MISSION IN KOSOVO **UNMIK**
Department of Human Rights and Rule of Law
Human Rights Division
Legal System Monitoring Section

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OBSERVATIONS AND RECOMMENDATIONS OF THE OSCE LEGAL SYSTEM MONITORING SECTION

REPORT No. 8: ACCESS TO EFFECTIVE COUNSEL[1]

STAGE 2: THE INVESTIGATIVE HEARINGS TO INDICTMENT

I. Issue

This report will analyse access-to-counsel and effectiveness-of-counsel issues during the investigative hearings until indictment.

Article 6 of the European Convention for the Protection of Human Rights (the "ECHR") and Article 14 of the International Covenant for Civil and Political Rights (the "ICCPR") provide a framework by which to protect the right of the accused to a fair trial. These provisions form part of the applicable law in Kosovo and apply, at least in part, to pre-trial proceedings. These instruments provide *minimum standards* and do not prescribe any particular methods by which the relevant authorities are to provide for their protection.

With regard to the right of access to effective counsel, LSMS has identified a number of breaches of international human rights laws. These breaches stem from both direct inconsistencies with the provisions of the applicable domestic law, the practices and procedures adopted by the relevant authorities and the conduct of defence counsel. This report will highlight:

i. The draconian restriction of communications between the accused and defence counsel;

[1] This report is the second report dealing with the issue of access to counsel and effectiveness of counsel. In referring to "defence counsel" this report includes both public and private counsel who represent defendants. See *LSMS Report No. 7: Access to Effective Counsel, Stage One: Arrest to the First Detention Hearing*, 23rd May 2000, Pristina/Prishtine.

ii. The denial of confidential communications between the accused and defence counsel prior to indictment and, in some cases, after indictment;

iii. The demanding of money by court appointed defence counsel from the accused[2];

iv. The failure of defence counsel to properly fulfil their professional responsibilities; and,

v. The denial of access to relevant court documents.

II. The Current Practice: Restricted Access to Legal Representation and Obstacles to Effective Assistance

(a) Physical Access Issues

The Appointment of Defence Counsel

LSMS interviewed detainees on access-to-counsel issues in Kosovo's five regions.[3] Of the detainees interviewed, the majority of detainees that desired counsel reported that they had in fact secured counsel, either through court appointment or by retaining private counsel, at the first examination.[4] However, in Gnjilane/Gjilan, twelve detainees reported that the public lawyer, who had been assigned at the first hearing, had subsequently withdrawn from their cases. In two cases defence counsel withdrew after having been appointed, respectively, as a prosecutor and a judge.

Adequate Facilities and Access to Defence Counsel

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

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[2] According to Article 149 of the Kosovo Penal Code, *extortion* is defined as "Whoever with the intention to obtain unlawful profit for himself or another person, by force or serious threat, compels a person to do or not to do something detrimental to his or another persons property, shall be punished by six months to five years imprisonment." It may be that some of the cases that involve demands being made for money amount to extortion pursuant to this Article. LSMS will continue to monitor this issue and to document relevant cases.

[3] LSMS interviewed more than sixty-one detainees in Pristina/Prishtine, fifty-two in Mitrovica/Mitrovice, thirty-five in Gnjilane/Gjilan, thirty in Pec/Pec/Peje , and nineteen in Prizren (where the monitor reported that additional interviews where suspended because of a lack of co-operation from the detainees).

[4] From the interviews conducted, the courts appear to be appropriately advising detainees of their right to counsel at the first examination. However, the ability of the accused to give proper instructions to defence counsel in order to effectively challenge his detention is being hampered by the late appointment of counsel at that hearing (*see* LSMS Report No.7 *Id*. at note 1). Additionally, a number of detainees reported not being advised, or being confused, as to whether or not they have the right to a free lawyer.

Decisions of Defence Counsel Affecting Access

"X": A Case Study

LSMS interviewed "X", a detainee, charged with attempted murder, in Pec/Peje. X had, at the time of the interview, been in detention for 3 months. X has a court appointed defence counsel, who has reportedly visited only twice throughout the period of X's detention.

