgement of notification of the possible conflict of interest, expressly requests the same counsel to represent him or her.[40]

> In a case concerning several accounts of aggravated thefts, robbery and plunder against five defendants in Pejë/Pec District Court, two of the defendants were represented by the same counsel. During the main hearing the two defendants gave conflicting testimony, showing that there was a conflict of interest in the defence counsel representing both defendants. In this case the presiding judge addressed the problem by asking defence

[40] Article 72 (1) Draft Criminal Procedure Code (DCPC).

> counsel which of the two defendants he wanted to represent. New counsel was subsequently appointed for the second defendant. This however left the second defendant in a disadvantaged position as the trial was restarted after a 45-minute break allowing the new defence counsel little time to prepare the defence.

According to the applicable law, visitors need authorisation by the relevant court to gain access to detainees. Although this does not apply expressly to defence counsel, the provisions have been applied in order to necessitate defence counsels to seek authorisation in order to gain access to their clients. The rationale behind this being the discretionary power of the investigating judge to order that visits between defence counsel and detainee be supervised until the indictment has been brought.[41]

> According to information available to LSMS defence counsels need court authorisation to visit their clients in Mitrovicë/Mitrovica, Pejë/Pec, Prizren and Gjilan/Gnjilane. In Prishtinë/Priština court authorisation is needed for ordinary prisoners, whereas for high-risk prisoners the investigating judge approves a visitors' list, and if the defence lawyer is mentioned on the list, he or she does not need further authorisations to visit their clients[42].
>
> This is of particular concern in Mitrovicë/Mitrovica, where the court is located in the north, forcing Kosovo Albanian defence counsels to await a police escort from the south to the court to obtain authorisation to visit their clients, and then await another police escort to the detention centre, also located in the north part of town. Defence counsels have reported having to calculate at least half a day to visit the detention centre and that this effectively bars them from visiting their clients as frequently as desired. The same concerns are relevant where defence counsels are representing persons who are not detained in the same district as the court where their case is pending.
>
> In Prizren and Mitrovicë/Mitrovica authorisations of visits also specify the amount of minutes defence counsels can spend with their clients. In Prizren the authorisations are given for between five and thirty minutes and in Mitrovicë/Mitrovica between 10 and 20 minutes, although the detention centres do not always enforce the time limits strictly. The visiting times allowed, on combination with the few visits defence counsels normally pay their clients, makes it questionable whether the suspect is given the adequate time to prepare for his or her defence, as required by Article 6 (3) (b) of the ECHR and Article 14 (3) (b) of the ICCPR.

Although defence counsels have not, except for in one case (see below) reported problems with obtaining authorisation, this practice is still of concern. The fact that, in most regions, defence counsels are required to visit the court prior to any visit to the detention centre may prove an obstacle in a tight schedule. Furthermore, as the entering into force of the Constitutional Framework makes it clear that communication between defence counsel and detainee cannot be supervised, so the legal justification for the requirement for defence counsel to seek visitation authorisations has ceased to exist.

[41] Article 203 FRY CPC, see also Article 74.
[42] There are various different categories of prisoners, determined by the Prisoners' Oversight Committee, of which category A prisoners are persons considered to be high-risk detainees, where there is a flight risk.

Under domestic law[43], the investigating judge *may* order that communication between defence counsel and detainee be supervised until the indictment has been brought in breach of international human rights standards.[44] LSMS has expressed concerns about this in previous reports and suggested that the law be amended. Although this has not happened yet, it seems that the courts no longer apply this provision.

> In Mitrovicë/Mitrovica the practice of court supervised visits between defence counsel and detainees was abandoned in June 2001, after the OSCE had repeatedly pointed out that this practice was in breach of international human rights standards.[45] However in August 2001 the President of the District Court in Mitrovicë/Mitrovica stated to LSMS that he has been advised by the then national co-head of the ADoJ that a judge can decide whether visits should be supervised or not, and that in her opinion it would be in breach of the domestic law to order judges not to apply these provisions. During a meeting in early September 2001, the national co-head of the ADoJ confirmed this opinion to LSMS. Defence counsels from Mitrovicë/Mitrovica have however confirmed that since June 2001, they have been allowed confidential communications with their clients.

The position of the President of the District Court in Mitrovicë/Mitrovica and the former national co-head of the ADoJ, seem to be in breach of UNMIK regulation 1999/24, stating that 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 enumerated international instruments, among them ECHR and ICCPR.[46] Under the Constitutional Framework the basic human rights instruments are directly applicable in Kosovo.[47] Therefore, direct applicability of human rights laws in Kosovo means that the domestic laws allowing court supervised visits between defence counsel and detainee are no longer in force, as they are in breach of human rights law.

II. CONDUCT OF DEFENCE COUNSEL

Apart from the obligations in law and practice to grant persons charged with criminal offences access to effective legal representation, the authorities are also required to ensure that lawyers are able to perform their professional functions without intimidation or other interference. The authorities, including the courts, are under the additional obligation to recognise and respect the critical role of the defence in ensuring that defendants receive a fair trial. The principle of equality of arms enshrined in the concept of a fair trial implies that the defence should be granted equal standing and equal resources throughout the criminal process.

Defence counsels on the other hand are obliged to respect the interests, and protect the rights of their clients. They must actively assist their clients by advising them about legal

[43] Article 74 FRY CPC.
[44] Article 6 ECHR & Article 14 ICCPR, See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18 (4).
[45] See e.g. *S v. Switzerland, 28 November 1991*, para 48.
[46] UNMIK regulation 1999/24, section 1, para 3.
[47] UNMIK regulation 2001/9 on the Constitutional Framework for Provisional Self-Government, adopted 15 May 2001, Chapter 3, Section 3.3 .

rights and duties and by taking the necessary steps to protect their interests during the course of the proceedings. They are further under the obligation to promote the cause of justice and shall seek to uphold human rights and fundamental freedoms recognised by domestic and international law.[48]

The domestic code of criminal procedure, the FRY CPC, provides defence counsels with a legal framework to take an active part throughout the proceedings. Thus defence counsel may appeal the decision to conduct the preliminary investigation and a decision to detain or to extend detention for their client.[49] During the investigation defence counsel may file motions for investigatory actions, and during interrogations or other investigatory actions, defence counsel may propose that the investigating judge puts clarifying questions to the person heard and they have the right to have their remarks entered into the record.[50] Defence counsel may also file complaints with the president of the relevant court regarding the prolongation of proceedings, and other irregularities during the course of the investigation. Once the indictment is filed, defence counsel may traverse (or challenge) the indictment.[51] During the main hearing defence counsel may question the defendant and witnesses and may motion for new facts to be investigated and for new evidence to be examined.[52]

In previous reports it has been noted that there is a pattern of ineffectiveness where defence counsels often fail to:

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

According to information provided by the presidents of the five district courts regarding the period between 1 January and 31 June 2001, the following motions or complaints have been registered on behalf of the defence:*

Court	**Article 159 (5)**	**Article 167**	**Article 181**	**Article 267**	**Total cases in process**
Gjilan/ Gnjilane	82 appeals	Many motions	2 complaints		111/173
Mitrovicë/ Mitrovica	7 appeals	No motions	No complaints	1 traverse	174/125
Pejë/Pec	10 appeals	1 motion	1 complaint	1 traverse	127/216
Prishtinë/ Priština	27 appeals	Some cases, no records	No complaints		399/365

[48] See Basic Principles on the Role of Lawyers, Articles 13 – 15.
[49] Articles 159 (5), 192 (4) and 197 (2) FRY CPC.
[50] Articles 167 and 168 (8) FRY CPC.
[51] Article 267 (2) FRY CPC.
[52] Article 322 (4) FRY CPC.

Prizren	120 appeals	No records	No complaints	12 traverses	417/166

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- The information is collected partly from the quarterly statistical information submitted by each court to the ADoJ, partly directly from the various District Courts.
- The articles refer to the FRY CPC; 159 (5), appeal against decision to initiate investigation, 167, motion for investigatory action, 181, complaint about prolongation or procedural irregularities, 267 traverse of indictment.
- Total cases in process refers to; cases under investigation / indicted cases, including juvenile cases.

The above information is not exhaustive, (for example, appeals of decisions to detain are not included), but shows that the practice seems to vary significantly from district to district, and that, apart from appeals against decisions to initiate a pre-trial investigation, very few motions/complaints are filed or registered. LSMS' monitoring has also noted that defence counsel often fail to take steps to challenge their clients' sometimes extended pre-trial detention.

> On 12 February 2001, a Kosovo Albanian male was arrested in Mitrovicë/Mitrovica under suspicion of having tried to sell marijuana to French KFOR. The suspect immediately pleaded guilty. At the detention hearing two days later, defence counsel was appointed, and the suspect was detained for one month. The reason given for his detention was that there was a risk he would flee, as he did not possess valid photo identification. On 14 March 2001 detention was extended for another month. On 30 March 2001 defence counsel visited his client for the first time. The visit lasted "a couple of minutes" and the detainee was informed that he would have to await the forensic examination from Bulgaria (in order to determine whether the substance was marijuana and the exact weight of the substance found). The detainee asked his counsel to appeal the detention order. This was not done as a detention order can only be appealed within 24 hours of having been presented [to the suspect] and defence counsel did not visit the detainee until 16 days after his detention. The suspect was released pending trial on 9 April 2001, i.e. almost two months after his arrest - on guarantees that he would appear for trial.

Although some positive developments have been observed in the professionalism of defence lawyers, in particular in high profile cases, where some defence counsels have taken a much more active, aggressive stance in defending their clients, major problems with the effectiveness of defence counsel remain.

Many detainees report that they are rarely visited by counsel and, as stated above, it frequently occurs that court-appointed counsel appear only during a court proceeding, either in a detention hearing or in the main session. As discussed in previous reports this may be partly attributable to the low salary (maximum 500 DM per month) allocated to court-appointed defence counsels, and also to obstacles that defence lawyers continue to have in gaining access to their clients.[53] This is of particular concern in cases where defence counsels have to travel some distance, from Serbia proper or within Kosovo.

[53] Justice circular 2000/1 on Instruction on payment to court-appointed defence counsel.

Considering that there is no additional pay to cover expenses this may result in a net loss for the lawyer. There is a need to amend the rules concerning pay for court appointed counsel to cover expenses, but the low level of pay can not exculpate counsel from not taking action on behalf of their clients. An additional problem are the continuing allegations of court appointed defence counsel asking for additional pay in order to ensure the release of the defendant.

> In a rape case in Prishtinë/Priština the defendant, a Kosovo Albanian male, was represented by court-appointed defence counsel. The defendant was found guilty of rape and sentenced to two and a half years' imprisonment. The verdict was appealed by the defendant, who also appointed new counsel to represent him on appeal. According to a written submission to the Supreme Court, the first, court appointed defence counsel requested first 1000, then 3000 DM, from the defendant to ensure his acquittal. After the defendant was convicted, the defence attorney requested 6000 DM in order for the appeal to be successful.
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> In Pejë/Pec, in a case concerning robbery and various other charges against a Kosovo Albanian male, there are allegations that defence counsel appointed by the family of the defendant asked the defendant for 4000 DM to ensure the acquittal of the defendant. In case of a guilty sentence the money would be returned. The defendant was found guilty and sentenced to four years and six months in prison.

III. EXTRA-JUDICIAL DETENTION AND ACCESS TO COUNSEL

Returning briefly to the initial discussion on the Draft Regulation on access to counsel for persons arrested by law enforcement authorities, it is of particular concern that the Draft Regulation applies only to persons held in police custody. KFOR continues to detain persons suspected of regular crimes and persons it deems to pose a threat to the security of Kosovo or to KFOR operations. International human rights standards apply to *all* persons deprived of their liberty.[54] Although UNMIK under Security Council Resolution 1244 (SCR 1244), establishing the mission in Kosovo, may not have direct authority over KFOR, regulation 2000/47 establishes that KFOR personnel shall respect the applicable laws and regulations in Kosovo insofar as they do not contradict with their mandate under SCR 1244.[55] Therefore the inclusion of KFOR detentions under the jurisdiction of the Draft Regulation, would serve as a reminder of the existing obligations under domestic and international law for KFOR to observe the rights of persons held in custody. OSCE has proposed that the Draft Regulation should be amended, so as to include persons held by KFOR as has been used in previous UNMIK regulations, e.g. 1999/2 where the "relevant law enforcement authorities" include KFOR.

[54] See the draft regulation, Sections 1 (a) and (b). On the US Military Forces obligations under the American Declaration and other relevant human rights or humanitarian law instruments, see Coard et al. v. United States, case 10.951, Report No 109/99, September 29, 1999, Inter-American Court of Human Rights. On the legal accountability of KFOR, see e.g. International Territorial Administration in the former Yugoslavia: Origins, developments and challenges ahead; Carsten Stahn (hereafter Stahn).
[55] UNMIK regulation 2000/47, section 2.2.

For further details on Extra-judicial Detention, including information on "information about the right to Counsel and Access to counsel for Persons in Extra-judicial Detention", please revert to the Section on Detention.

IV. RECOMMENDATIONS

Unfortunately, many recommendations previously made by LSMS have not been implemented. Therefore, the following recommendations are partly reiteration of the recommendations previously made in LSMS, going back to reports made in 2000 (e.g. Report No. 8: Access to Effective Counsel).

- The accused and his/her defence counsel should **be guaranteed confidential communications**, whether written or oral, at all stages of the criminal process. Each detention or holding facility **must make a space available** where detainees and defence counsel can communicate confidentially, i.e. the communication may be within sight but not within hearing of others. The authorities must ensure that the accused and his/her defence counsel **are able to communicate freely**, without significant time or other restrictions, at all stages of the criminal process. Article 74(2) FRY CPC must not be applied.
- The practice of requiring defence counsels to seek court authorisation to visit their clients in detention should be abandoned by both courts and detaining authorities.[56]
- The relevant authorities **should 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 defendant may change defence counsel or the court may appoint new counsel to the case.
- The relevant authorities 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 any relevant files and evidence.
- All relevant personnel, including judges, prosecutors and defence counsel, must be **provided enhanced practical training** on their roles and responsibilities to ensure that the rights of the accused to an effective defence during both the investigation and the trial phase are upheld.
- Payment to defence counsels appointed by the court should cover expenses for travel and other necessary costs, such as copies, expert certificates or other costs necessary for the preparation of an effective defence.

[56] Based on information made available by ADoJ, the Penal Management Section is developing a system to replace the necessity for court authorisation with a simple power of attorney written by the person in custody in favour of his defence counsel.

SECTION 4: DETENTION

I. INTRODUCTION

Concerns regarding the many cases of arbitrary detention in Kosovo have been raised in previous LSMS reports. Although steps have been taken to address some of the problems, detention without a clear legal basis or without judicial review continues in Kosovo. Three persons are presently detained under the executive authority of the SRSG, without judicial scrutiny[57], and over a hundred persons are detained extra-judicially under the authority of COMKFOR. Furthermore, a *habeas corpus* mechanism in Kosovo is still lacking, although international human rights law is directly incorporated into Kosovo law – most recently through the Constitutional Framework.[58] Nevertheless, LSMS awaits the promulgation of the Draft Criminal Procedure Code, which is expected to contain provisions regarding *habeas corpus* procedures.

An area where some positive steps have been taken to end the use of illegal detention is with the mentally ill. Especially welcome is the close co-operation between the UN civil administration, the OSCE and other relevant actors in this area. Improvements have also been noted in addressing the issue of the legality of police detention. Unfortunately, a co-ordinated approach has not yet been used to resolve the other detention issues.

II. DETENTION BY EXECUTIVE ORDERS OF THE SRSG

Factual Overview

In the last report on the criminal justice system in Kosovo, LSMS concluded that the practice of issuing executive orders to detain persons (usually following a court order for their release) was a breach of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).[59] This is due to two main reasons. First, the executive orders themselves have no clear legal basis in domestic and international law. Second, there is no possible judicial review of this detention. In addition the public overriding of judicial decisions by the executive, (e.g. when detaining persons who the courts have ordered released) creates difficulties in promoting respect for the rule of law. Various other organisations, including the Ombudsperson Institution in Kosovo, have reached the same conclusions.[60]

[57] As of 12 September 2001, three people were held under Executive Orders, with LSMS being aware of a further four persons who had recently been held under Executive Orders. On 21 September 2001, the Detention Review Commission upheld the detention of the three suspects.
[58] Promulgated as UNMIK Regulation 2001/9 on 15 May 2001 by the SRSG.
[59] Article 5 ECHR and Article 9 ICCPR state in essence that a person can be deprived of his or her liberty only for purposes, and in accordance with procedures established by law.
[60] See Ombudsperson, Special Report No. 3 from 29 June 2001.

However, the use of executive orders for detention has continued.

Justification for Executive Orders for Detention

LSMS is not aware of any official document clearly setting out the reasons for the use of executive powers of detention and their limitations. Based on public statements by UNMIK and a letter sent from the then SRSG to the UN Secretary-General in January 2001, LSMS understands that the SRSG exercises this executive authority in cases where he believes that otherwise a particularly damaging or severe injustice would ensue.[61]

> Regarding the most recent executive detention orders for persons alleged to have been involved in the Nis Express bombing case, it is difficult to see the reason behind SRSG's decision to use his executive authority. In this case a panel of three international judges had concluded that the evidence was not strong enough to justify detention, and consequently ordered the suspects to be released.

Regulation 2001/18, which is further described below, does not create legal grounds for the use of Executive Orders for detention. However, the only grounds on which the Review Commission can uphold an extra-judicial detention are set out in Article 6.1, which reads:

> 6.1 The Commission shall determine that an extra-judicial detention based on an executive order is justified where the Commission considers that there are reasonable grounds to suspect that a person has committed a criminal act, and
>
> a. His identity cannot be established or if other circumstances exist which suggest the strong possibility of flight; or
>
> b. There are reasonable grounds to suspect that he will destroy the traces of the criminal act or particular circumstances indicate that he will hinder the investigation by influencing witnesses, accomplices or persons who are concealing the criminal act or traces thereof; or
>
> c. Particular circumstances justify a fear that the criminal act will be repeated or an attempted criminal act will be completed or a threatened criminal act will be committed.

Therefore, it appears that, whatever the initial reason for the use of executive detention is, it can only continue if a person meets the normal grounds for pre-trial detention in criminal cases. However, executive detention is normally used when a regular court (usually with international judges) has already determined that the conditions for pre-trial detention are not met and ordered the release of the suspect.

Legal Review Of Detention

[61] In order to identify such cases, the SRSG in the January 2001 letter stated that a three-pronged test should be used. "First, the *merits* of the case must be strong enough to warrant executive action. Second, it must be established that an unfavourable result, such as a release of a suspect from detention, would pose a *menace* to public security. Finally, there must be a basis to believe that allowing the case to proceed without executive intervention would result in *manipulation* of the case by involved officials."

The right to be able to challenge any detention before a judicial body with the power to order release (*habeas corpus)* is a fundamental and non-derogable principle of international law, applicable even in times of emergency. Case law from the European Court of Human Rights indicates that the right to challenge a detention is a right from which no derogation is permitted.[62] The Special Rapporteur on States of Emergency of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has said that the remedy of habeas corpus is "not derogable at any time or under any circumstances".[63] The Inter-American Court of Human Rights has also confirmed that the right to challenge a detention before a judicial authority, is necessary for the protection of other basic rights, and therefore is in itself a right that has to be respected at all times and under all circumstances.[64] The lack of judicial review of the executive detention is one of its key concerns.

This problem has been acknowledged by the SRSG, who attempted to remedy it through the promulgation of UNMIK Regulation 2001/18 in August 2001, establishing a Detention Review Commission (DRC) charged with the task of reviewing Executive Orders. The Regulation, however, does not provide the judicial review of detention that is required by international law.[65] The Regulation does provide for a mechanism for the review of these detentions, and, for the first time, sets out the clear grounds for such detention to continue. However, it does not provide the "independent judicial review" of the detentions, that an UNMIK Press Release of 4 September 2001 said was the purpose of the regulation.[66] The DRC is a body set up outside the judiciary, and it consists of three members appointed directly by the SRSG for a limited period (apparently only for three months, although this is not clear in the regulation) and who only come to Kosovo specially to deal with the limited number of cases. The members of the DRC are therefore dependent on the SRSG, who is a party to all disputes they consider.[67] The Ombudsperson issued a special report on Regulation 2001/18 on 12 September 2001[68], stating that the regulation does not bring Executive Orders into compliance with international human rights standards.

[62] Aksoy vs. Turkey, 18.12.1996, Brannigan and McBride vs. the UK, 26.05.1993, Lawless vs. Ireland, 01.07.1961.
[63] See report of the Special Rapporteur on States of Emergency of the UN Sub-commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/1996/19, para. 13.
[64] Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of January 30, 1987.
[65] UNMIK Regulation 2001/18 was drafted without any involvement from the OMiK or any other organisation.
[66] UNMIK Press Release of 4 September 2001, UNMIK/PR/637.
[67] The European Court of Human Rights has frequently held that such apparent dependency on the executive disqualifies a body from being independent . See for example, Ringeisen v. Austria, European Court of Human Rights, Judgement of 16 July 1971, Langborger v. Sweden, European Court of Human Rights, Judgement of 22 June 1989, especially para 32, Belilos v. Switzerland, European Court of Human Rights, Judgement of 29 April 1988, and Findlay v. the United Kingdom, European Court of Human Rights, Judgement of 25 February 1997, para 73. See also a Scottish case, one of many domestic cases applying the ECHR case law on independence: Starrs and others v. Procurator Fiscal, High Court of Scotland, 11 November 1999.
[68] Special Report No. 4 of the Ombudsperson Institution in Kosovo.

Practice of Detention – Access to Counsel

Persons detained under Executive Order do not receive the actual order to detain. Instead they receive a written notification from the ADoJ citing parts of the order. This letter of notification does not inform the detainee of the reason for the detention, or what crime he or she has allegedly committed, nor does it explain the possibility of challenging the lawfulness of the detention.[69]

Defence counsel in most regions need court authorisation to visit their clients in detention. This has on occasion posed a problem for persons held under executive orders in the UNMIK detention facilities including the case of the suspects of the Nis bombing that occurred in February 2001, where eleven persons where killed and several others seriously injured.

> On 19 March 2001, five persons were arrested suspected of having carried out the attack. One was released shortly afterwards, whilst the four remaining suspects received a judicial detention order for one month. On appeal a panel consisting of three international judges quashed the detention order regarding three of the suspects, and they were ordered released, while the detention of the fourth suspect was extended. The three suspects were however not released, as the SRSG issued executive orders to continue the detention of all suspects. The suspects were then transferred from the Prishtinë/Priština detention centre to Camp Bondsteel; from where the one suspect still in judicial detention later escaped. In July two of the remaining suspects were again transferred to Prishtinë/Priština and Mitrovicë/Mitrovica respectively, and it was after this transfer that defence counsel was denied access. Defence counsel was initially not able to get the necessary court order authorising the visits. On motion of defence counsel, the international investigating judge – who after the court order to release did not have jurisdiction over the detention matter – eventually signed a decision authorising visits by defence counsel and surveyed visits by the wife of the detainee.

Emergency Powers

A further justification for the use of the executive powers by the SRSG was made during an UNMIK press statement this year, when an UNMIK spokesperson stated that the use of executive powers of detention was justified as human rights could be limited in times of emergency.

International human rights law does indeed contain specific provisions allowing the limitation of (derogation from) many human rights standards in times of public emergency, but such limitations or derogation are strictly regulated by law. Under the ICCPR and ECHR, the following conditions must be satisfied: first, the emergency must be publicly proclaimed, as should the extent of the derogation from basic human rights standards, and the justification for these; and second, the measures taken must be strictly

[69] Article 5 (2) & (4) ECHR and Article 9 (2) & (4) ICCPR state that anyone who has been arrested shall be informed of the reason for the arrest and of any charged against him or her and shall have the right to take proceedings to challenge the lawfulness of the detention.

necessary to meet the needs of the situation. The limitation of human rights standards must go no further than is absolutely necessary.[70]

The practice of executive detention does not meet these strict criteria. Whilst SCR 1244 arguably could be a declaration of a state of emergency, it does not state itself to be such, nor does it give any explicit authorisation to the Secretary-General (and through him, UNMIK) to derogate from particular human rights standards. The legal instruments that bind UNMIK officials, including the SRSG, to comply with international human rights standards (such as Regulation 1999/24) do not make any reference either to any limitations/derogation on these rights. Therefore the basic public declaration of the measures that are being taken to limit human rights and why they are justified in an emergency, are not in place.

In his quarterly report to the Security Council on the situation in Kosovo of 13 March 2001, the Secretary-General stated that "there has been considerable progress in the implementation of UNMIK's mandate. The emergency phase is largely over"[71], which suggests that any emergency powers needed today should be limited. With a functioning judicial system in place, the need for emergency powers of detention is reduced even further. In fact, Regulation 2001/18 has made it clear that the purpose of the executive orders for detention is to detain persons under suspicion of having carried out a crime and who may be at risk of flight or interfering with justice; in other words, regular pre-trial detention. There is no obvious reason why such issues should be dealt with outside the judicial system. If the main concern is one of sensitive evidence, then the existing judicial system can be adapted to deal with such cases.

On the other hand, judicial review of a detention is a right that can never be abolished, even during emergencies. Even in times of serious armed disturbances, such as in Northern Ireland and in south-east Turkey, the European Court of Human Rights has only allowed emergency powers to limit access to judicial review of detention for a period of days, not abolish it outright.[72] Given the few cases at issue, the easiest step would be to stop executive detention immediately and allow the courts to deal with the case.

[70] For further comments on states of emergency see the recently issued General Comment No. 29 by The UN Human Rights Committee on *States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001

[71] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 13 March 2001, S/2001/218, para. 62.

[72] In Brannigan, op cit. the ECHR stated that a period of seven days' detention before the detainee was brought before a judge fell within the powers a government could legitimately take on during in an emergency, given that in Northern Ireland, all detainees had a general habeas right from the moment of detention. In Aksoy, op cit, the ECHR considered that 14 days' detention without being brought before a judge was too long, particularly as there was no habeas remedy, even in a region suffering armed conflict.

III. DETENTION BY KFOR

Factual Overview

Of similar concern is the continuing use of extra-judicial detention by KFOR, in particular, since mid-2000, the practice of detaining people at the US KFOR base, Camp Bondsteel. Persons held at Camp Bondsteel are for the most part neither detained on the basis of any law or court order, nor does their detention come under any review by a judicial body.[73] The number of detainees at Camp Bondsteel has fluctuated at around one hundred, at times reaching nearly two hundred.

As with SRSG executive detentions, the two key concerns are the lack of a clear legal basis for the detention compatible with international law, and the absence of judicial review of the detentions. During this period, more explanations have been forthcoming from KFOR as to their practice, but the extra-judicial detentions have continued.

Basis for Detention

The then COMKFOR set out KFOR's basis for its use of detention powers in a letter to the OSCE's Head of Mission on 6 September 2001. He pointed out that detention policy applied to KFOR as a whole, not only to US KFOR, and was authorised by him, with the support of SHAPE (Supreme Headquarters Allied Powers Europe). KFOR, he said only detain people reluctantly and would be much relieved to end this task. However, they see a necessity to detain persons in this way due to the difficulties in establishing a judicial and police system, as well as the insurgencies in the Presevo Valley (southern Serbia proper) and fYROM.

COMKFOR stated in this letter that the criterion used by him to authorise extended detention by KFOR was that the "person in question represents a threat to the safe and secure environment". He repeated KFOR's belief that they have the legal power to do so due to their authorisation under SCR 1244 to maintain a safe and secure environment in Kosovo and that the Military-Technical Agreement of 1999 was "relevant in this context".

Based on this letter, and other information received by LSMS monitors from KFOR, LSMS believes the detainees in Bondsteel effectively fall into four general categories. First, there are those who KFOR believe have committed a criminal offence, either in Kosovo or outside of Kosovo, but whom KFOR believes the Kosovo judicial system is not able to prosecute fairly and objectively (e.g. as the evidence against them may be sensitive). Second, there are those who are detained for purely preventative reasons because they may pose a threat to peace and security. Thirdly there are persons who are suspected of a criminal offence and who are eventually handed over – either immediately upon apprehension or later – to the criminal justice system; and fourthly there are persons under judicial detention who for security or other reasons are held at Camp Bondsteel.

[73] Although all the detainees are held at US KFOR Camp Bondsteel other KFOR contingents take detainees to Camp Bondsteel and hand them over to US KFOR.

Review Mechanisms and Other Detention Practice

The vast majority of the detainees in Bondsteel are held outside the judicial system.[74] They therefore have no access to any judicial review of their detention. In his letter, COMKFOR described the process by which a detention is authorised. Each of the cases is reviewed by KFOR staff, the commanders of the multinational brigades and a review panel at KFOR Main Headquarters, before being authorised personally by KFOR. However, this, of course, is not an independent judicial review body that is able to assess the legality of a person's detention and order his/her release.

According to the information received by LSMS monitors, the majority of the detainees at Camp Bondsteel have not received any written information about who is detaining them, on what legal basis, for what period, and how they can challenge the lawfulness of the detention. In April and May 2001 detainees received a hand-written translation of a part of a "detention order", but this practice was subsequently discontinued. In the letter to the OSCE COMKFOR stated that detainees receive a "certificate" stating the reason for their detention.[75] However no detainee interviewed by LSMS as of 14 August 2001 reported that he or she had received such a paper. After further inquiries to Camp Bondsteel, the OSCE received information on 14 September 2001 that detainees were now receiving written information regarding their detention.

Access to Counsel

For persons arrested by KFOR and later handed over to the justice system, the problem with access to counsel is normally solved once the person is brought to court for the first hearing. This may however be after a substantial delay, in breach of the right to be brought promptly before a judicial authority and to be informed about any charges.[76]

According to information available to LSMS there is an internal KFOR memo stating that detainees *are permitted access to a legal advisor or representative at their own expense.* There is however no corresponding rule stating that a detainee shall be informed of this right, and according to information collected from detainees at Bondsteel, detainees are not informed about their right to counsel. LSMS is aware that most of these persons do not request counsel but this does not exempt the detaining authority from their obligations under domestic and international law.

> In one case known to LSMS, a Bondsteel detainee requested the president of the District Court in Gjilan/Gnjilane to provide him with counsel, but was informed that he would be provided with counsel only once his case was handed to the court.[77]

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[74] In a letter from the SRSG to the OSCE HoM dated 31 August 2001, the SRSG stated that two persons were being held in Bondsteel at UNMIK's request. This implied that these were the only two persons being held under court order in Bondsteel.
[75] Ibid.
[76] Article 5 (2) & (3) ECHR and Article 9 (2) & (3) ICCPR.
[77] The applicable law, Article 205 FRY CPC, requires the presidents of courts (or designated judges) to visit detainees under their jurisdiction at least once a week.

One of the reasons it has been deemed essential that persons who are detained have access to counsel is to provide a safeguard against abuse.

> There have been allegations of abuse at Camp Bondsteel. In August 2001, for example, LSMS was contacted by counsel of a person detained in Camp Bondsteel, who was alleging that his client had been abused during interrogations. LSMS interviewed the detainee and deemed that his allegations of abuse were credible. This detainee, who had secured counsel prior to the KFOR arrest, also informed LSMS that he had been interrogated several times without being informed about his right to remain silent, his right to counsel or about the reasons for his detention.

In the cases where persons held at Camp Bondsteel have been able to secure counsel, either because they are under judicial detention, their cases have been handed over to the justice system or otherwise, defence counsels have in general been granted access.

KFOR Detentions in Relation to International Human Rights Law

The clarification from COMKFOR on the basis of KFOR's detention practice is welcome, as it permits an analysis of how this practice complies with international standards. As with the SRSG, the starting point is that KFOR, and its individual national components are bound by international human rights law. First, human rights law is incorporated into the mandate of the actors deployed in Kosovo under UN auspices, as envisaged in SCR 1244.[78] KFOR, as an UN-authorised force, is bound to comply with the purposes of the United Nations, one of the chief purposes being, along with security, the promotion of human rights.[79] In addition, among other responsibilities listed in SCR 1244, KFOR has to support, as appropriate, the work of the international civil presence. SCR 1244 requires that "both presences operate towards the same goals and in a mutually supportive manner".[80] As UNMIK is responsible for protecting and promoting human rights, KFOR's obligation to support UNMIK requires that it, as a minimum, refrain from undermining this objective. This can only be achieved through compliance with international human rights standards.[81] Second, the human rights obligations of the Federal Republic of Yugoslavia remain in force throughout the territory and bind the present authorities in power. Third, the human rights obligations of the governments of the various national contingents of KFOR apply to the conduct of their troops abroad. As the US has signed and ratified the ICCPR and the American Declaration of Human Rights, the standards set forth in these instruments are binding on US KFOR.[82] The Inter-

[78] SCR 1244, para. 5.
[79] Charter of the United Nations, Art. 1 (3), see also Art. 55 (c).
[80] UNSC Resolution 1244, para. 6.
[81] This proposition is also supported by a 4 July 1999 statement by then Acting SRSG Sergio Vieira de Mello. While recalling that KFOR was responsible for ensuring public safety and order until such time as UNMIK was capable of doing so, he emphasised that KFOR would be bound by international human rights standards in the performance of these duties. "Statement on the Rights of KFOR to Apprehend and Detain," Office of the Acting SRSG, UNMIK, 4 July 1999.
[82] The Covenant can have extraterritorial application, as was held by the Human Rights Committee, Comments on United States of America, para. 19, U.N. Doc. CCPR/C/79/Add 50 (1995).

American Commission on Human Rights has found that American states are bound by human rights obligations even in their extraterritorial treatment of non-nationals.[83]

As described above, international law requires at a minimum that detention be based on clear law, and that every detainee has the right to challenge the detention in court.[84] This even applies to armies in times of conflict. It is noteworthy that the United States government has accepted in another context that it is bound to promptly hand over to the judicial system persons detained by its army, even during armed conflict.[85]

In order to comply with international law, KFOR's detention must have a sound and clear legal basis, and be based on the limited criteria that can justify detention under international law.[86] KFOR's powers of detention are not, however, set out in any law or regulation in Kosovo. Moreover, detaining persons who may be a "threat to peace and security" is not detaining persons who are suspected of having committed a crime. Instead it is a "preventive detention", detention based on a vague and wide criteria of persons who the authorities have decided may be a threat. This type of detention is not permitted by ECHR Article 5, as the European Court of Human Rights explained in the case of *Jecius v Lithuania*.[87] Therefore, KFOR's basis for detention is not in conformity with the international human rights standards.

There remains, of course, the question as to whether KFOR has powers to derogate from human rights law, given an emergency. KFOR have given as reasons for its use of detention the difficulties in the establishment of a judicial system and police service, as well as the insurgencies outside Kosovo. The SRSG has also stated that KFOR is authorised to detain persons when it is "unable to make available sensitive information, including intelligence".[88]

Although valid concerns, none of these issues can legally justify the extraordinary step of detaining large number of persons extra-judicially, indefinitely and without independent review. All the concerns can be met by developing the judicial system. Two years into its mandate, UNMIK has established a judicial system with both local and international participation, as well as a mainly international police force. Even though LSMS has expressed concerns about continuing problems within the system, the system is functioning. The increased participation of international judges and prosecutors in

[83] See *Coard et al. v. United States* and *The Haitian Centre for Human Rights et al. v. the United States*, case 10.675, Report No. 51/96.
[84] Articles 5 and 6 ECHR, Article 9 and 14 of the ICCPR, and Article XXV of the American Declaration of the Rights and Duties of Man (signed by the USA).
[85] This was made clear in the case of *Coard et al. v. United States*, decided on 29 September 1999 by the Inter-American Commission on Human Rights. In this case, which concerned the detention of civilians by the US Army during its invasion of Grenada, the United States argued that it had complied with its obligations to present its detainees to a court, by handing them over to the courts after two weeks' detention. The Commission disagreed, stating that two weeks was too long for the army to detain persons, even though the US Army was engaged in an armed conflict during part of the period. Case 10.951, Report No. 109/99.
[86] See ICCPR Article 9, ECHR Article 5.
[87] Application No. 00034578/97, Judgment 31 July 2000, paragraph 51.
[88] Letter SRSG to OMiK HoM, 31 August 2001.

particular makes it possible for the justice system to deal with even the most sensitive cases objectively and in accordance with international standards of human rights.