Despite the fact that the lawyer in X's case is court appointed, the lawyer is alleged to have requested payment of 2,500DEM from X. X states that the sum requested was paid in instalments. A week after the payment of the final instalment, the lawyer is alleged to have threatened X stating that, "If you hire me privately I will be able to work this out for you, if you do not, I will not visit you". The lawyer is then reported to have told X not to speak to the Carabinieri about the transactions and that he would be released.

LSMS interviewed the lawyer in X's case regarding the issues raised by X. The lawyer stated that X had insisted on paying the 2,500DEM and that no demands for money had been made. On discussions regarding the preparation of the defence, the lawyer had not prepared the case. Moreover, X indicated that the lawyer had been inactive during questioning by the investigative judge.

On discussions between LSMS and an UNMIK representative, it transpired that a bill had been received by UNMIK from X's lawyer for court-appointed services in X's case. The UNMIK representative indicated that this payment would be suspended.

LSMS has identified a number of other cases in Pec/Peje involving allegations of demands for money, infrequent visits and blatant inactivity with regard to the preparation of the defence. It appears that many of these court-appointed cases involve the same lawyer.

The problems identified in X's case are not isolated to Pec/Peje. In two cases in Gnjilane/Gjilan detainees reported that court appointed defence counsel had, after the first hearing, requested money before continuing to represent the defendant. When the defendant refused, in both cases the lawyer did not visit again.

Similarly, a Pristina/Prishtine detainee, who had been in detention for more than 6 months at the time of the interview, on charges of murder, reported that his court appointed lawyer visited him once whilst he was in detention and asked him for money to continue representation. The detainee advised the lawyer that he could not afford to pay. The public lawyer never visited again. The detainee then reportedly hired a private lawyer despite the fact that he could not in reality afford one - his wife was pregnant and in hospital and his family is, according to his description, in "bad shape". Other detainees in Pristina/Prishtine also reported similar issues regarding their defence counsel.

Authority Restricted Access

In Mitrovica/Mitrovice, the Kosovo Serb lawyers interviewed reported that (i) they are not permitted to speak with their clients prior to the first detention hearing; and (ii) they are not permitted any confidential communications with their client's until after the conclusion of the investigation and after the indictment has been issued. These lawyers reported that, before each and every visit with their client, they must obtain a written "permission slip" from the investigating judge. The permission slip sets forth the date and length, in minutes, of each visit. (A copy of the permission slip is attached to this report as *Appendix 1*)

Defence counsel in Gnjilane/Gjilan reported that, whilst they are theoretically able to visit their clients without restriction, the entry procedures for Camp Bondsteel frequently take from one to three hours. The length of these entry procedures reduces the time counsel is able to spend with his or her client and have resulted in a decrease in the frequency of the visits. This problem is exacerbated further in the case of court appointed lawyers who have reported that, due at least in part to the low rates of pay, they are inclined to be less proactive in their appointed cases.

(b) Effectiveness Issues

The Conduct of the Authorities in Relation to Confidential Communications Between the Detainee and Defence Counsel

In Gnjilane/Gjilan, 23 out of 35 detainees interviewed indicated that their meetings with defence counsel took place in the presence of a detention facility representative or supervising officer.

In Mitrovica/Mitrovice, the Kosovo Serb lawyers interviewed, in April 2000, indicated that each visit with their clients must be conducted in the presence of either a member of the investigating judge's staff, or a detention officer. These lawyers have made clear that it is the District Court, and not the detention facilities, that is imposing these requirements. One of the lawyers interviewed believes that the penalty for attempting to communicate confidentially with his client, without the permission of the investigating judge, would be the court-ordered cessation of all of his attorney visiting privileges. LSMS is currently investigating whether Kosovo Albanian lawyers are also subject to the same practice.

The Conduct of Defence Counsel and Effectiveness

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

For example, in Gnjilane/Gjilan, twelve of the detainees interviewed reported that they had never received a visit by their retained or court appointed defence counsel. In Pristina/Prishtine, a detainee charged with murder and represented by a court appointed lawyer reported that he had *one* attorney visit in *7 months*; another reported that he had *one* attorney visit in *6 months*.[5] Even in cases where detainees are visited by counsel more frequently, the overwhelming majority of detainees reported that, on average, the lawyer's visits were for 10 to 15 minutes.