Furthermore, the recent regulations on border crossing, terrorism, on the authorisation of possession of weapons and on measures against organised crime provide legal tools to investigate and prosecute persons who are suspected of involvement in illegal activities in the border and boundary areas of Kosovo.[89] The problem of the use of sensitive material, including military intelligence, is one that is dealt with by criminal justice systems across the world, especially those dealing with terrorism and other key security problems. However, the need to protect sensitive information can never be a reason to detain persons outside the judicial system or without allowing them to fairly challenge their detention.[90] The OSCE has offered to work with KFOR and the UN Civil Administration to ensure that the criminal justice system has the necessary procedures in place to be able to deal with such information, whilst granting all persons fair trials and the right to fairly challenge their detention.

IV. MENTAL HEALTH DETENTIONS

In the last report, it was pointed out that the largest number of illegal detainees in Kosovo (over 250) were at the Shtime/Stimlje Special Institute for the Mentally Retarded, under the control of the Administrative Department of Health and Social Welfare (DHSW). One patient in the Institute has been detained there, without a court order, for over 50 years. LSMS also pointed out that steps had finally been taken to rectify this situation, with cases having been submitted to the Ferizaj/Urosevac Municipal Court and steps being taken by the ADoJ to address this issue after that court refused to hear the cases.

The positive development continued in the spring and summer of this year, and the legal situation of illegal detentions in Shtime/Stimlje appeared close to resolution. The DHSW showed new vigour in attempting to resolve the situation, and in June 2001 issued an Administrative Instruction confirming that no person can be detained in Shtime/Stimlje without a court order. The instruction further recognised that the Department owes a duty to the persons in the Institution to prepare them for discharge, if they desire it. The Institution then began to review all the cases of its persons, deciding whether there are grounds to detain the person in question. If there are not, the Institute should inform the patient that they are free to leave – which has already been done in a few cases. If the Institution considers that there are grounds to detain, their case should be submitted for the court to decide whether to issue a detention order following a fair hearing.

However, the process of resolving the legal position of the detainees came to a temporary halt during the summer. At the end of the period covered by this report, the review of all the cases was not completed, and no cases had yet been submitted to the court. DHSW therefore remains responsible for the greatest number of illegal detainees in Kosovo. A key problem has been the inadequacy of the existing law governing the detention of the

[89] UNMIK regulations 2001/10, 12, 7 & 22.
[90] See Chahal v UK, Judgement 15 November 1996, and in particular paragraph 131.

mentally ill which is unclear, and almost unworkable in places (for example it gives no grounds on when the mentally ill should be detained). A working group on mental health law, including OSCE and ADoJ, effectively completed a draft regulation to address these problems earlier in the year, which will set up specialist Mental Health Panels within the existing District Courts. However, this regulation remained stuck within the ADoJ during the summer.[91]

At the same time, in the first part of this year ADoJ devoted much effort to ensuring that the courts would be able to effectively deal with mental health cases under the existing law. ADoJ, together with the OSCE, organised an information session for judges, social workers and psychiatrists in the spring. Following this useful discussion, ADoJ drafted a circular to explain how the existing law could be made more workable, and would provide lawyers for patients who would come before the court. However, this circular has also not been issued, and the lack of guaranteed legal representation appears to be one of the main reasons that the Institution did not submit cases to the court during the summer.

Whilst Shtime/Stimlje is the main facility for the detention of the mentally ill, there are also concerns about illegal detentions of the mentally ill in the health sector, particularly in Prishtinë/Priština hospital. LSMS has very little knowledge on how many persons are detained in there, although it is believed to be over a hundred at any one time. Detention however, appears to be much more short-term than in Shtime/Stimlje.

The continued problems with the treatment of the mentally ill within the criminal justice system, particularly the use of "security measures" to keep persons who need treatment and who have not been convicted of any crime in prison, are still a major concern. This issue has been addressed directly in the draft criminal and criminal procedure codes, which transfer all responsibility for treatment of the mentally ill to the (civil) Mental Health Panels, set up by the draft mental health regulation. It is therefore important that the new criminal laws and the new draft regulation on mental health are passed as quickly as possible.

V. CUSTODY TIME LIMITS

One of the necessary 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. This entails a positive obligation for authorities, both law enforcement agencies and the judiciary, to ensure that a person is brought before a judicial official within the timeframe mandated by the law.

LSMS has provided a detailed analysis of the applicable domestic and international law on custody time limits in its first and second 6-month review and therefore will not repeat those arguments, but state some of the more recent concerns and developments.

[91] LSMS has been informed by ADoJ that the draft regulation has been sent to the SRSG' Office of Legal Affairs in October 2001.

As a rule, the applicable law in Kosovo sets a 24-hour time limit for holding a person in custody before being brought in front of an investigating judge.[92] Under certain exceptional circumstances a suspect could be held for up to 72 hours.[93] Nevertheless, the 24-hour time limit is still widely disregarded in Kosovo. Instead the 72-hour exception is the rule.

In previous reports LSMS has recommended that detention facilities should release persons who are held without a valid detention order. In this regard, LSMS monitoring indicates positive developments within the UNMIK Penal Management Section, which has adopted a clear policy of refusing to hold persons without a valid court order for detention. Furthermore, there is now a system in place where detention facilities notify the competent court 72 hours in advance of the expiry of a detention order. In the notification, the court is informed that, if an extension order is not issued before the expiry of the time limit, the detainee will be released.

As far as the police practice is concerned, LSMS has observed that, although the exceptional 72 hours time limit for custody is still used as the standard procedure, this timeframe is at least now widely respected by the law enforcement authorities. However, there seems to be some confusion within the law enforcement authorities regarding the division of responsibilities between investigating judges and prosecutors in criminal cases. According to the domestic law on criminal procedure, whenever preliminary investigations are initiated and criminal charges are drawn up, police investigators have to forward these charges to a public prosecutor.[94] When a suspect has been *identified* and arrested, the police have to present the person before the investigating judge within 24 hours. Finally, when persons are arrested under Article 196 and may be exceptionally held in custody for up to 72 hours, the prosecutor is to be *immediately* informed. This division of competence has, on occasion, seemed to confuse police officers who have failed to inform the appropriate judicial official about the case, thus rendering it difficult for the latter to take the necessary procedural steps.

In order for the police to be able to bring persons in front of a judge before the expiry of the time limits a duty roster of investigating judges to deal with cases during off-duty hours has been set up in every region.[95] Although this is a clear improvement, LSMS has observed that the system does not always function as intended and there seems to be a trend whereby judges on duty extend detention past the maximum 72-hours without hearing the suspect.

> On Wednesday 11 July UNMIK police arrested a Kosovo Albanian male who was found in possession of a large amount of weapons. On Friday 13 July the judge on duty in Prishtinë/Priština District Court, informed that no detention hearings are being held

[92] Article 195 FRY CPC.
[93] Article 196 FRY CPC. In December 2000, the Yugoslav Constitutional Court declared Article 196 of the FRY CPC unconstitutional as it permits detention ordered by law enforcement officials rather than the court.
[94] Art. 151 and 153 FRY CPC.
[95] Each police station is on a weekly basis provided with a copy of the roster, set up by the presidents of the various courts, indicating which judge is on duty during out off office hours.

during weekends, as there are no clerks available to do the necessary paper work. The following day the same judge in writing ordered Penal Management to keep the suspect in detention and to bring him to court on Monday 16 July. In this case the situation was resolved by an international judge holding a detention hearing with the suspect before the expiry of the 72-hour period.

In another recent case the police arrested two persons suspected of trafficking in women. The suspects were arrested the evening of 6 August 2001 at 19.15 hours. On 9 August 2001, on the verge of the 72-hour time limit, the suspects were brought before a judge in Prishtinë/Priština District Court. The judge did however not hear the suspects but ordered that they would be transferred from police custody to regular detention facilities. The reason forwarded by the investigating judge for the postponement of the detention hearing was that the prosecutor had not been contacted by the police in time and therefore had not had any possibility to file a request for pre-trial investigation. *When asked what legal grounds there were for the postponement of the hearing, the judge said that there were no grounds in law but that it was common practice to postpone hearings for 24 hours.* The two suspects were heard the following day.

As admitted by the judge in the second case, the above decisions to postpone the hearings have no legal grounds. According to the domestic law, the investigating judge, after having informed the suspect of his or her right to counsel, may postpone the detention hearing with 24 hours in order for the suspect to arrange for counsel.[96] According to commentary however, if the time period in article 192 (3) was violated due to a delay to bring the person before the judge within 24 hours as foreseen in Article 195, a decision must be adopted immediately.[97] Although it is not clear how these comments relate to the exceptional 72-hour police detention under article 196, it seems reasonable to conclude that no further extensions are allowed when the exceptional 72-hour rule is applied. In neither of the described cases, was the postponement decided in the interest of the defendant. Furthermore, regarding the second case, domestic law foresees a situation where the detention hearing is held before the prosecutor has filed a request for pre-trial investigation. In such case, the prosecutor has to file the request within 48-hours, or the suspect shall be released.[98]

Consequently, whilst acknowledging the developments in respecting the time limits for police custody, LSMS is still concerned with the occasional breach of the suspects' basic rights regarding timely judicial review of their detention. Although situations like the ones mentioned above may be primarily attributed to the investigating judge or the public prosecutor, law enforcement agencies are still expected to conduct their initial investigatory actions within a reasonable timeframe, to allow sufficient time for judicial officials to perform their duties as required.

[96] Article 193 FRY CPC.
[97] Commentary on the Law on Criminal Procedure (Komentar Zakona o krivicnom Postupku); Branko Petric, Belgrade 1986.
[98] Article 193 (4) FRY CPC.

VI. RECOMMENDATIONS

Extra-Judicial Detention by the SRSG and KFOR

- LSMS suggests that the practice of extra-judicial detentions can effectively be replaced by initiating a mechanism (system) to allow sensitive evidence to be heard within the criminal justice system, whilst respecting the rights of the defendant to challenge detention. International judges and prosecutors within the current UNMIK structure can and should be involved in reviewing such sensitive evidence while still maintaining these cases, especially the detention aspect, inside the judicial system. Following the same line of reasoning LSMS recommends that KFOR should bring its detention practice in line with the legal guarantees and remedies provided in both the domestic law and in the international human rights law. In particular, immediate information on the grounds for detention and the right to engage defence counsel should be provided upon apprehension and subsequently, detainees must be entrusted to the judicial system for investigation and review within the time limits enshrined in the applicable law. Where particular detainees were apprehended based on specific information gathering mechanisms, KFOR can address these cases together with the sensitive information to an international prosecutor or investigating judge who then can ensure the protection of the evidence and in the same time allow the detainee all legal remedies to have his/her detention reviewed.

  Consequently, a regulation should be drafted to provide for measures whereby sensitive evidence can be presented and used in court with due respect to the principle of equality of arms and the rights of the defendant. OSCE repeats its offer to assist in a relatively speedy implementation of such a regulation. For example, the recently issued UNMIK regulation 2001/18 on the detention review commission does include procedures whereby sensitive evidence may be reviewed, which may be a starting point.[99]
- In order to be willing to hand cases over to the justice system KFOR has requested that an international prosecutor prosecute the cases. Presently there is only one international prosecutor in the Gjilan/Gnjilane region, and her workload does not permit her to take all cases referred to her by KFOR. Therefore, it is recommended that the SRSG appoint a second international prosecutor for the Gjilan/Gnjilane region.
- The Detention Review Commission should be abolished.
- KFOR should announce that it will respect any order of a court to release any person it detains.

Mental Health Detention

- The Draft Regulation on Deprivation of Liberty and Compulsory Treatment should be promulgated as soon as possible.

[99] UNMIK regulation 2001/18, section 5.

- ADoJ should issue its draft circular on the implementation on the Law on Non-Contested Procedure regarding mental health detention and confirming that legal assistance will be provided in all cases.
- Shtime/Stimlje Special Institution should immediately conclude its review of the cases. All cases where it is believed a person should be detained should be sent to the court immediately. All other persons should be informed that are free to leave.
- All use of detention in the health sector, particularly Prishtinë/Priština Hospital, should be reviewed.

Custody Time Limits

- UNMIK police should be provided with adequate training on their role in the investigation of criminal cases, in particular on their duty to immediately inform the prosecutor of any person arrested and their duty to immediately – i.e. within 24 hours - bring the arrested person in front of a judicial authority.
- Court officials should cease giving UNMIK police and the detention authorities orders to continue detention without hearing the suspect after the period of police custody has expired.
- ADoJ should revise the system with judges on duty so as to provide them with the necessary logistical support, (e.g. court clerks, interpreters etc.) to be able to hold detention hearing during off duty hours.

SECTION 5: TRAFFICKING AND SEXUALLY RELATED CRIMES

I. INTRODUCTION

With both legal and humanitarian dimensions, the issue of trafficking in persons is a major human rights concern both for LSMS and the actors within the administration and the judiciary in Kosovo. There has been an alarming increase in the number of cases over the past six months and few resources allocated to assist victims or witnesses involved in these cases. Accordingly, determining an approach to tackle this phenomenon has proven to be a significant challenge for law enforcement agencies and the judiciary alike. The enactment of Regulation 2001/4 in January 2001 illustrated the intent of the executive administration to deal with this issue seriously and at the same time has provided a legal instrument expected to be more effective than the old and permissive framework envisaged by the FRY Criminal Code.[100]

However, despite the expressed interest of the authorities in trafficking cases, legal and law enforcement reform has shown minimal effect on the frequency and severity of trafficking criminality. Even with a specialised police unit and a new anti-trafficking regulation, rules of evidence do not allow the use of covertly-gained evidence in court, witness protection and witness security has not been extended to trafficked victims serving as witnesses, social services do not have an effective response to victims, and UNMIK has not established the Victim Assistance Co-ordinator as mandated in Regulation 2001/4. These failures each have contributed to a lack of significant arrests of traffickers, lengthy investigations with little evidence, disappearance of witnesses, and lack of trust in police and the judiciary.

Throughout this year, LSMS has documented and monitored 21 cases[101] dealing with trafficking related offences, prosecuted either under the provisions of Article 251 FRY CPC or under regulation 2001/4. Of all these cases, trials were held in 8 and convictions ranged from 5 months to 6 years of imprisonment. The rest of the cases are either still under investigation or trials have been set or pending. The following analysis presents an overview of the structural and substantive developments in this area at the level of law enforcement, prosecutors and the courts.

II. LAW ENFORCEMENT AGENCIES

The creation of the Trafficking and Prostitution Investigation Unit (TPIU) within UNMIK Police evidences UNMIK's intention to effectively handle trafficking in persons and related criminality. As a specialised unit, TPIU was created to approach trafficking through an experienced and multi-faceted perspective, which understands the organised

[100] See FRY CC Article 251, for example.

[101] The figure represents the total of trafficking related cases dealt with by courts throughout Kosovo. The breakdown of cases per region is as follows: 3 cases in Prishtinë/Priština , 3 cases in Gijlan/Gnijlane, 4 cases in Pejë/Pec, 2 cases in Mitrovicë/Mitrovica and 9 cases in Prizren.

aspect of trafficking as well as the victim's perspective. LSMS understands that the responsibility for combating such a complex phenomenon does not rest solely with TPIU. Co-ordinated efforts need to be focused on achieving a comprehensive and effective response. This includes primary co-ordination within UNMIK Police and also between UNMIK Police and KFOR, as the latter assumes, on occasion, a law enforcement role. With an efficient allocation of efforts and logistical capacities, and the understanding that TPIU is the frontrunner of the law enforcement response to trafficking, requiring clear support from other law enforcers, criminality related to trafficking in persons could receive a decisive response. Such co-ordination of procedures and policies is an essential aspect of ensuring that the activity of law enforcement agencies provides for the protection of human rights and freedoms.

Structural Issues

Lack of Protective Measures Guaranteeing Security of Victims and Witnesses

A major challenge in investigating and prosecuting trafficking cases comes from the nature of the crime itself, as evidence is often elusive and difficult to gather without the co-operation of the victim. The victim's testimony is vital and all successful convictions to this date relied on victim testimony and evidence. Most victims who have chosen to testify are those who have decided to participate in a voluntary repatriation programme, which is not linked with the police. Rare are the testimonies of non-victim witnesses who have tangential knowledge about the circumstances of the case. However, while potentially crucial for prosecuting trafficking cases, victims' testimonies are the hardest to obtain. Co-operation with the prosecution is dangerous for the victim or witness and therefore it cannot be forced. Where the victim or witness decides not to come forward and testify, but is then coerced to against her/his will, there is a danger that these witnesses would turn hostile and threaten the credibility of the entire prosecution.

The elements of the crime naturally imply the existence of well-organised networks of perpetrators (recruiters, sellers, buyers, transport facilitators, managers of night-clubs and bars, etc.), thus, if one or few perpetrators are caught, the threat remains that additional accomplices, who can pose a serious threat to the well-being of co-operative victims, are still at large. Consequently, if expected to co-operate, victims and witnesses must be protected not only on an ad-hoc basis, but through a multi-tiered security scheme ranging from interim and short term security to safe relocation and psychological and social alternatives for the future.