The brevity of the attorney visits is, in some cases, driven by restrictions placed upon defence counsel by the authorities. For example, the brevity of the lawyer visits in Mitrovica/Mitrovice is a direct result of the time restrictions imposed by the Court and the Court's prohibition on confidential communications between defence counsel and detainees. Similarly, in Gnjilane/Gjilan, time restrictions are also being placed on attorney visits, although it is unclear as to whether these restrictions are imposed by the Court or the detention authorities.[6]

In other cases, the brevity of the attorney visits appears to be directly related either to what is perceived to be inadequate pay by UNMIK or to attorney misconduct. Eight defence counsel in Gnjilane/Gjilan reported that, due to the low levels of pay in court appointed cases, they cannot afford to invest the same time into those cases and are thus less proactive in their conduct of the defence. (*See* also the discussion in Section II (a) *supra* demonstrating that detainees in Pristina/Prishtine, Gnjilane/Gjilan, and Pec/Peje have reported that certain court appointed lawyers have demanded that the detainee pay them money to continue visiting and/or working on the case.)

Thirteen detainees in Gnjilane/Gjilan have reported that every visit by their defence counsel was conducted in a "group" setting with the lawyers other clients. These "group" meetings with clients are of concern in that, as to the individual detainees, communications in those meetings clearly are not confidential. Detainees in Mitrovica/Mitrovice and Pristina/Prishtine have also reported similar group meetings.

Access to Court Files and Effectiveness of Defence Counsel

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

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

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

that they are permitted to copy only those pages of the court files approved by the investigating judge, but that *all police documents are "sealed."*

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

Witness Confrontation Issues

Defence counsels right to examine witnesses during the investigation is generally restricted, as this right is preserved for trial.[8] The investigating judge must ensure proper examination of all relevant issues for and against the defence and may permit the defence to ask questions.[9] The safeguard from the perspective of the defence, lies in the assumption that the witness will appear at trial and be subject to examination by defence counsel in a properly adversarial forum.

In one Mitrovica/Mitrovice case, involving a defendant charged with a war crimes offence, defence counsel indicated that a central prosecution witness had been called and examined by the investigating judge, in the absence of defence counsel, despite counsel having made requests to be present during the hearing. Due to the critical nature of the testimony, counsel in this case requested that the witness be recalled, this request was denied by the investigating judge. Defence counsel raised fears that this witness may not attend trial and that the testimony will be entered into the proceedings unchallenged.

In another case in Pristina/Prishtine defence counsel indicated that two important witnesses had been called and examined in the absence of defence counsel and that counsel had not been given notice of the hearing or their attendance.

III. Access to Effective Counsel during the Investigative Stage to Indictment: The Law

The following sections of the report outline the international human rights laws and domestic laws relating to access to counsel and the role and effectiveness of counsel during the investigative stage of the proceedings.

[7] FRY CPC Article 131 and 73 deals with access to records and evidence. See also LSMS Report No.7 *Id*. at note 1.
[8] See, for example, *Can v Austria* A 96 (1985) Com Rpt. at para 64. and *Schertenleib v Switzerland* No.8339/78, 17 DR 180 (1979).
[9] FRY CPC Article 168(8), see the discussion on the role of defence counsel in this report.

International Human Rights Law

(a) The Right to Legal Representation

The right of access to legal representation is a continuing right that applies at all stages of the criminal proceedings.

Following the decision of the European Court of Human Rights in *Imbrioscia v Switzerland*[10] it is clear that the "fair trial" guarantees of Article 6 ECHR, including the Article 6(3)(c) right to legal representation, apply to pre-trial criminal proceedings. Whilst the manner of their application depends upon the circumstances of the particular case, it is implicit from the judgement of the European Court that where an accused requests legal representation during the investigative stage, such representation should be provided.[11]

The guarantee of access to legal representation during the pre-trial criminal phase has also been recognised by the Human Rights Committee[12], the Inter-American Commission[13], the Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia[14], the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda,[15] and the Rome Statute.[16] The imperative for access to counsel is particularly heightened in those cases involving vulnerable defendants such as juveniles or the mentally ill.[17]