LSMS recommended the implementation of such a witness protection programme in previous reports, but a concrete result has not yet been seen. Rather, victims of trafficking have still been picked up from bars and requested to participate and co-operate in the investigation, even though there is no effective mechanism currently available to the victims, such as a safe location for victims during the investigation. In some special cases, safe temporary location and protection was provided, almost always with the financial assistance of the OSCE or by another victim assistance organisation. These measures were not based on a regulated structure and policy. While TPIU has expressed frustration with its lack of financial and material resources for protecting witnesses and

victims, and whilst Pillar I has not responded to the challenge, victims/witnesses found themselves, in exceptional cases, left to their meagre resources as soon as their testimony was secured. As foreign women, the only resources they may have are often the ones from which they have just escaped.

> An illustrative example is the case of three foreign women arrested in a raid at the Queens Bar in Prishtinë/Priština. After a brief hearing in front of a Minor Offences judge the three women were convicted of "illegal border crossing" and served a 10 days sentence in the Lipjan/Lipljane Detention Centre. Although they first refused to testify against the owner of the night-club, they later agreed to give full statements about the way they were trafficked to Kosovo, asking in return for guarantees of personal safety. An ad-hoc solution was found and the victims were temporarily placed in a hotel under police protection. However, after they provided statements to TPIU and the investigative judge, the three victims ended up in the street and were eventually picked up and taken to another night-club in Prishtinë/Priština where they were forced into prostitution again. During a raid in the latter club, TPIU found the three victims amongst the dancers-prostitutes and brought them to testify another time in front of a judge. No form of organised protection was provided the second time either.
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> In a series of trafficking related cases monitored by LSMS in Prizren, pre-trial investigations and even a trial came to a halt after insufficient evidence forced the prosecution to drop charges. The victims, who initially gave statements in front of the police incriminating the club owners and their associates, eventually changed their testimonies claiming that they were not forced to do anything against their will. None of these victim-witnesses were offered any kind of protection or relocation after their initial testimony. A suspect involved in several investigations related to trafficking offences has so far managed to escape prosecution, as the victims who reported him for forcing them into prostitution in his club changed their statements in the course of the investigations. In one case, the police re-called victim I.R one week after her initial incriminating testimony and she asked for her statement to be disregarded and for the investigation to be dropped. Police investigators noticed several marks and bruises on the victim's body. Again, in spite of these clear signs of intimidation, police took insufficient measures to efficiently protect these victims and thus secure crucial evidence against the alleged traffickers.

Logistical Matters Hampering Investigations

Internationally recognised human rights standards point out that the right to an interpreter and to have relevant documents translated applies not only during trials and court proceedings, but also at all stages of criminal proceedings including during police questioning and preliminary examinations or inquiries.[102]

A logistical problem impeding on the work of counter-trafficking law enforcement agencies has been the translation of documents or proceedings into the victim's language or a language that she/he understands. Foreign victims are subjected to questioning which may be traumatic in a language they do not understand despite the fact that many cases fail without the victim/witness's ability to relate testimonial evidence. One ad-hoc

[102] Principle 14 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment.

technique used by police investigators, is to have UNMIK officers, who are co-nationals of the victim/witness, provide translation. This solution, on one hand, risks imprecise translation from a non-professional interpreter and on the other hand, it may cast doubt on the impartiality and independence of the translators who may have been involved in the same or related investigations.

From a different perspective, but still related to translation, LSMS is concerned with the registration process initiated by TPIU for foreign women working in Gjilan/Gnjilane region. The women are required to sign a specific document in order to avoid prosecution for illegal entry and presence in Kosovo. Although the document is written in English, Albanian and Serbian, while the vast majority of these women do not speak any of the three languages, they are still expected to sign it without proper translation. As the likely consequence of failing to adhere to the requirements of the document is prosecution and deportation on an immigration-type charge, this practice has the potential to violate an individual's right to be informed of the legal obligation assumed under the document in a language that she/he understands.

Substantive Issues

Effectiveness of Investigations

LSMS has observed a trend in recent months regarding the approach of the law enforcement agencies that are investigating and cracking down on trafficking cases. UNMIK police, often in co-operation with KFOR and Carabinieri, conducted massive raids throughout Kosovo on establishments suspected of harbouring and using trafficked women. These operations were characterised as successful operations making a significant impact on the criminal circles involved in trafficking to the public and press. Most of these operations resulted, indeed, in tens of arrests, but not, however, of suspected traffickers. Instead, foreign women, who were most likely victims of trafficking, were arrested and charged with various immigration-related offences. Numerous such cases were reported in Gjilan/Gnjilane region, Prishtinë/Priština region and also, to a smaller extent, Prizren region. Furthermore, most of these women were prosecuted and convicted for illegal border crossing and/or possession of false documents, as they either did not have passports or their passports did not have entrance stamps for Kosovo territory. Many of them served sentences of 10 to 20 days imprisonment and also received deportation orders.

In Gjilan/Gnjilane region operations of this sort have been conducted jointly by KPS and UNMIK police (TPIU). The UNMIK co-ordinator for KPS justified the operation as a "moral necessity" dictated by increasing public pressure. Both KPS and TPIU had reportedly become alarmed over the rapid rise in the number of foreign women working in various bars throughout the region suspected of being involved in prostitution. As a measure to control the phenomenon, TPIU initiated a system of registration for foreigners, discussed above, that operated against women fitting a certain profile foreseen by police, *i.e.* foreign women working in bars and night-clubs. These women were required to sign a document, created by the regional police unit, which would authorise

them to remain in Kosovo for one month or for the duration of their "contract for work". If the women decided to stay longer, they would then face legal action initiated by police.

LSMS is concerned about this approach as it represents an ineffective attempt to crack down on trafficking, and a misguided method of law enforcement. Targeting the women, rather than the organisers and pimps profiting from them, is easier and less risky, but it may alienate the victims and create greater fear the law enforcement officers. On the contrary, police has claimed that the registration process allows them increased access to potential victims and also offers the victims the opportunity to report any criminal behaviour perpetrated against them. In reality, the system envisaged by police may also frustrate any attempt to gain trust from the victim's side. Furthermore, prosecuting the victims for offences such as illegal border crossing or possession of false documents is seen by police as a method to eventually "break the women down" and make them testify against the traffickers.

Such practices are not only unproductive in terms of controlling the trafficking phenomenon, but they also violate the rights of the victims as set forth in Regulation 2001/4. Section 8 of the Regulation provides that a person is not criminally liable for prostitution or illegal entry, work or presence in Kosovo if there is evidence to support a reasonable belief that the person is a victim of trafficking. Moreover, Sections 10.2[103] and 10.3[104] of the regulation impose an **obligation** on law enforcement officers to advise and promote the rights of trafficking victims as set forth in Section 10.1[105], regardless of doubts or even charges of prostitution or illegal entry and presence in Kosovo.

Possible Conflict of Interests

LSMS is concerned that some trafficking investigations at police level involve the possible conflict of interest amongst the investigators themselves where police personnel are involved in trafficking or have used the services of trafficking victims. Many of the victims interviewed by LSMS stated that international police officers were among their frequent "clients".

Beyond the moral and criminal aspect (Regulation 2001/4 penalises "users" of trafficking victims under Section 4), this issue raises potential conflicts of interests. The same officers alleged of using these "services" may be involved at one point in trafficking or related investigations, and under such circumstances their impartiality is evidently seriously affected. Furthermore, such a conflicting position within the law enforcement authority casts doubt on the entire international presence in Kosovo, be it administration, judiciary or other bodies involved in building up the new society.

[103] The services and facilities for the assistance of victims of trafficking shall be available to such victims, in accordance with Section 10.1, regardless of any charges of prostitution or of illegal entry, presence or work in Kosovo that may be pending against them.

[104] Law enforcement officers shall advise persons who are suspected victims of trafficking at the earliest available opportunity of their right to request the services and facilities set out in the present section and shall contact the appropriate persons to arrange the requested assistance.

[105] Section 10.1 provides that suspected victims of trafficking should be offered free interpretation in a language of their choice, free legal counsel, temporary safe housing, psychological, medical and social welfare assistance.

LSMS documented the case of a UNMIK police officer from Mitrovicë/Mitrovica who was reported by a juvenile victim for sexual abuse. An international prosecutor was put in charge with the case from the outset of the police investigation, but the case has never been brought in front of an investigating judge, as the prosecutor considered that there were no sufficient grounds for a request to start the investigation. The main reason for dropping the case was the inconsistencies in the victim's statements and the fact that eventually she expressed her will, together with her father, not to pursue with the investigation. LSMS's concerns in this case were threefold. First, cases of sexual abuse come under automatic prosecution, so the victim's will has no legal impact on prosecuting the case. Second, the prosecution put forward from the outset of the case the issue of immunity from detention and prosecution that the officer enjoyed under UNMIK Regulation 2000/47. A waiver of immunity was not granted and eventually the case was dropped. Third, the first investigations conducted by police revealed several aspects, which were, however, not followed in depth although they were relevant for the pursuance of the case. Both the victim and the suspect mentioned a person who facilitated in finding a house, brought the victim, "convinced" her to meet intimately with the suspect, and it appeared from the officer's statement that this person was not doing this kind of inter-mediation for the first time. The victim also alleged being picked up from her house by force and then taken to the house. However, the person was not considered at any time as a possible trafficker and he was not even questioned by police. The police officer was also not charged with procuring the services of a possible trafficked juvenile as envisaged by Section 4 of Regulation 2001/4.

In a case scrutinised by LSMS in Prizren, a Kosovo Turkish victim reported to UNMIK police in Rahovec/Orahovac of being raped and forced into prostitution by a Kosovo Albanian male named N.C. The victim also stated that some of her customers were UNMIK police officers stationed in Rahovec/Orahovac and she clearly mentioned that she would be able not only to identify them but also to show the investigators their apartments. This case, together with two other cases involving the same suspect, were qualified under the Yugoslav Criminal Code and not under Regulation 2001/4 and, thus, fell under the jurisdiction of the Municipal Court in Rahovec/Orahovac rather than the District Court. As part of the procedure, the Rahovec/Orahovac police were put in charge with the investigations. As police officers from this municipality were allegedly involved in the reported criminal activities, the procedure created obvious conflict of interests; yet, the investigation went forward with police in command. The latest police reports on the case indicated that the police determined through their investigation that the victim lacked credibility and, as a result, her complaints were disregarded. While she may have lacked credibility, it is not the role of the police, especially when they are allegedly implicated in the criminal events, to make such a determination, which ultimately obstructs progress on the entire case.

From public information made available by UNMIK police, LSMS is aware that several international police officers faced internal disciplinary action for involvement in prostitution and other related activities. The harshest disciplinary measure possible against such officers is to repatriate them; criminal investigations have not been initiated against them.

III. PUBLIC PROSECUTOR'S OFFICE

Substantive Issues

Many trafficking investigations or trials are halted without conviction of the suspects or defendants due to the prosecutor's decision to drop the charges. Whereas LSMS is aware that withdrawing from prosecuting a case falls within the discretion of the public prosecutor as envisaged in the applicable law[106], this discretion is unchecked and unchallenged under the current situation in Kosovo, although mechanisms of review are provided for in the law. According to the domestic law, the work of a public prosecutor can be subjected to internal review from a higher public prosecutor within the structure of a particular court, while the Provincial Public Prosecutor's office has the authority to oversee and make recommendations on the practice of the public prosecutor's offices throughout the province with the aim of achieving a comprehensive and uniformed practice.[107] The Provincial Public Prosecutor has just begun a very limited supervision and documentation of the prosecutors' activities. LSMS is concerned that the current system of discretion is open to substantial abuse. This issue may be of particular importance in transitory judicial systems such as the one in Kosovo, where independence and impartiality of the judiciary may fall below expectations.

LSMS monitoring indicates that prosecutors have dropped many cases of alleged trafficking charges, either during the investigation or during the trial. Despite the new Regulation, trafficking cases were often investigated, prosecuted, and tried by the judiciary as low-profile cases, with investigations being carried out even by the Municipal Courts. This situation has made it possible for many trafficking suspects to be released or exonerated of criminal responsibility through the procedure of dropping charges. These cases proceeded virtually unknown to the public or the authorities administering the justice system, as little scrutiny was exercised on the low levels of the judiciary.

UNMIK Regulation 2001/22 on Measures Against Organised Crime provides the legal definition[108] of organised crime that covers trafficking, since by its nature, trafficking involves a well-defined and structured group of people, which is formed for the purpose of committing criminal acts (punishable, according to Regulation 2001/4, with more than 4 years imprisonment). Thus, in the future trafficking cases may be viewed as requiring forceful response from the criminal justice system.

> In a case prosecuted and tried in Prizren District Court, a Kosovo Albanian male was charged with buying a woman in Albania and later selling her to a strip-bar in Prizren. Despite testimonies of the victim, of a colleague who witnessed the kidnapping and of the

[106] Article 51 of FRY CPC reads that a public prosecutor may withdraw his petition for prosecution up until the end of the main trial before the first instance court […].
[107] Article 7 and 9 of the Law on Public Prosecutor Office.
[108] Section 1 of the Regulation defines "organised crime" as the commission of a "serious crime" by a structured group in order to obtain, directly or indirectly, a financial or other material benefit. Furthermore, "serious crime" is defined as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years.

owner of the bar who remembered the defendant telling him about the forged passport given to the victim and arguing about the price of the victim, the public prosecutor requested the dropping of charges, during the trial, due to lack of evidence against the accused. The panel acknowledged the request and consequently closed the case.

After a large raid organised by KFOR and UNMIK Police in Prizren in April 2001, several foreign women were found in a strip-bar. Condoms were also found everywhere inside the premises and one of the suspects was caught in a room behind the bar together with one of the victims; the latter was half-naked. The owner and some of his alleged accomplices were arrested and handed over to the prosecutor and investigating judge, both of them. After "exculpatory" statements given by the suspects (e.g. "it was a coincidence that I – (the suspect) – was fixing the ice machine in the back room and the woman happened to be there with me changing her clothes…"), the public prosecutor proposed to drop the charges due to lack of evidence. Some of the victims in this case, who were not provided with neither assistance nor protection, radically changed their statements in favour of the suspects. While this could be considered suspicious behaviour worth investigating further, none of the judicial officials ordered a more thorough investigation in the case.

As a last example, three suspects of alleged trafficking offences have been arrested and investigated twice in Prishtinë/Priština in an interval of three months. Each time, the public prosecutor requested their release from detention and suspension of the investigations due to lack of sufficient evidence. There were several foreign women working in the suspects' bar who testified in front of police investigators that they had been trafficked into Kosovo. When brought in front of the investigating judge, they were questioned for just couple of minutes without proper translation being provided, and they stated that actually no one forced them into prostitution and that they came to Kosovo voluntarily. Immediately after that, without deeper investigations or a more detailed questioning of the women, the public prosecutor reached the conclusions that there was insufficient evidence for continuing the investigation in this case

IV. COURTS

Of the entire criminal justice system in Kosovo, LSMS has primarily focused on the court system and has indicated in previous reports both concerns and also developments regarding the courts' activity. After two years of efforts on UNMIK's side to build and develop a functional judicial system, LSMS appreciates that this goal has, mostly, been achieved. The current system has been endowed with the necessary mechanisms to ensure an efficient case-flow management whilst, on one hand, guaranteeing individuals due process and, on the other hand, holding the members of the judiciary accountable for their performance.

LSMS has continued to observe procedural shortcomings within the court system, which may have a negative impact on the rights of the parties. Furthermore, it has also more thoroughly scrutinised substantive aspects of the courts' activity, which have serious consequences not only from a human rights perspective, but also for the credibility of the system itself. In the following section, LSMS highlights its concerns from both perspectives. Although specifically referring to trafficking cases, these issues represent

practices and trends, which have been monitored by LSMS across the criminal justice system.

Structural Issues

Distribution of Regulation 2001/4

One technical problem with a significant impact on court handling of trafficking cases, has been the inadequate distribution of the Regulation 2001/4. Without the actual text of the law in their hands, many judges justified their lack of action in trafficking cases or their inappropriate approach to these cases with the fact that they did not receive the translated version of the Regulation. LSMS is aware of cases where judges from either District Courts or Municipal Courts have claimed that they have never seen the trafficking regulation and that they are not aware of its scope and structure. It is not clear how well distributed Regulation 2001/4 in fact was, as the OSCE alone distributed it to judges from several courts throughout Kosovo, while the KJI organised a training seminar to familiarise the judiciary with the scope of the regulation. However, the official responsibility of distributing UNMIK regulations lays with the administrative and executive authorities[109], and the fact that judges from some courts, regardless of the number, did not receive a piece of legislation of crucial importance which they are expected to apply, represents a reason for concern. This logistical irregularity has had a significant impact especially on the cases of illegal border crossing instrumented by police against foreign women found working in bars and night-clubs.

> In the cases of four foreign women detained in Gijlan/Gnijlane in June 2001 the Minor Offences Court passed convictions of 15 to 20 days imprisonment and deportation orders for a period of 2 years on charges of illegal border crossing from FYROM or Serbia proper into Kosovo. Upon an inquiry by LSMS with the judges from Gijlan/Gnijlane Minor Offences Court, they rejected the arguments laid down in Section 8[110] of Regulation 2001/4 with the reasoning that they have never received nor seen the Regulation.

The administrative shortcomings of the system, such as lack of institutionalised and systematic translation and insufficient distribution of legislation, under the responsibility of ADoJ and the Office of the Legal Advisor is severely impacting the administration of justice. The problem is more than just "logistical", it is a failure of the administrative/state bodies to provide judges with the necessary tools to ensure individual rights and due process, and to fulfil their responsibility to interpret laws and properly and fairly adjudicate cases in their courts.

[109] According to ADoJ, the delay in distributing UNMIK regulations is attributable to the fact that new legislation is not translated by the issuing authority prior to being passed.

[110] The text says that a person is not criminally liable for prostitution or illegal entry, work or presence in Kosovo if that person provides evidence to support a reasonable belief that she is a victim of trafficking.

Lack of Adequate Translation/Interpretation

As mentioned previously in this report, translation issues have been affecting the work of law enforcement agencies and to the same extent but with more serious consequences, they are impacting the work of the courts as well.

As far as trafficking cases are concerned, the manner of carrying out translation during court proceedings is crucial since the vast majority of the trafficked women are foreigners who many times speak neither of the three languages officially used in Kosovo (English, Albanian or Serbian). Despite the recommendations made by LSMS, no action has been taken so far at the ADoJ level to hire independent and qualified interpreters able to carry out adequate translation in court hearings. While the applicable law[111] indicates that the presidents of the District Courts should keep a list of interpreters for foreign languages, LSMS appreciates that in the current situation the courts do not have the administrative capacity to independently take such actions as to appoint interpreters according to the needs of the proceedings. Such action can only be taken by ADoJ or by the court with prior and specific ADoJ approval. From a human resources point of view, the issue should not be too complicated since, according to IOM statistics, 99% of the trafficking women come from Moldavia, Romania, Ukraine, Bulgaria and Russia. Consequently, interpreters for Russian and Romanian would cover almost all cases of trafficking in terms of court translation. Furthermore, it would not be necessary for each court to have official interpreters for these languages. A pool of interpreters based in ADoJ could respond to requests received from any court in the province whenever interpretation in any of the two languages would be needed.

Instead, ADoJ has to date appointed Serbian language interpreters for these cases expecting the Russian speaking victims to understand some of the proceedings. For the victims who did not speak Russian either (mostly Romanian victims), courts have relied on the Moldavian victims, who usually speak both Romanian and Russian, to translate for the others what they had understood of the Serbian translation.

This practice raises concern as fundamental provisions of the domestic applicable law, the FRY CPC, state that defendants have the right to know and understand the charges brought against them,[112] that victims and defendants have the right to adequate translation[113] and that all persons involved in criminal proceedings have the right to an effective defence.[114] Furthermore, failure of the courts and the state to ensure that parties to a criminal proceeding understand those proceedings breaches basic human rights standards enshrined in both ECHR[115] and ICCPR[116]. The Human Rights Committee

[111] Article 105 of Law on Regular Courts; Articles 56-57 of the Rules on Internal Activity of the Courts.
[112] Article 4 reads that during the very first interrogation, the accused must be informed about the charge against him/her and the grounds for the charge.
[113] Article 7 (2) states the parties, witnesses and other persons participating in proceedings have the right to use their own language in the course investigating or other judicial proceedings or during the trial.
[114] Article 11 states that the accused has the right to present his/her own defence and that he/she must be given sufficient time to prepare it.
[115] Article 6 (3)(e) of ECHR states that everyone charged with a criminal offence has the right […] to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

expressed in one of its General Comments[117] that the right to an interpreter is an integral part of the right to defend oneself and the right to adequate time and facilities to prepare defence, referring to cases of both ignorance of the language used by a court and difficulty in understanding it. Referring not only to the assistance of an interpreter but also to the quality of the interpretation, the European Court underlined in one of its judgements[118] that *in view of the need for the right guaranteed by paragraph 3 (e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter, but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.*

> The above-mentioned scenario has seriously affected the hearings held in Minor Offences Courts in cases of illegal entry or stay in Kosovo. After raids conducted in various bars and clubs in Gijlan/Gnijlane and Prishtinë/Priština, foreign women were picked up and later briefly interrogated by officers of TPIU. Being taken afterwards to Minor Offences Court for hearings before an investigative judge, the women have not been informed where they were and what were the consequences and the scope of the hearing. Due to lack of adequate translation, the women were heard by the investigative judge in groups of 3 to 4 at a time so that the Russian speaking women could "understand" the Serbian interpretation provided by the court and then translate to the others who spoke only Romanian. In separate interviews conducted by LSMS with these women after such court hearings took place, some of them said that they did not even know if they were in a court and that they understood virtually nothing of what was going on during the hearing. Furthermore, all these women received Serbian versions of the court decisions convicting them for illegal border crossing and no translation of these documents was provided. After more than a week of detention, some of these women still had troubles understanding why they were there and whether they would be deported or not after serving the sentence.
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> In a trafficking case investigated in Prishtinë/Priština, several victims who wanted to testify against the alleged traffickers were brought to court for three days in a row without being heard due to the lack of a Russian or Romanian interpreter. Certain ad-hoc unofficial solutions were made available, but the judge did not officially request nor ADoJ provided a qualified interpreter for these hearings. As a last resort, translation was facilitated by a co-national of the victims working for an international organisation in Kosovo.

Regardless of the quality of the translation, the use of unofficially appointed interpreters during court hearings could render the whole procedure and the actions taken by the court void. The applicable law in Kosovo contains numerous provisions[119] referring to the use of permanent court interpreters and also to the procedures of hiring and evaluating these interpreters, which indicate that official translation in courts should always be performed by one of these permanent and properly recruited interpreters.

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[116] Article 14 (3)(f) of the ICCPR reads that […] everyone shall be entitled […] to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
[117] General Comment 13, paragraph 13, adopted by the Human Rights Committee under Article 40 paragraph 4 of ICCPR.
[118] *Kamasinski v. Austria* case (19 December 1989) ECHR.
[119] See *ante note* 106; also see Regulation on the Examination for Permanent Court Interpreters.

Substantive Issues

Misinterpretation of Regulation 2001/4 by the Courts

A prerequisite for efficient and adequate resolution of trafficking cases at the court level is a correct understanding on the judges' part of the trafficking phenomenon, and of the legislation enforced to control and react to it. In this regard, LSMS has noticed that even where judges were fully informed about the regulation and its content, they have indicated a poor ability to interpret it and a misunderstanding of its scope and intent.

As a first example, LSMS is aware of a trafficking case investigated by the Kamenica Municipal Court, in which a Kosovo Serb was charged under Regulation 2001/4, as he allegedly "arranged" for a Kosovo Serb victim to meet soldiers in a KFOR camp outside Kamenica. Although initially the court started the investigation under Section 2 of the Regulation, which prescribes a sentence of up to twelve years imprisonment thus making the District Court competent to handle the case, later on the alleged crime was investigated in accordance with Section 4, which prescribes a sentence of up to five years and consequently brings about the material competence of the Municipal Court. The interpretation given by the investigative judge from Kamenica Municipal Court was that the suspect was procuring the services of the victim to the clients and Section 4 of Regulation 2001/4 refers to such cases of "procuring the sexual services." LSMS expressed concern at that time over this interpretation, as from the reading of Section 4 of the regulation, it was obvious that the text was actually referring to the "clients" of the sexual services and not to the ones facilitating them. The wording of the legal text is "any person who uses or procures the sexual services of a person […]", as the word "procures" defines persons procuring the services for themselves and not for others. The misinterpretation was supported by the Public Prosecutor from Gijlan/Gnijlane District Court. In his view, the suspect could not have been charged under Regulation 2001/4 and especially not under Section 2 because "he was just a mediator" between the victim and the clients. He explained to LSMS that in his opinion this situation could not fall within the scope of Regulation 2001/4.

Another example of misinterpretation of trafficking offences is a case investigated and tried in Prizren District Court. The suspect in this case was charged with buying a Moldavian woman from a bar in Albania, bringing her to Kosovo with a forged Albanian passport, raping her and then selling her to another strip-bar in Prizren. Despite the obvious legal qualification of the above-mentioned facts under Regulation 2001/4, the prosecutor qualified the offences as falsification of documents (Article 203 LPK) and rape (Article 74 LPK). The same legal qualification was maintained throughout the trial.

In a recent case investigated by the Mitrovicë/Mitrovica District Court, an international UNMIK police officer was arrested and charged with rape and unnatural sexual acts. An international investigative judge and international prosecutor handled the case. Facts taken from police reports indicated that the juvenile victim might also have been a victim of trafficking. They also indicated that the victim had been working as a prostitute for approximately two years and the suspect had been using her services occasionally. There were also indications that the suspect was aware of the fact that the juvenile was a victim of trafficking, since she had been recruited and harboured by a certain person for the purpose of sexual exploitation. The suspect knew this trafficker and he always contacted

> and paid money to her when he wanted to have sex with the victim. Section 4[120] of Regulation 2001/4 penalises persons using or procuring the services of trafficking victims, but despite the obvious correspondence of the alleged actions of the suspect with the mentioned provisions, the international prosecutor did not envisage this legal qualification. Therefore, no charges flowing from the regulation were raised. Instead, the request for conduct of investigations was made for alleged offences of rape and unnatural sexual acts, which, it appears, could not ultimately be sustained with material evidence. Thus, the suspect was released after the initial 30 days of detention and he immediately left Kosovo.

A general lack of understanding of Regulation 2001/4 was documented by LSMS in the Minor Offences Courts throughout the region. Apart from the structural irregularities mentioned previously in this report, in the cases of foreign women tried and convicted for illegal entry in Kosovo[121], LSMS noticed that all judges involved have denied the rights reserved for trafficking victims under Chapter III of Regulation 2001/4.

> In some of these cases of illegal entry the offenders explained to the judge that they had been smuggled over the border without their knowledge or consent, or they simply explained that they had been trafficked. These arguments should have been enough for absolving these offenders of any criminal responsibility, as Section 8 of the regulation has made clear that a person is not criminally responsible for prostitution or illegal entry in Kosovo if that person provides evidence to support a reasonable belief that he or she was a victim of trafficking. However, the reasoning of some of the judges was that either there was no correspondent case in the District Court establishing that the women were victims of trafficking, or that the regulation did not set a standard of evidence that could be used for proving the victim status. This argument regarding the lack of a prior ruling in a trafficking case establishing the victim status of the illegal entry offender is not in line with the applicable law.[122] The standard set by Regulation 2001/4 refers to a reasonable belief that the person was trafficked. Accordingly, the argument based on the absence of a standard of evidence for such cases cannot be considered either as long as the presence of a foreign woman found working in a night-club and evidently crossed into Kosovo without proper documentation represents in itself a ground for suspicion that should determine the judge to further investigate and administer evidence to assess whether he/she has a reasonable believe that the woman was trafficked.[123]

The convictions received by women in all these cases were accompanied by deportation orders. Such orders illustrate the crucial nature of the consequences of the misinterpretation or lack of consideration for the provisions of Regulation 2001/4, as Section 11 prohibits deportation for suspected victims of trafficking. LSMS is aware,

[120] Any person who uses or procures the sexual services of a person with the knowledge that that person is a victim of trafficking in persons commits a criminal act and shall be liable […]. Paragraph 2 of Section 4 prescribes a more serious penalty for the offence in paragraph 1 if the victim is a juvenile.
[121] LSMS covered 12 such cases in Gjilan/Gnjilane MOC and 8 in Prishtinë/Priština MOC.
[122] Article 21.1 of FRY CPC reads that if the application of criminal law depends on a prior ruling on some legal issue which lies in the jurisdiction of the court in some other proceedings or in the jurisdiction of some other government agency, the court trying the criminal case may itself rule on that point as well, in accordance with the provisions that apply to presentation of evidence in criminal proceedings. The criminal ruling on that legal issue has effect only with respect to the criminal case tried by that court.
[123] Furthermore, Article 16 FRY CPC states that the right of the court to evaluate the existence or non-existence of facts shall not be bound nor restricted by special formal rules of evidence.

however, that deportation orders are impossible to enforce by police at this stage, which only means that the women would be released back into Kosovo after serving the sentence.

LSMS is also concerned that in some of the cases monitored by LSMS, the decisions of the MOC judges were based on legal provisions that had no applicability to the factual circumstances of the case.

> On 12 June, a Moldavian woman was sentenced to 20 days imprisonment and deportation by the Minor Offences Court in Gjilan/Gnjilane for illegally crossing the ***state*** border between Serbia and Kosovo.[124] Referring to this offence had no correspondence with the actual circumstances in Kosovo, since the demarcation between Serbia proper and Kosovo is not officially considered as a border, but as a boundary.
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> On 26 June the UNMIK Police Regional Investigating Unit in Gjilan/Gnjilane appealed four decisions by the Minor Offences Court in which charges were dropped for illegal border crossing. The police in their appeal argued that the fact that the women in question had no stamps in their passports was enough evidence to show that they had entered Kosovo illegally from Macedonia. However, LSMS is aware that no stamps are issued by the UNMIK border police at the border crossing between Macedonia and Kosovo.

Trafficking Cases Handled Casually by the Courts

In addition to the various structural and substantive aspects in the courts' activity described above, which have been and still are hampering the proper pursuance of trafficking cases, LSMS has observed a concerning trend in the approach of some judges who investigate or try serious allegations of trafficking.

LSMS's intention is not to scrutinise the judicial decision-making process in the sense of weighing evidence or commenting on deliberations. There are, however, situations where recurring trafficking suspects were treated in a manner that illustrates a disregard for the seriousness of the cases on behalf of certain judges in the District Courts.

> LSMS is especially concerned with the case of three Kosovo Albanian suspects investigated by District Court Prishtinë/Priština for alleged involvement in trafficking in relation to a night-club. During a raid conducted in November 2000, the suspects were arrested and an investigation was started on allegations of inter-mediation in the exercise of prostitution under Article 251 of FRY CC.[125] The investigation was handed over to an investigative judge from Prishtinë/Priština District Court who heard the suspects and decided to release them and suspend the investigation due to insufficient evidence. Only two months later, in February 2001, TPIU raided the same bar again and the three suspects were arrested for similar allegations of trafficking. Police questioned some of the victims found in the bar and they all confirmed they had been trafficked. A different

[124] Article 71 paragraph 1 of the Law on Illegal Border Crossing and Movement in Boundary Zone.

[125] (1) Whoever recruits, induces, incites or lures female persons into prostitution, or whoever takes part in any way in turning a female over to another for the exercise of prostitution, shall be punished by imprisonment for a term exceeding three months but not exceeding five years.
(2) If the offence described in paragraph (1) of this article has been committed against a female under age or by force, threat or ruse, the offender shall be punished by imprisonment for a term exceeding one year but not exceeding 10 years.

> judge conducted the second investigation but it ended up in the same manner as the first one. After being detained for one month, and despite giving statements that were inconsistent with some of the documents in the court file, and with parts of their previous statements, the suspects were released again for lack of sufficient evidence. The judge did not seem to be concerned either with the radical discrepancy between the statements given by the victims to police and the ones given in front of him. On the contrary, from the information that LSMS received from the police officer who accompanied the victims to the court, their questioning lasted for only couple of minutes and the investigative judge showed no initiative to determine the true circumstances of this case.

There are other examples of judges showing a casual approach on trafficking cases, where they are seemingly ignoring the seriousness and the consequences of the phenomenon and the criminality related to it.

> In another case investigated and tried in Prishtinë/Priština District Court, five Kosovo Serb suspects were convicted to sentences varying from two to three and a half years imprisonment for inter-mediation in exercise of prostitution and sexual and physical abuse of some of the victims. The case was handled by a panel of judges and prosecuted by an international public prosecutor. Whereas no major concerns arose during the trial, LSMS acknowledged that the defendants were released pending appeal. The applicable law[126] does grant the panel the possibility to consider and decide on whether or not the accused should be released pending appeal, and the basis for this assessment should be the provisions of Article 191 paragraph (2) points 1, 3, or 4 FRY CPC.[127] Although LSMS understands and supports that detention prior to final conviction should be an exception and not a rule, in this case the court found during the trial that the five defendants had put in place a highly well organised network for trafficking and that this network had its branches both in Kosovo and in Serbia proper. Consequently, in the light of Article 191's provisions, LSMS believes that the risk of flight for these particular defendants was and is high. On the other hand, the key witness in this case was one of the trafficked women (also heavily abused), whose testimony was the strongest evidence of the prosecution. With the defendants at large and with her address made public during the court questioning, this victim has been put in a precarious position, and it appeared that her safety was not considered when the panel took the decision to release the defendants.
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> The written verdicts in this case have still not been delivered to the defendants and police is unaware of the whereabouts of some of the five defendants.

Regulation 2001/4 specifies in its Section 6 that, during an investigation of a trafficking case, the investigating judge may order the confiscation of property used in or resulting from the commission of trafficking criminal acts and the closure of establishments suspected to be involved or associated with such acts. The orders are to be taken upon a proposal of the public prosecutor.

[126] According to Art. 353 (2) FRY CPC, in pronouncing a verdict that calls for a lesser prison sentence [than 5 years], the panel […] shall terminate custody if the accused is already in custody and the reasons for ordering custody no longer qualify, while paragraph (4) of the same article provides that the provision of Paragraph 2 shall be applied to the ordering or termination of custody between the time when the verdict is announced and the time when it becomes final.

[127] Art. 191 paragraph 2 (1,3) provides that custody shall be ordered if there *are grounds for suspicion that the accused might flee* (point 1), or "*if particular circumstances justify the fear that the crime will be repeated or an attempted crime will be completed, or a threatened crime will be committed"* (point 3).

> In a recent trafficking case investigated in Prizren, the alleged trafficking activities were closely linked to two night-clubs, which had been previously raided by police in numerous occasions due to suspicions of similar criminal activities. Furthermore, two previous investigations of trafficking allegations were linked to the same two clubs. Nevertheless, the investigating judge did not order the closure of these clubs despite a formal request filed by the international prosecutor involved in the case. As a result, the clubs have continued to function, only under a different management.

The casual manner with which trafficking cases are often handled by the courts is reflected not only in the substantive work of the courts, but also in its administrative tasks. The courts have procedural or administrative shortcomings that sometimes have a significant impact on the merits of a case.

> In the most recent trafficking investigation carried out in Prizren, six Kosovo Albanian men were arrested for alleged involvement in criminal activities, under the provisions of Regulation 2001/4. Three of the suspects were arrested on 30 August 2001, and after 24 hours police investigators handed the case over to a Public Prosecutor of the District Court for the proper filing of a request for start of investigations. However, as the file was handed over on a Friday afternoon, the Public Prosecutor failed to file the request with the investigative judge, arguing that this was not possible since the clerks had already left. For the same reasons the investigative judge could neither set, nor hold a detention hearing on Saturday or Sunday. Consequently, on 2 September 2001, at the end of the 72 hours custody limit, all three suspects were released from custody.