Decisions fundamental to, amongst other things, the preparation and presentation of the defence at trial are made during the pre-trial process. These decisions include, for example, the conduct of searches, the identification and preservation of evidence, the identification and examination of witnesses, the early commissioning of expert reports and the continuation of detention. The rationale for granting the accused rights under Article 6 ECHR, in this pre-trial phase, is that the fairness of the trial may be seriously prejudiced by a failure to comply with the Article 6 ECHR guarantees during

[10] (1994) 17 EHRR 441. See also *Murray v UK* (1996) 22 EHRR 29 and *Averill v UK* No.36408/97 (6th June 2000) which deals with access to counsel during interrogation.
[11] Where an individual has been arrested and/or detained and they cannot afford to pay for a lawyer they must, where the interests of justice demand, be provided with counsel free of charge. For guidance as to the very broad application of the "interests of justice" test, see *Benham v UK* (1996) 22 EHRR 293 and *Quaranta v Switzerland* A/205 (1991). In assessing the interests of justice regard should be had, for example, to the complexity of the case, the capacity and age of the defendant and the possible sentence the defendant faces. It appears from the decisions of the European court that, where the defendant faces any possible deprivation of liberty, the interests of justice test will be satisfied (see *Benham v UK* at para.61).
[12] Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9th April 1997, para.27.
[13] Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc.8 rev.1, 1986, pg.154, El Salvador.
[14] Rule 42 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.
[15] Rule 42 Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.
[16] Article 55(2)(c) of the Rome Statute for the Establishment of a Permanent International Criminal Court.
[17] See *Quaranta v Switzerland* (1991) A-205.

interrogation and the investigation. Defence counsel also serves an important function as the "watchdog of procedural regularity throughout the pre-trial process."[18]

(b) The Right to Effective Legal Representation

The relevant authorities are under a positive obligation to ensure that where legal assistance is provided, such assistance is "effective".[19] Whilst the authorities are not responsible for every failure or shortcoming on the part of defence counsel, they should intervene where there is a manifest failure to provide effective representation.[20]

The right guaranteed by Article 6 ECHR is to *assistance* of counsel and not merely *nomination* of counsel to a particular case.[21] Publicly appointed counsel should be appropriately qualified and sufficiently experienced to conduct the specific case assigned. Adequate facilities and procedural mechanisms should also be made available to counsel in order to ensure the proper preparation and conduct of the defence.

The frequency of contact and ease by which defence counsel is able to gain access to his client is a primary hurdle to counsels' ability to advise his client and take proper instructions for the conduct of the proceedings. In some cases excessive red tape, leading to delay in gaining access to a defendant, may significantly undermine a lawyers ability to effectively represent the defendant.[22]

The right to effective counsel also requires that, in general, lawyer-client communications must be private, confidential and not subject to restriction.[23] Communications may take place within the sight, but not within the hearing of others.[24] These environmental guarantees are critical to the conduct of open dialogue – essential for the proper instruction of the defendant as to his rights and the proper preparation of the defence. The European Court of Human Rights has emphasised that, "If a lawyer were unable to confer with his client and receive confidential instructions from him without [such] surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective."[25]

As a part of the guarantee of "effectiveness," adequate facilities must be afforded to defence counsel to ensure that they are able to properly perform the function of

[18] *Ensslin, Baader and Raspe v FRG* (1978) 14 DR 64.
[19] *Artico v Italy* (1990) 12 EHRR 469.
[20] *Kamasinski v Austria* A 168 para.65 (1989), referred to at page 264 by Harris, O'Boyle and Warbrick in *The Law of the European Convention on Human Rights* (Butterworths 1995).
[21] See *Artico v Italy* at para.36, *ante* at note 19.
[22] See, for example, Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75, at para.18, May 1997. The European Commission has recognised that, in certain cases, the most cost-effective disposition of legal-aid funds may require some restriction upon the number of consultations between counsel and an appellant (*M v UK* No.9728/82 36 DR 155 at 158 (1983)). Any proposed restriction upon access to counsel must, however, be judged on a case-by-case basis and be extremely limited.
[23] Article 6(3)(c) ECHR, Article 8 ECHR and Article 14(3)(d) ICCPR.
[24] *S v Switzerland* (1992) 14 EHRR 670, see also Article 93 of the Standard Minimum Rules for the Treatment of Prisoners and Principle 8 of the Basic Principles on the Role of Lawyers.
[25] See *ibid*. *S v Switzerland* at para.48.

procedural "watchdog" and are able to properly represent the defendant during the investigation. Defence counsel must be guaranteed those facilities necessary, for example, to ensure that physical and other evidence for and against the defendant has been properly collated and disclosed,[26] that relevant expert evidence has been commissioned at an early stage and that an indictment has been properly grounded.

Domestic Law

(a) The Right to Legal Representation

The FRY CPC contains a number of provisions granting defence counsel the right to be present during the investigative proceedings.

Article 67(1) FRY CPC guarantees the accused access to defence counsel at all stages of the criminal process. The accused must be informed of this right before the first examination and defence counsel is entitled to attend the first examination.[27]

Article 168 FRY CPC deals with those aspects of the investigatory proceedings that defence counsel *may* attend. These include: the examination of the accused,[28] any inquest conducted by an expert and the examination of that expert[29], the search of a dwelling,[30] and, where the witness is "sizable" to the case or where defence counsel petitions to attend during the testimony of a witness, he/she may attend the examination of the witness.[31] The investigating judge must give timely notification to the defendant and defence counsel of the investigative proceedings and of the testimony of witnesses that they may wish to attend.[32]

Communications between the accused and defence counsel are governed by Article 74 FRY CPC. Where the accused is in custody, Article 74(1) FRY CPC contains an express provision allowing communication between defence counsel and the accused after the first examination. If, however, Article 74(1) is construed so as to prohibit communications between defence counsel and the accused prior to the first examination, then this conflicts with the relevant international provisions outlined above.

During the investigation the FRY CPC grants the investigative judge broad powers by which to regulate written and oral communications between defence counsel and the accused, including a prohibition on private communications,

[26] *See*, for example, *Jespers v Belgium* (1981) 27 DR 61 and *Edwards v UK* (1993) 15 EHRR 417.
[27] Article 67(2) FRY CPC. The FRY CPC is not explicit as to when "criminal proceedings" are deemed to begin. Article 67(1) FRY CPC states that "The accused may have defence counsel throughout the entire course of criminal proceedings." If access to counsel requires the commencement of a formal hearing then Article 67(1) conflicts with the international provisions, see LSMS Report No.7 *Id*. at note 1.
[28] Article 168(1) FRY CPC.
[29] Article 168(2) FRY CPC.
[30] Article 168(3) FRY CPC.
[31] Article 168(4) FRY CPC. The word "sizable" is used in the translation of the FRY CPC.
[32] Article 168(6) FRY CPC.

> *"The examining magistrate may order that the accused give letters to defence counsel or defence counsel give letters to the accused only after he himself has examined them or that the accused may converse with defence counsel only in his presence or in the presence of some particular official."* (Article 74(2) FRY CPC) [emphasis added]

These restrictions may remain in force until the completion of the examination or the bringing of an indictment, at which stage the accused and defence counsel must be granted communications free from surveillance.[33]

The draconian nature of these restrictions on communications brings the FRY CPC into clear conflict with the international provisions outlined above. The effect of the limitations is to inhibit discussion of relevant issues in the case between defence counsel and the accused which, ultimately, impacts upon the preparation of the defence for trial and deprives defence counsel of any meaningful or practical role during the investigation.

(b) The Role of Defence Counsel at the Investigative Stage

The FRY CPC contains a number of provisions dealing with the role of defence counsel during the investigative stage of the procedure. For the sake of this overview, the relevant provisions will be divided into three categories: The "Watchdog" Function, The Examination and Collection of Evidence Function and The Guiding and Assisting the Investigation Function. It is imperative that adequate facilities and procedures are in place in order to ensure that defence counsel can perform these functions effectively.

The "Watchdog" Function

According to the FRY CPC the courts and other relevant authorities are under a duty to truthfully and completely establish the facts important to the rendering of a lawful decision and, with equal attention, to establish those facts both for and against an accused.[34] Moreover, once the decision to initiate an investigation has been taken, the court is under a broad duty to gather, amongst other things, all evidence and information necessary for deciding whether or not to bring an indictment; all evidence that may not be available at trial, or the presentation of which may prove difficult at trial; and all other evidence that may be useful to the proceedings.[35] As a part of the "watchdog" function, defence counsel is obliged to ensure that the court performs these tasks properly, the consequences of the court's actions will have a direct impact upon the investigation and may effect the defence at trial.