LSMS finds the situation where suspects are released from detention only because there were no court clerks available to assist the work of a prosecutor or a judge concerning. This kind of justification was also used in a Prishtinë/Priština investigation when a District Court judge refused to hold detention hearings during weekends because there were no court clerks available.

V. RAPE AND OTHER SEXUALLY RELATED OFFENCES

LSMS continues to monitor sexual violence cases and a whole chapter has been dedicated to this topic in the previous LSMS review of the criminal justice system. Unfortunately, there have not been any substantial positive developments since then. Instead, the issues identified at that time as major problems at police or court level have still dominated the approach of the judiciary to the sexual violence offences and its victims.

Therefore, in this section is not to restate the same concerns with different case-based examples. In this section, rather, LSMS highlights that problems such as improper forensic analysis and poor evidence gathering during initial stages of the investigation, conduct that suggests a biased attitude on the part of members of the judiciary towards rape victims and the lack of support or advocacy for victims throughout the criminal proceedings still persist. Whereas in many areas of the criminal justice system

developments have been documented, particular concerns related to this area of sexual violence have not been addressed.

Forensic Analysis in Cases of Sexual Violence

LSMS continues to have serious concerns over the conduct of forensic examinations of victims of sexual assault and domestic violence currently being carried out by the Prishtinë/Priština Institute of Forensic Medicine. The lack of proper forensic evidence in rape and other sexual assault cases compromises the ability of the police and courts to investigate and prosecute cases, thus impacting directly on the victims' ability to obtain an effective legal protection.

Apart from the low quality of the forensic reports, LSMS is also concerned with examples of forensic examinations that are simply not carried out. Normally, forensic doctors are obliged to work from 0800 to 1700hrs, Monday to Friday. However it has become standard practice for the majority of doctors at the Forensic Institute to cease work at 1300hrs. In response to concerns raised by OSCE, ADoJ and UNMIK Police over the institute's failure to provide timely examinations of rape and other assault victims, a "call-out" roster was established in May 2001, enabling forensic doctors to be contacted outside "normal" working hours.

However, the call-out system does not function effectively as illustrated in a number of cases, where forensic doctors have refused to respond to police "call-outs" to examine victims. As a result, investigations and prosecutions in rape cases have been compromised through the inability of the police to obtain adequate forensic evidence. At the same time, the psychological state of the victim, as well as the victim's willingness to co-operate with the police in pursuing a prosecution, is undoubtedly affected by the indifference shown by forensic doctors during her initial exposure to the investigative and judicial process. On 9 July 2001, in a memorandum addressed to the Supreme, District and Municipal Courts, ADoJ, UNMIK Police and the OSCE, the Forensic Institute stated that the examination of rape victims should be conducted "within 24 hours", and that "one of the forensic experts shall always be available to conduct this kind of examination." However, despite this explicit commitment, forensic doctors continue to refuse to co-operate in the examination of rape victims.

> On three occasions (25 March, 5 April and 6 July 2001) the Prishtinë/Priština Regional Serious Crime Squad (RSCS) escorted rape complainants to the Forensic Institute to request a forensic examination. In all these instances, the "on-call" doctor was not present or reachable, and even when reachable he refused to perform the evaluation. Consequently no forensic examination took place.
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> On 10 July 2001 at 0930hrs UNMIK police escorted a rape complainant to the Prishtinë/Priština Forensic Institute. The forensic doctors were in a staff meeting. They were informed of the presence of the victim, but did not break off the meeting in order to attend to her. The victim was therefore forced to wait 90 minutes before being examined. The examination, when it finally took place, lasted no more than 5 minutes. The examining doctor, on completing the examination, reportedly stated to the police that she had not been raped and therefore there was no point in writing a report. Only after an

argument between the police and the forensic pathologist, the latter agreed to prepare a report.

On 22 August 2001, having been refused treatment the previous evening by the Department of Gynaecology at Prishtinë/Priština Hospital, a rape complainant was taken to the Forensic Institute by UNMIK Police. According to police, the doctor was uncooperative and, without carrying out a forensic examination of any kind, ordered that the victim be admitted to the neuro-psychiatric Clinic in Prishtinë/Priština. The Police Officers asked to speak to the doctor in charge of the Forensic Unit, who, on arrival, refused to assist in any way. The victim was not properly examined until 27 August, by which time the value of the forensic evidence obtained was minimal.

The OSCE is currently involved in a capacity building project at the forensic institute. This project intends to promote the development of effective sexual assault examination procedures, which are in compliance with international standards and norms. The maintenance of such standards depends on the long-term development of the personal and professional integrity of the forensic doctors working at the institute. However, it will also depend on the establishment of effective internal control and disciplinary mechanisms to address the continuing failure to provide an appropriate and effective forensic service.

Conduct Suggesting Biased Attitudes in the Judiciary and Lack of Victim Advocacy

Whereas the issue of improper forensic analysis and evidence gathering has also a logistical dimension and the shortcomings might arise from precarious infrastructure and resources of police investigators and forensic teams, the biased attitude of some of the judges and prosecutors towards sexual violence victims and the lack of victim advocacy are purely substantive aspects of the manner in which the justice system is administered in Kosovo at this time.

Conduct suggesting bias towards victims of sexual offences at all levels of the judiciary has been identified previously, but significant improvements have not been identified. Instead, LSMS has observed that victims of sexual offences may still face irony, sarcasm or lack of consideration from the prosecutors, defence counsels or judges' part. Rape trials often remain imbued with ironical remarks on how the victim felt during the sexual intercourse, in which "position" was she raped, how hard did she scream, etc. In some cases, prejudices and preconceived opinions about rape cases have been openly expressed during court hearings by either judges from the panel or other principals. Often it appears that rapes are still perceived as fabricated cases, which the victims use in order to pressure a marriage. Another prejudice often illustrated through the prosecution of these cases is that as long as the victim's virginity was not intact at the time of the sexual abuse, than the guilt of the defendant is somehow mitigated and sometimes even excused. In almost all rape cases monitored by LSMS, judges have asked the victim whether she was a virgin at the time of the rape, whether she had a boyfriend and if so how many of them.

One of the most disturbing examples was the reaction of a judge from Prishtinë/Priština who, upon the request of the victim in a rape case to withdraw the

> charges brought against the defendants, shouted in open court: "I knew from the very beginning that this was not a rape!" Such a reaction indicates that the judge ruled on the case with the preconceived idea that the victim's allegations were not true and that was only a matter of time before she came to admit it.

Greater efforts should be made to change this mentality, even if it means initiating disciplinary actions. The creation of the JIU within ADoJ may also, by surveying and investigating the conduct of the judges and prosecutors, provide the latter with an impetus for voluntarily adjusting their attitudes through self-discipline. Where self-discipline does not work out, swift investigations and disciplinary actions should be undertaken. However, this is yet to be seen.

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The concept of victim advocacy was recommended by LSMS in the previous reports. At this time, the immediate implementation of a structural approach to this issue is both an appropriate response and urgently needed. As an initial program to provide such assistance, the OSCE has identified and trained in the past six months one defence counsel from each region that have been expected to represent victims of trafficking whenever such a need occurred. This development of a programme of victims' advocates and the right of the victim to have an advocate to represent their interests needs to be recognised and respected by the judiciary and criminal justice system generally.

> LSMS is aware of a recent investigative hearing that took place in front of an international judge in a sensitive case of sexual abuse of a juvenile victim. Due to the victim's age and the sensitivity of the case, particular emphasis was placed on the protection of the victim and also on providing her with appropriate psychological and moral support. Based on the conclusions of a psychiatric evaluation, stressing the need to not expose the victim to unfamiliar persons, the investigative judge decided to limit access to the hearing to the prosecutor, the suspect's defence counsel and an interpreter, thus refusing the presence of the victim's advocate. While the decision on limited access was taken by the judge with the best interests of the victim in mind, there are no legal grounds for such denial. The suggested lawyer present has been trained by the OSCE in issues of trafficking victims, and had also been given written authorisation by the victim for the hearing. Furthermore, the international prosecutor present at the hearing proposed that the advocate should be allowed to participate. The circumstances of this case made the denial somehow understandable, especially considering that there was no time available for the lawyer and the victim to get accustomed to each other, however, LSMS is concerned that the decision of the investigative judge might create an adverse precedent.

The expansion of the initial project of victim advocacy for trafficking victims to include victims of sexual violence represents the necessary following step for enhancing the protection and promotion of victim's rights in criminal proceedings, and therefore, its implementation should be supported.

VI. RECOMMENDATIONS

- Immediate solutions should be adopted by ADoJ to ensure free access to independent and qualified interpreters. For cases where suspected victims of trafficking are involved either as witnesses or alleged offenders (cases of illegal border crossing, illegal presence in Kosovo or possession of false documents), LSMS recommends that a pool of Russian and Romanian interpreters be hired and used whenever and wherever needed. The pool of interpreters should be based within ADoJ and then deployed in various courts throughout Kosovo according to where trafficking cases occur. Assistance of interpreters should not be limited to every interview or statement given to police investigators, confrontation with written documents, and all court proceedings.
- LSMS recommends that UNMIK and KFOR adopt a stronger response to the involvement of their personnel in trafficking activities. Internal disciplinary measures are not sufficient, as long as Regulation 2001/4 specifically penalises users of trafficking victims' services. Through a transparent process of requesting waivers of immunity, international personnel should be equally brought under criminal investigation when considered or found to be involved in criminal activities related to trafficking. Immunity from detention and prosecution should not, as highlighted in the Ombudsperson Special Report No. 2, be considered by international personnel working in Kosovo as a protective shield for illegal activities of any kind.
- Substantial training and awareness raising campaigns should be addressed to the judiciary on both the trafficking phenomenon from a social and sociological perspective, and on the trafficking legislation from a legal perspective. Previous training on more general issues related to the anti-trafficking regulation proved to be insufficient. Therefore, in depth specialised training and round-tables should be facilitated by KJI on specific provisions of the legislation which, in the court's practice, seem to be less understood. As concrete examples related to trafficking issues, LSMS recommends immediate training of judges and prosecutors on issues such as: explanation the legal definition of "trafficker", "victim" and "user of victims' services", with emphasis on the criteria that needs to be followed when qualifying these activities; highlighting the status of trafficking victims under Regulation 2001/4, with emphasis on the immunity from prosecution that these victims have in relation to criminal acts committed while being trafficked; the scope and consequences of not applying the rules on confiscating of property and closure of establishments (Section 6 of Regulation 2001/4).
- LSMS recommends the creation of a specialised police unit, similar to TPIU, which should focus only on cases of sexual and child abuse and domestic violence. Such a unit, with capacities directed only on these issues, will enhance co-ordination and efficient response in an area where responsibilities are too fragmented. The unit should have a direct and continuos contact with forensic teams and the medical forensic institute to ensure prompt and effective evidence gathering. Furthermore, it shall establish working relationship with agencies involved in victim advocacy and victim support in order to co-ordinate efforts for an enhanced victim protection.
- LSMS recommends the immediate appointment by the SRSG of the Victim Assistance Co-ordinator, responsible for liasing with all the relevant authorities in the

efforts of bringing a concerted strategy in response to the pressing need for assistance and protection of trafficking victims.

- LSMS strongly supports legislative recognition for the concept of victim's advocacy, meaning that victims of sexual violence offences should have immediate and continuous legal support throughout criminal proceedings.

SECTION 6: MINOR OFFENCES AND MUNICIPAL COURTS

I. INTRODUCTION

Due to a lack of resources and the necessity to set priorities, the activities in the various Municipal Court (MC) and the Municipal Court for Minor Offences (MOC) have been monitored by LSMS only on an ad hoc basis and mainly in cases concerning juveniles, suspected victims of trafficking or domestic violence. As a consequence, LSMS has so far not reported extensively and systematically on the activity of these courts, and even less has been known about the functioning of the Minor Offences Courts. LSMS has concerns that possible breaches of human rights standards are occurring in Municipal Courts and MOCs, however the international community has not been paying attention to these courts, instead focusing on District Courts. Whereas, at District Court level, there are international legal officers appointed within the ADoJ to facilitate the work of the international judges on an administrative level, who inherently have in depth knowledge of each case, there is no corresponding function for the Municipal and Minor Offences Courts. Whilst LSMS is not implying that international judges or prosecutors should be necessarily involved in handling cases at this level, ADoJ should focus more attention to the problems these courts are facing, both logistical and substantive.

II. MUNICIPAL COURTS

Competence of Municipal Courts

Presently there are 24 Municipal Courts established in Kosovo, but not all of them are functional. The Municipal Courts are located in the five regions according to territorial and administrative divisions. Municipal Courts in Kosovo deal with a large number of cases concerning minor criminality and therefore have a key role in administering justice in criminal cases, and thus indirectly in the prevention of crime.

According to the Law on Regular Courts, Municipal Courts have jurisdiction to try all criminal cases where, as prescribed by law, an individual judge is competent to pass judgement and criminal offences where the punishment is a fine or imprisonment up to five years.[128] At the initial stage of criminal proceedings municipal courts may undertake immediate action concerning criminal offences committed within the territorial jurisdiction of the court, if there is a danger that the investigating judge of the competent district court will not be able to act in due time.[129] In the area of civil law, municipal courts have a broad jurisdiction, covering all types of civil case with the exception of divorces, which are tried in district courts.[130]

[128] Article 26 (1) Law on Regular Courts.
[129] Article 26 (4) Law on Regular Courts.
[130] Article 26 (6,7,10,11) Law on Regular Courts.

Range of Cases

As mentioned above the Municipal Courts are covering a broad scope of cases, including types of cases that are also tried at district court level, such as, domestic violence cases, juvenile cases, assault cases, illegal possession of weapon cases. The following table shows a variety of cases tried by municipal courts during the reporting period January to June 2001.[131]

Type of case	Total cases in process	Completed cases	Pending cases	Transferred cases
Investigations	3614	1152	2457	5
Appeals on inv.	205	202	1	2
Criminal cases	13764	2996	10285	483
Civil cases	16217	2290	13875	52
Juvenile cases	1141	290	837	12
Land registers	48	48	0	0
Executions	5313	810	4472	1
Inheritances	2519	973	1545	1
Non-contested procedure	2678	806	1872	
Other cases[132]	41068	40546	522	
Payment orders	144	41	100	3
Total	86708	50154	35966	561

Workload of Judges in Municipal Courts

During the period between January and March 2001, Municipal Courts processed 36.014 cases. Of these 19.553 cases or 54.3 % were completed. Of the uncompleted cases 0.2 % or 90 cases were transferred to other competent organs.

Number of Cases per Judge (January –March 2001)

The following statistic shows the average workload per judge in each region for the first quarter of 2001. As it is obvious from the table below, there are discrepancies among the number of cases dealt with by judges from various regions. One explanation is that the number of judges also varies significantly from court to court, and this number is not always in accordance with the caseload of each court. Thus, there are situations where courts with few judges deal with a large caseload, while courts with a larger core of judges have a lesser caseload. LSMS recommends that the appointment of judges in Municipal Courts be revised in accordance with the average caseload documented in each court over the past two years.

Kaçanik – 270 cases

[131] The information is based on statistical information made available by the ADoJ.

[132] These cases include authentication of contracts, certification of signatures and manuscripts, intabulations and execution of criminal sanctions passed by the court.

Prizren/Prizren - 78 cases
Viti/Vitina - 73 cases
Pejë/Pec- 68 cases
Suharekë/Suva Reka- 66 cases
Gjilan/ Gnjilane - 66 cases
Malishevë/Malisevo – 62 cases
Klinë/Klina- 58 cases
Prishtinë/Priština - 55 cases
Ferizaj/Urosevac- 55 cases
Kamenica/Kamenica – 53 cases

Below average
Deçan/Decane- 14 cases
Podujevë/Podujevo- 21 cases
Skënderaj/Srbica- 21 cases
Dragash/Dragase- 24 cases
Gllogovc/Glogovac- 26 cases
Rahovec/Orahovac – 31 cases
Vushtrri/Vucitrn- 32 cases
Mitrovicë/Mitrovica- 37 cases
Lipjan/Lipljane- 42 cases
Gjakovë/Djakovica- 43 cases

Statistics on completed criminal cases (January – August 2001)

The following table shows criminal cases that were completed by Municipal Courts in all regions. The statistics are based on the information received from ADoJ. The Municipal Courts in the northern Mitrovicë/Mitrovica municipalities, Leposavic/Leposaviq and Zubin Potok, are not functioning under the UNMIK justice system. They are however known to function as part of a parallel court system under Serbian rule.

Municipal Courts	Total cases in process	Completed cases during the reporting period	Uncompleted cases	Transferred cases
Gjilan/ Gnjilan	917	185	732	
Kamenicë/ Kamenice/ Kamenica	393	160	232	2
Viti/Vitina	308	71	237	
Prizren/Prizren	3786	622	3174	7
Dragash/Dragase	77	26	51	
Malisheva/ Malisevo	380	126	254	
Rahovec/Orahovac	542	111	431	
Suharekë/ Suva Reka	787	186	601	

Pejë/Pec	440	210	218	12
Deçan/Decane	151	73	75	3
Gjakovë/Djakovica	470	167	303	
Istog/Istok	154	70	83	1
Klinë/Klina	212	83	125	4
Prishtinë/Priština	2618	287	1903	428
Ferizaj/Urosevac	1420	394	1026	
Gllogovc/Glogovac	135	75	53	7
Kacanik	786	26	760	
Lipjan/Lipljane	216	124	91	1
Podujeva/Podujevo	182	88	94	
Mitrovicë/ Mitrovica	473	180	293	
Skënderaj/Srbica	216	127	72	17
Vushtrri/Vucitrn	120	40	79	1
Leposaviq/ Leposavic	--	--	--	--
Zubin Potok	--	--	--	--

Administration of Justice and Procedural Irregularities

LSMS has increased it monitoring since July 2001 to provide LSMS with the necessary background for identifying certain practices within these courts. These practices have only been considered where LSMS found either breaches of international human rights law, or administrative shortcomings with direct effect on rights of individuals to due process. In general, it can be noted that the concerns identified in Municipal Courts are very similar to those encountered when monitoring cases within the District Courts.

Incomplete Distribution of New UNMIK Regulations

As at district court level, LSMS has noted that Municipal Court judges frequently report that they are not given new legislation that they are expected to apply, in a timely manner. LSMS is further of the impression that the distribution at municipal level leaves even more room for improvement than at the District Court level. It is still unclear which unit within ADoJ is obliged to deliver new regulations to the courts and, although LSMS has tried to identify this unit, every inquiry made has had the same result. None of those contacted was able to clarify first whether there was a statistical overview of which regulations had been translated and distributed and to which courts and second, which unit is directly responsible for these issues. During this inquiry, LSMS was referred to different units within ADoJ, including the Prosecution Services and Court Administration unit.

Inadequate Interpretation

The inadequate interpretation in cases involving non-Albanians remains a major problem throughout the criminal justice system. Since the establishment of UNMIK the need for professional court interpreters has rapidly increased. LSMS has continued to monitor

trials at all levels where no adequate interpretation is provided for the defendant. It has also been noted that in some cases court files are not made available in a language that the defendants understand, in breach of basic defence rights.

> In a case involving two Russian defendants charged with assault against a Kosovo Police Service officer on duty, in Prishtinë/Priština Municipal Court, the interpretation was performed by a former professor in Russian language who was not officially appointed as a court interpreter. When the professor could not attend one session of the trial, interpretation was conducted by a Serbian court interpreter whom the defendants partly understood. Even when Russian interpretation was available, only parts of the proceedings were interpreted and sometimes the questions put to the defendants were not translated exactly.

Defence Rights

As in District Court cases, defence counsel is frequently not appointed until the outset of a hearing and is given virtually no time to consult with his or her client or read the court file before the hearing starts. Counsel often takes no active part in the proceedings. See further section 4.

LSMS continues to observe that co-defendants are requested to leave the courtroom during the testimony of the other defendants. This practice prevails at both District and Municipal Court level, in breach of international standards ensuring suspects the right to be tried in their presence.[133] The presiding judges did not recount the testimonies to co-defendants in any of the cases monitored by LSMS, in breach of domestic law.[134]

Role of Lay Judges

As a rule, Municipal Court trials are held in front of a panel consisting of one professional judge and two lay judges. As in District Court trials, lay judges are frequently observed to be completely passive during criminal proceedings. They fail to examine witnesses, there are no consultations between the professional judges and the lay judges before decisions are taken. Sometimes trials are held without the presence of lay judges.[135]

> In a case in Prishtinë/Priština Municipal Court against three juveniles, charged with aggravated theft, the trial was completed in the absence of one lay judge, in spite of the fact that the presence of the panel is an absolute prerequisite for holding the main hearing. It can also be noted that neither the prosecutor, nor defence counsel for the three juveniles objected to holding the trial in the absence of the lay judge.
>
> In Prizren Municipal Court a juvenile trial commenced in the absence of one lay judge. In this case the presiding judge also ignored his duty to deliberate with the rest of the panel about reading out the statements of the witnesses who were not present at trial, also in breach of the domestic law.[136]

[133] Article 6 (3)(c) ECHR, Article 14 (3) (d) ICCPR.
[134] Article 319 FRY CPC.
[135] Article 291 FRY CPC.
[136] Article 333 (1 &2) FRY CPC.

Insufficient Co-operation with the Law Enforcement Authorities

During the police investigation, law enforcement agencies must take the necessary steps to locate the perpetrator.[137] As far as the identification procedure is concerned, LSMS has noted that the law enforcement authorities sometimes fail to correctly establish the identity of defendants and witnesses. There have been some cases in Municipal Courts where defendants have appeared in court without having any idea about why they were being summoned. According to local judges and prosecutors, it also happens that persons found on the crime scene give false information to police officers, sometimes even giving personal data of another person. Police should conduct identification of persons involved in criminal acts more thoroughly from the outset of the investigation, since by the time the case reaches the courts, it may be too late. Furthermore, the local courts do not have the logistical capacities to perform identification checks, thus rendering the co-operation with police crucial.

> In Prishtinë/Priština Municipal Court a juvenile charged with illegal woodcutting appeared in court after having been summoned to testify in front of the investigative judge. The juvenile pleaded not guilty and stated he had no idea who had given the personal information on his behalf. A witness, representing the landowner, confirmed that the juvenile had not been seen at the crime scene. The investigation was subsequently suspended. Notwithstanding that fact, the minor's personal information was obviously registered at the investigation record, which might have negative consequences for him in the future.
>
> During another Prishtinë/Priština Municipal Court case, two persons were arrested and detained for suspicion of committing an assault. Both suspects were giving false information regarding their identity at the hearing and the investigating judge stated that she was not able to establish the identity of the suspects.

Juvenile Cases in Municipal Courts

The Municipal Courts primarily handle cases involving juvenile offenders. These procedures are affected by the same inconsistencies as those identified in previous reports by LSMS when analysing the criminal justice system at District Court level.

There are currently only seven Municipal Courts in Kosovo dealing with juvenile cases. Since the recent UNMIK appointments of judges and prosecutors in Kosovo, no further measures have been undertaken to increase the number of juvenile judges. The lack of judges dedicated to juvenile cases obviously affects the workload of juvenile judges and many of them claim that they are overwhelmed with cases and cannot conduct the juvenile cases with the necessary expedience. In Prizren the juvenile judge dealt with 302 cases over the last six-month period. Another serious concern stems from the fact that the same judge who conducts the investigation is later sitting in the trial panel, most of the times as the presiding judge. This latter aspect raises concern from the perspective of the judge's impartiality in the case. From an international human rights law point of view, the

[137] Article 151 (1) FRY CPC.

European Court found a lack of impartiality where an investigating judge had ordered detention of the accused prior to the trial and had also interrogated him on a number of occasions, and later was appointed as the trial judge.[138]

LSMS understands that an increase in the number of judges brings about other issues, such as additional funding to ensure salaries and the logistical support necessary for performing the judge's duty (additional clerks, offices to accommodate the judge and his/her clerks, equipment necessary in day-to-day activities, etc.). However, the lack of sufficient funds may be overcome through a flexible allocation of workload between the courts.

The following statistics show the registered and completed juvenile cases during the reporting period from January to June 2001.

Municipal Court	***Total cases in process***	***Completed cases during the reporting period***	***Uncompleted cases***	***Transferred cases***
Gjilan/Gnjilane	147	42	103	2
Prizren/Prizren	302	48	254	
Pejë/Pec	70	42	28	
Prishtinë/Prishtina	263	53	202	8
Ferizaj/Urosevac	114	29	85	
Mitrovicë/Mitrovica	68	30	38	
Gjakovë/Djakovica	66	24	42	

Participation of the Centres for Social Work

The Centres for Social Work (CSW) under the Department of Health and Social Welfare (DHSW) should play a key role in all cases involving domestic violence and juveniles. Without the active participation of this authority, the police and the courts are not able to proceed with juvenile criminal cases and cases involving intra-familiar violence in a proper manner. Their co-operation is also crucial in deciding whether to pronounce educational[139] or punitive[140] measures against a juvenile who has been convicted of a criminal offence.

The domestic law provides for an active role for the CSW during juvenile proceedings. The CSW has the right to be informed of the course of the proceedings, to make recommendations and to point out facts and evidence of importance for a correct decision.[141] During the preparatory proceedings against a juvenile, the CSW may, if necessary, be requested to submit a report concerning the relevant circumstances for an

[138] See De Cubber case, 26 October 1984, ECHR.
[139] i.e. raised supervision from parents, other family granted with foster rights and duties, tutelage organ, and also court reprimand.
[140] i.e. sending the juvenile to an educational institution, to an educational-correctional centre, or to prison
[141] Article 459 FRY CPC.

evaluation of the juvenile's mental development and the environment in which he/she lived and might have an impact on his or her personality.[142] For the trial, both the CSW and the legal guardian shall be summoned.[143]

As pointed out in the last Review on the Criminal Justice System, the UN administered CSW offices lack the staff, the professional knowledge, the resources and sometimes even the willingness to fulfil its legal obligations regarding juveniles. In cases where the CSW have been involved, they have demonstrated a lack of professional knowledge, indicating a substantial need for training or even a significant reform.

The participation of the CSW varies between the different municipalities, but in general the CSWs are still frequently failing to provide the juvenile panels with the requested reports, which are obviously of importance for the decision to pronounce either educational or punitive measures. For example, of the eleven juvenile cases completed in Pejë/Pec Municipal Court in April, the CSW submitted reports in five cases. Furthermore, it is common practice that, although duly summoned for trial, CSW fails to appear for hearings involving juveniles.

Participation of Legal Guardians in Juvenile Criminal Cases

Both international and domestic laws require the participation of parents or legal guardians in criminal proceedings involving juveniles.[144] LSMS has however found that the involvement and participation of parents in juvenile procedures is often lacking. Court monitoring revealed that parents or legal guardians often do not assist the juvenile, either because they were not summoned or because they chose not to show up for the proceedings. In light of the obligation to consider the best interests of juveniles in criminal proceedings, LSMS encourages better communication between juvenile judges and the juvenile's parents or legal guardians. Parents are normally in the best position to provide information regarding the circumstances under which the juvenile lives and the involvement of parents in the entire criminal procedure must be considered as crucial for the future development of the juvenile. The contact between the juvenile judge and the juvenile's parents should also be continued after the completion of the case since the parent might provide the juvenile judge with information concerning the impact of sanctions against the juvenile or even recommending other measures.[145]

Intra-Familial (Domestic) Violence

International standards on the rights of victims of crime require state authorities to ensure that appropriate assistance is available to victims throughout legal proceedings. The assistance should include material, medical, psychological and social support, as well as information for victims on the availability of health and social services, and ensuring access to them.[146]

[142] Article 471 (1-4) FRY CPC.
[143] Article 481 (2) FRY CPC.
[144] See Articles 9 & 18 CRC and , i.e. Articles 471 (2) & 481 (2) FRY CPC.
[145] Article 492 FRY CPC.
[146] Declaration of Basic Principles of Justice for Victims and Abuse of Power.

In accordance with the international standards outlined above, UNMIK and the provisional organs in Kosovo are under a positive obligation to provide sufficient and appropriate protection for victims of domestic violence. Obligations towards victims of domestic violence further arise under international standards aimed at the protection of women and children as well as under general principles of equal protection.[147]

Domestic violence cases form a very broad category of criminal acts committed by one member of a family against another. Cases of domestic violence are therefore tried at all court levels depending on the seriousness of the offence.[148]

LSMS has observed that domestic violence cases are often not dealt with in a professional and adequate manner. Punishments are low and inadequate, and in some cases the offender went unpunished. Victims are often placed in positions where they are forced to return to homes where they may be subject to further abuse by the same offender. As in juvenile cases, the Centre for Social Work is often ineffective in cases involving domestic violence and fail in providing assistance to courts. The following examples indicate some of the procedural irregularities in domestic violence cases.

> In Prishtinë/Priština Municipal Court a defendant was found guilty of violent behaviour under article 190/1 of KPC prescribing a prison sentence of between six months and five years. The defendant had beaten his wife with a piece of wood. He was sentenced to six-months suspended sentence, i.e. in effect below the lowest possible sentence. According to the medical expert the defendant was aggressive, impulsive and drunk at the moment when he assaulted his wife.
>
> In another Prishtinë/Priština Municipal Court case a defendant who had brutally beaten up his wife was given a suspended sentence. The defendant was initially charged with violent behaviour, but during the main session the prosecutor amended the indictment and re-qualified the act as light bodily injury arguing that the defendant had only used a "cold weapon" (i.e. not a fire arm). According to the victim she had been regularly maltreated and beaten up by her husband for several years. This history of violent behaviour should have weighed more in reaching the final decision, as the suspended sentence pronounced by the court put the defendant back at large and put the victim at risk of being abused again.
>
> In a Prizren Municipal Court case regarding domestic violence, the wife of the suspect reported that her husband had repeatedly mistreated her, and also beaten their three children (aged three, six and eight) with a belt leaving marks all over their bodies. On one occasion she was beaten so bad that she lost consciousness. The husband was charged with "light bodily injury" and the outcome of the trial was that the court only admonished the husband. According to Article 59 FRY CC, a judicial admonition may be administered for criminal acts with a maximum one year prison sentence *if they have*

[147] Convention on the Elimination of All forms of Discrimination of Women (CEDAW), Declaration on the Elimination of Violence against Women, Convention on the Rights of the Child.

[148] Minor Offences Court have jurisdiction in criminal cases for which a person can be sentenced to up to one year in prison, Municipal Courts: 1 – 5 years in prison, and District Courts: more than 5 years in prison.

been committed under such extenuating circumstances which render them particularly minor.

Drug Cases and Material Competence of Municipal Courts

The number of drug related offences in Kosovo, as well as other offences typically related to organised crime have increased after the conflict in 1999. There are criminal networks dealing with drugs and these networks are becoming increasingly attractive for many young people either as distributors or as users. In this report however, there will only be a discussion regarding the material competence for the various courts to try drug related offences. As noted in the introduction to this section, Municipal Courts are, in general, competent to try all criminal cases with up to five years imprisonment.[149] As an exception to the main rule, municipal courts are also competent to try cases regarding aggravated theft with a maximum prison sentence of up to ten years.[150]Article 245 FRY CC on *unauthorised production and sale of narcotics* reads:

> (1) Whoever without authority manufactures, processes, sells or offers for sale, or purchases, keeps or transfers for sale, or intercedes in a sale or purchase, or otherwise puts into circulation substances or preparations which are declared intoxicating drugs or psychotropic substances, shall be punished by imprisonment for a term exceeding six months *but not exceeding five years*.
> (2) If any offence described under Paragraph 1 of this Article has been committed by *several persons* who joined for the purpose of committing the offence, or if the perpetrator of the act has *organised a network* of middlemen or re-sellers, or if the offence has been committed using a *particularly dangerous* narcotic or psychotropic substance, shall be punished by imprisonment for a term exceeding one year *but not exceeding 10 years*.

Thus, according to the above provision, jurisdiction over drug related offences, is divided between Municipal and District Courts depending on the circumstances in the individual case. However, on the basis of statistics obtained from the ADoJ and according to LSMS monitoring, it can be concluded that all drug related cases are dealt with by the District Courts regardless of the circumstances under which the offence was committed. LSMS has tried to clarify this, and to this end contacted several actors within the local judiciary. One argument forwarded by a District Court judge was that all drugs, regardless of quantity or characteristics, were to be seen as *particularly dangerous* narcotic or psychotropic substances, thereby qualifying as cases under the jurisdiction of the district courts. LSMS is unaware of either case law or legal opinion clarifying the issue. Therefore, it is recommended that the Supreme Court, in accordance with its mandate under domestic law, clarifies the issue of jurisdiction in drug related cases.[151]

[149] Article 26 (2), Law on Regular Courts.
[150] Ibid. regarding aggravated theft, see 135 KPC.
[151] Article 45 Law on Regular Courts states that: "the Supreme Court of Kosovo in its general session …determines principled attitudes and legal opinions for unique application of provincial laws by the courts in the territory of province…".

> On 12 February 2001, a Kosovo Albanian male was arrested on suspicion of attempting to sell *7 grams of marihuana*. The suspect admitted having been in possession of the amount. The suspect was held in pre-trial detention for almost two months before he was released pending trial on 9 April 2001. Mitrovicë/Mitrovica District Court is handling the case.

The circumstances in the above case, i.e. the very small quantity of marihuana can not be considered as a *particularly dangerous narcotic substance*, clearly indicate that this case would be within the jurisdiction of the municipal court rather than the district court.

Another concern related to drug offences, are verdicts based on Article 245 FRY CC for what seem to be simple cases of *possession* of narcotics for personal use, something that under the applicable law is not penalised. LSMS's monitoring indicates that charges for unauthorised production/sale of narcotics are brought indiscriminately in all cases related to narcotics, be they production and sale or just possession. LSMS's concerns are based on Article 7 (1) of the ECHR according to which no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

> On 28 April 2001 two Kosovo Serb males were arrested after 579 grams and 728 grams of cannabis respectively had been seized in their homes. Beyond the police statements that attest to the seizure, there seem to be no evidence of production or sale. Furthermore, the allegations of sale were made by a third party whose identity was not disclosed by police and who was not called to testify in front of the court. On 2 August, i.e. after more then three months pre-trial detention, they were sentenced to two years and five months and three years and six months imprisonment respectively.

Of the 205 individuals listed on the 25/07/01 Gjilan/Gnjilane District Court indictment list, 48 or 23% were facing drug charges.[152]

III. MINOR OFFENCES COURTS

Introductory Remarks

There are 22 MOCs in Kosovo within the UNMIK structure and authority and 3 operate in parallel by Serbian people that do not recognise UNMIK authority. The jurisdiction of MOC covers areas of public peace and order, security of traffic, public security, economy and finances, areas of working relations, education, science, culture and information, areas of health and social protection, health insurance, environment and administration.[153] With such a broad jurisdictional spectrum, the MOCs are without doubt a very important part of the judiciary in Kosovo.

Brief Overview of Minor Offences Procedure

[152] The mentioned statistic refers to the period from January 2000 to August 2001.
[153] Minor Offences Courts in Zubin Potok and in Leposavic are not under UNMIK system.

According to the legal definition, minor offences represent violations of public order with less serious consequences on the essential social values, as determined by the law.[154]

Territorial jurisdiction of the minor offence courts is determined by the location where the offence was committed, and when that cannot be determined, jurisdiction is determined by the residence of the offender.[155]

The *material jurisdiction* for trying cases in the first instance lies with the municipal court for minor offences. The second and last instance court for minor offences, High Court for Minor Offences, is located in Prishtinë/Priština and covers the whole territory of Kosovo.

The parties in minor offence procedure are the defendant and the injured party. The rights of the defendant, as established by the law, are: submission of evidence, filing of any kind of motion and also legal remedies, defending himself in person or engaging professional legal assistance, accessing and copying the case file.[156] The injured party is a person whose personal or property rights have been violated or threatened by the commission of the minor offence. The injured party's rights in the minor offences procedure are as follows. Submission of the request to initiate a minor offences procedure, submission of evidence, making proposals and property-legal claims for compensation of damage caused by the minor offence, engaging professional assistance to represent him/her in the proceedings, accessing and copying the case file, appealing the decision.[157]

Minor offences procedure can be initiated upon the request of either authorised governmental or local administrative bodies or the injured party.

The presence of the offender in the proceedings can be secured by summoning, bringing by police escort, bail, and *detention*. However, in minor offence proceedings the detention does not exist as such. The law allows for "holding,"[158] meaning that a suspect cannot be "detained" but "held"[159] in cases where the suspicion of flight exists, or when the identity of the offender cannot be determined. The Municipal Minor Offences judge will issue an order for holding the suspect, which cannot exceed 24 hours.[160] Within this period of time, the suspect must be questioned and a decision on the offence made.[161] The judge may also order a person to be held if that person is found committing an offence under influence of alcohol and there is a risk that he/she might commit other offences. A

[154] Guidelines for Bar Examination, 1987, Prof. Dr. Borislav Blagojevic and Oliver Antic.
[155] Art. 74 Law on Minor Offences (LMO).
[156] Art. 87 LMO.
[157] Art. 95 LMO.
[158] Art. 153 LMO; also see Guidelines for Bar Examination, 1987(*ante note 2*).
[159] Although both notions imply deprivation of liberty, the distinction made by the Law on Minor Offences seems to stem from the short duration of the latter, the different procedure of imposing it and also different consequences for the person detained.
[160] Art. 155 LMO.
[161] Art. 195 LMO, states that an offence procedure is completed by making a decision by which the procedure is suspended or the accused pronounced guilty.

similar measure may be taken by a law enforcement agency and the suspect cannot, in such cases, be held for more than 12 hours.[162]

As in criminal investigations, a Minor Offences judge may question or hear the alleged offender, the injured party, and witnesses of both. The judge may order hearing of experts, search of premises and persons, or temporary confiscation of items connected to the offence.

Trials in MOCs are public, except in cases where interests of morality justify exclusion of the public, while the proceedings with juvenile offenders are always held without the presence of the public.[163]

As a derogation from the common rules of procedure, a decision on minor offences may be taken without summonsing and questioning the offender if the request to initiate the procedure is submitted by law enforcement authorities or inspection authorities, and is based on direct observation of the officers or inspectors.[164] The same rules apply for offences punished by law only with a fine.

The penalties foreseen in the law for minor offences are either *pecuniary penalties* or *imprisonment*. If the judge so considers, a *reprimand* can be given to persons found guilty for committing offences with minor consequences. The general minimum limit for imprisonment is one day, and the general maximum limit is 30 days, or 60 days for more serious minor offences by which the health or life of people is jeopardised.[165] Imprisonment of a juvenile offender cannot exceed 15 days. Protective measures can also be ordered, such as the confiscation of items or funds connected to the minor offence, prohibition of driving the vehicle, deportation of the foreigner citizens, or mandatory treatment of alcoholics and drug addicts.[166]

The Effect of Recent UNMIK Regulations on the Jurisdiction of MOCs

Some of the recently enacted UNMIK Regulations have brought about changes in the material jurisdiction of MOCs, by transferring jurisdiction of well-defined areas of delinquency or criminality from the MOC to Municipal or even District Courts.

Three regulations in particular should be mentioned: UNMIK Regulation 2001/04 on the Prohibition of Trafficking in Persons in Kosovo, UNMIK Regulation 2001/10 on Prohibition of Unauthorised Border/Boundary Crossings and UNMIK Regulation 2001/07 on Authorisation on Possession of Weapons in Kosovo. Specific activities previously categorised as minor offences have been redefined as more serious criminal acts.

[162] Art. 156 LMO.
[163] Art. 33 LMO.
[164] Art. 201 LMO.
[165] Art. 2 LMO.
[166] Art. 16 LMO.

Statistical Information on Minor Offences Courts

The table below presents the overall activity of the MOC's in terms of efficiency and workload.

Municipal Minor Offences Courts	*Total cases in process*	*Cases completed during the reporting period*	*Unfinished cases*	*Update*
Gjilan/Gnjilane	6140	2728	3412	31/08/01
Kamenicë/Kamenica	1642	1212	430	31/08/01
Viti/Vitina	2306	1504	802	30/08/01
Prizren/Prizren	4307	2467	1600	30/08/01
Dragash/Dragas	865	786	79	31/08/01
Malishevë/Malisevo	2232	658	1574	31/08/01
Rahovec/Orahovac	2236	1275	961	11/09/01
Suharekë/Suvareka	1847	1074	803	31/08/01
Pejë/Pec	3797	2643	1154	31/08/01
Istog/Istok	588	497	91	31/08/01
Decan/Decane	898	743	155	7/09/01
Gjakove/Djakovica	1133	722	411	7/09/01
Kline/Klina	1975	1502	473	31/08/01
Prishtinë/Priština	6945	6120	510	31/08/01
Gllogovc/Gllogovac	1121	662	459	31/08/01
Lipjan/Lipljane	709	665	44	30/08/01
Podujevë/Podujevo	267	215	52	30/07/01
Kacanik	1429	1118	311	30/08/01
Ferizaj/Urosevac	2710	2153	557	6/09/01
Mitrovicë/Mitrovica	2376			31/08/01
Skenderaj/Srbica	719	650	34	31/08/01
Vushtrri/Vucitrn/Vucitrn	802	605	197	15/08/01
Leposaviq/Leposavic	--	--	--	--
Zubin Potok	--	--	--	--

Cases in Minor Offences Courts

The following overview is intended to provide a general understanding of the legal areas covered by the MOCs and also to identify issues of concern affecting the activity of these courts in each particular area.

The Area of Security and Safety on the Roads

Of the 23,042 minor offence cases dealt with by MOCs between January and June 2001, 14,362 cases involved traffic offences (87%). Of particular concern in these cases is the

measure of seizing the vehicles driven by the offenders, which seems to be applied throughout Kosovo.

The general practice in cases of traffic offences is that police issue a traffic ticket and, as a "protective measure," seizes the vehicle and tows it to designated parking places where the owner may recover it, only after he or she has paid the fine. The offender is also required to pay the towing and storage fees. Where this practice may be a very lucrative business for the towing companies, it is not in accordance with the Law on Basis for Traffic Safety on the Roads applicable in Kosovo. Seizing or confiscating a vehicle involved in a traffic offence is not authorised by the above-mentioned law.

Instead, the police authorities rely on a Civilian Administrative Instruction 1999/1 issued by the Deputy SRSG, which foresees the possibility of seizing vehicles involved in traffic offences such as dangerous overtaking or dangerous driving. The same Administrative Instruction prescribes in its Section 9 that vehicles not recovered within 30 days shall be subjected to forfeiture. Consequently, if the offender does not have the financial possibility at a specific time to pay the fine or the parking fees, he or she might lose the vehicle all together. LSMS believes that this practice is unacceptable in that it imposes an additional burden on the offender. The only penalties prescribed by the law are a fine, imprisonment or, if applicable, a reprimand. The seizure of a vehicle and/or having to pay parking fees are not among them. Furthermore, the applicability of the mentioned Administrative Instruction is questionable all together. First, the Instruction fails to indicate whether it is applicable only for a limited period of time, as justified by the exceptional circumstances in 1999. It also fails to point out whether it supersedes any of the traffic laws already applicable in Kosovo, such as the Law on Basis for Traffic Safety on Roads. Even if it did, basic principles of law recognised and enshrined in any national legislation provide for a strict hierarchy of laws, according to which a law can only be modified, changed or derogated from by a law with a similar or higher "rank". In other words, an administrative instruction passed by an executive or administrative body cannot supersede, change, modify or derogate from the provisions of a law passed by a legislative authority (parliament or otherwise).

The Area of Public Security

In cases where a weapon was possessed without valid permission, the material jurisdiction belonged to the MOC (area of public peace, safety and order). Aggravated forms of possession, qualified by the type of weapon and amount, were tried by the Municipal Courts (small amount of weapons and ammunition, Article 199, par. 1 KPC), while District Courts had jurisdiction in cases where possession was strictly prohibited (Article 199, par. 3 KPC) or it was a large amount of weapons. With the enactment of UNMIK Regulation 2001/07 on Authorisation on Possession of Weapons in Kosovo, cases of illegal possession of weapons are tried only by municipal or district courts. The same applies for illegal border crossing, cases that were previously tried by MOCs under the Law on State Border Crossing and Movement in Boundary Zone (1979).[167] For the newly defined criminality, related to crossing or movement within border/boundary areas, the competence has been handed over to higher courts.

[167] Art. 71.

Of the cases documented by LSMS, it seems that various MOCs throughout the region dealt with cases of illegal entry or presence in Kosovo differently. Examples of asymmetrical pursuance of illegal entry offences have been provided in a previous section of this report focusing on trafficking related criminality, and therefore they will not be discussed again.[168] There was however another case in Prizren MOC, where two FRY nationals (male and female) with refugee status in Germany, were sentenced with fines of 150 DM each and orders of deportation for committing the offence of illegal border crossing from Albania to Kosovo. The decision breached both domestic legal provisions, respectively article 23 of the Law on Minor Offences which penalises only non-nationals, and international human rights standards, namely Protocol 4, Article 3 ECHR, prohibiting the deportation of nationals.

The Area of Public Peace and Order

Prior to the entry into force of Regulation 2001/4, cases involving intermediation in exercising prostitution and cases of prostitution were under jurisdiction of the Municipal Minor Offences Court,[169] Municipal and District Courts.[170] However, LSMS have not identified any cases of intermediation in the exercise of prostitution tried by the MOCs, in what might have been a situation of overlapping competence between the MOCs and the District Courts.

Cases of domestic violence[171] often involve offences falling within the area of public peace and order. LSMS is concerned with a pattern in MOCs throughout Kosovo of not treating offences committed in the domestic sphere of the offender or victim as an offence. The reasoning behind this interpretation has been that the Law on Public Peace and Order only penalises offences committed in public, and a private residence cannot be considered a "public place."

In a case tried in Prishtinë/Priština MOC the offender was found not guilty for slapping his wife in the bedroom of their house, as "no disturbance of public peace occurred." A similar case was tried in Vushtrri/Vucitrn MOC with an identical outcome and justification. On the other hand, the Gjilan/Gnjilane MOC found guilty and convicted a husband for beating his wife and the issue of whether the location of the offence was public or not was not even mentioned. Consequently, as stated above, LSMS has noticed discrepancies amongst the practice of various MOCs, with similar cases receiving opposite outcomes depending on where the trial was held.

Further concerns related to the treatment of domestic violence victims have been addressed previously within this section in relation to the case law of the Municipal Courts. However, these concerns apply to the same extent in cases of domestic violence tried in the MOCs.

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[168] See Section on Trafficking and Sexually Related Crimes.
[169] Law on Public Peace and Order, article 18 point 6 and 8.
[170] Article 251, par. 1 and 2 FRY CPC.
[171] Although not regulated specifically as domestic violence, these violations are prosecuted as light bodily injury, violent behavior, and disturbance of house order and peace. Art. 18 paragraph 5 and Article 21 paragraph 1.

Concerns Stemming from Observation of MOC's Activity

Defence Rights

Of the minor offence cases observed by LSMS, there were very few cases where offenders had any legal assistance. This issue is of special concern since there are still numerous minor offences which carry a penalty of imprisonment, and the assistance of a defence counsel in cases implying an individual's deprivation of freedom represent a necessary guarantee for meeting the standard of a fair trial. Article 87 of the Law on Minor Offences defines the right to have defence counsel as optional but not mandatory. Furthermore, there is no concept of ex-officio appointed defence counsel in minor offence procedure. As observed by LSMS, the expediency of the minor offence procedure (the offenders many times do not even realise that they are in front of a judge and that a trial is in progress)[172] and the lack of information provided to the offender by the judge on basic rights during the court proceeding, amount to a breach of the offender's right to a fair trial as enshrined in the international human rights law.[173] The right to defence counsel and to adequate time and facilities to prepare a defence, refer to any kind of proceedings in front of a judicial authority, including examinations or inquiries conducted by law enforcement agencies. While it is true that the minor offence procedure is not a criminal procedure by definition, LSMS notes that the only difference between them stems from the extent of endangering the same legally protected social values.

Inadequate Interpretation

The same concerns expressed by LSMS in other sections of this report apply to the activity of MOCs and similar steps as for the higher courts should be taken for addressing this issue.

The Treatment of Juvenile Offenders

The treatment of juvenile offenders by the MOCs is also of concern for LSMS. As already discussed previously under the Municipal Courts, LSMS is concerned about the failure of the CSW representatives to appear in court when juvenile offenders are on trial. Instead they frequently send standardised written opinions, many times not matching the personal circumstances of the juvenile. The situation is more serious in cases where juveniles are sentenced to imprisonment, as a substitute for non-payment of a fine. According to the working report of the Minor Offences Court for the first quartile of this year, there were 206 juveniles sentenced to prison, or 2,1% of the total number of persons convicted.

Working Relationship between Law Enforcement Agencies and the MOCs

Law enforcement agencies and the MOCs are interdependent, as police authorities initiate most of the minor offence cases tried by the MOCs. However, LSMS has documented

[172] Depending on the court building, some courts hold sessions in rooms that look like offices. The judges do not wear any particular dress that make them stand out. Therefore, it certainly plausible that a person may not know that they are in the midst of a trial.
[173] Article 6 ECHR; Article 14 ICCPR.

complaints from both sides regarding insufficient communication and information sharing between the two bodies. Police investigators sometimes submit cases to the MOCs that fall within the jurisdiction of Municipal or District Courts, thus creating confusion and jurisdictional clashes between the courts. Another frequent scenario is that police officers do not submit the request for initiation of the minor offence procedure in the proper format required by the law, and as a result many cases are left aside by the MOCs due to such procedural irregularities. Many requests coming from police fail to provide the identity and residence of the offender rendering the pursuance of the case by the court impossible. Instead, with its specific means of gathering information, law enforcement agencies should be the ones providing necessary feedback to the courts regarding identification or location of offenders, and not the other way around.

Efficiency of MOCs

Based on the Report on Efficiency of the Minor Offences Courts, LSMS notes an uneven distribution of workload on the MOCs in various regions.[174] While the workload in Prishtinë/Priština MOC was 229 cases per judge in the first quarter of this year (15 judges), in Malisheva/Malisevo MOC there were 807 cases per judge (only one judge appointed), and in Decan/Decane MOC 24 cases per judge (4 judges appointed). Obviously, the appointment of judges in certain courts does not correspond with the caseload of those particular courts. Malisheva/Malisevo MOC is an example in this sense as only one judge was appointed up to date, although surprisingly Malisheva/Malisevo MOC also seems to be the most efficient court, with 319 cases completed by the judge in the first quarter of this year.

Another concern already reported upon by LSMS in previous reports, is the appointment of judges who lack the necessary qualification for the position. Of all the MOC judges as of 31 March 2001, 24 of them, respectively 21,4%, did not have the appropriate qualification for performing the duties of a judge (professional examination for minor offences judge), which automatically raises the issue of validity of the decisions taken by these judges.

Concerns Expressed by MOCs

According to the interviews conducted by LSMS with some Presidents of MOCs, a major concern on their part is related to the low salaries of 300-400 DM,[175] and also to security issues arising from the threats directed against judges.[176] Insufficient security measures in the MOCs expose judges to threats, even in traffic cases.[177]

The failure by parties to respond to summonses is another issue of concern. In the judges' opinion, this derives from the fact that police officers who serve the summons do not know the address of the parties or witnesses. As mentioned above, police officers fail to

[174] Made available to LSMS by ADoJ.

[175] Interviews conducted with the President of MOC Peja/Pec, MOC Gjilan/Gnjilane, Acting President of MOC Prishtina.

[176] MOC Peja/Pec, MOC Gjakova/Djakovica.

[177] In MOC Peja/Pec, the President was threatened by two males who entered into his office and told him that he has to pay the fine of 300 DM, by which one of them was charged in relation with traffic case. Prior to this case the President was threatened by a KPS police officer.

collect the necessary information about the parties, thus rendering the proper summonsing impossible.

Another complaint was related to the lack of appropriate working space. Gjilan/Gnjilane MOC is located in the building of the District Court, with 6 judges and 25 staff sharing 5 offices. The trials are held in a manner of "taking turns," with one judge holding trials in one office and the others waiting in the corridors for their turn. Similar complaints were documented in the MOC in Gllogovc/Glogovac, which is located in a private house and the working conditions are difficult.

IV. RECOMMENDATIONS

- LSMS recommends appointment of administrative legal officers within ADoJ, who, apart from the court administrators already appointed by ADoJ for each region, should keep under review the activity of municipal courts and courts of minor offences, with a view on addressing concerns stemming from possible violations of international human rights law and domestic law, and also addressing the various challenges and needs of these courts. Such officers should be appointed for each municipality, with their responsibility covering both the municipal court and the court for minor offences from that particular municipality.
- A liaison office within UNMIK Police should be established to enhance co-ordination with the local courts in terms of delivering summons, executing court orders and providing relevant information to the courts. The office should have police officers to support the courts when identification of certain offenders or witnesses is needed by means only available to law enforcement agencies or when specific police-type actions are ordered by the courts and need to be taken promptly.
- Municipal and Minor Offences Courts should have access to the same pool of interpreters within ADoJ.
- The appointment of judges in Municipal and Minor Offences Courts, especially in the latter, should be based on each court's caseload, so that disparities amongst the workloads of judges in various courts throughout Kosovo do not occur.
- ADoJ should designate an additional serving judge, where needed, to act as a second juvenile judge who can take over some of the caseload in situations when the full-time juvenile judge cannot properly handle the amount of cases assigned to him/her.
- UNMIK Police should revise their practice of seizing vehicles when drivers commit traffic offences, as this practice imposes an additional sanction not prescribed by law.