During the first examination, the accused must be allowed to present his position concerning all incriminating circumstances and to present all facts in his/her favour.[36] In a mandatory defence case, the examination *must* take place in the presence of defence

[33] Article 74(3) FRY CPC.
[34] Article 15(1) and (2) FRY CPC.
[35] Article 157(2) FRY CPC.
[36] Article 218(5) FRY CPC, see also Article 4(2) FRY CPC.

counsel.[37] In a non-mandatory defence case and in the absence of an express waiver, defence counsel should also generally be permitted to attend the examination, except where the accused has failed to provide counsel despite having been given 24 hours notice to do so,[38] where counsel fails to attend the hearing despite having been given sufficient notice, or where counsel has been denied access to an investigatory action.[39] A breach of the safeguards governing the examination of the accused may render the accused's statement inadmissible.[40]

Consonant with their "watchdog" function, defence counsel may lodge a complaint with the President of the Court on the basis of a prolongation of proceedings or other irregularities in the conduct of the investigation.[41]

The Examination and Collection of Evidence Function

The FRY CPC contains provisions granting defence counsel the right to examine evidence during the investigation. Once a decision to conduct an investigation has been taken, Article 73(1) FRY CPC guarantees defence counsel access to the case records and to the physical evidence that has been gathered.[42] As a practical matter this must include the police file which may contain investigatory leads and impeachment material.[43] Where it is in the interests of the proceedings, the investigating judge is also under a duty to disclose to the defendant and defence counsel, before the close of the investigation, all important evidence gathered in the investigation (*see* Recommendation No. V to this report).[44] On the basis of the examination of such evidence, defence counsel may, for example, make motions for the presentation of fresh evidence (*see* the following section of this report on *The Guiding and Assisting the Investigation Function*). These disclosure provisions must be interpreted broadly, consonant with defence counsels watchdog function and the need to ensure the proper preparation of the defence at trial.

[37] See Article 218(9) FRY CPC. Mandatory defence cases are defined by Article 70 (1) and (2) FRY CPC as those cases where the accused is mute, deaf or incapable of effectively defending himself, or if proceedings are being conducted for a crime for which the death penalty may be pronounced [the death penalty is no longer applicable in Kosovo] or where an indictment is brought for a crime carrying a sentence of ten years or more.
[38] But, in the case of indigency, *see supra* n.11.
[39] *Ibid.* See also Article 67(2) FRY CPC. Article 168(5) and 73(2) FRY CPC envisage the exclusion of defence counsel and the accused from certain investigatory actions where the interests of national defence or national security require. Whilst Article 73(2) limits exclusion to the examination of certain documents or items of physical evidence, it is not clear that Article 168(5) is also so limited. In any event, any exclusionary provisions must be given an extremely restricted reading.
[40] Article 218 (10) FRY CPC.
[41] Article 181(1) FRY CPC.
[42] FRY CPC Article 73(2) provides that in exceptional cases involving issues of national security defence counsels' access to evidence may be *temporarily* restricted.
[43] The decision to initiate an investigation and to continue detention is largely based upon the police file. See generally *LSMS Report No.7 Id.* n.1.
[44] Article 173(1) FRY CPC.

The Guiding and Assisting the Investigation Function

The FRY CPC envisages an active role for defence counsel in guiding and assisting the conduct of the investigation and challenging the basis for an indictment.

Before reaching a decision to initiate an investigation, the investigative judge may request an oral hearing with the prosecution and the defence in order to clarify relevant matters.[45] The defence may appeal, to the Panel of Judges, against a decision to conduct a preliminary investigation.[46]

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

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

Finally, although not fully addressed in this report, the domestic provisions outlined above are not only important because of their potential effect upon the defence at trial, but also because once an indictment has been brought, the accused and/or defence counsel may challenge that indictment within 8 days.[47] The grounds upon which an indictment may be dismissed include, for example, an insufficiency of evidence or other circumstances precluding criminal responsibility.[48] Moreover, witnesses called by the prosecution and by the defence in the challenge of the indictment should be called at trial, subject to the discretion of the Presiding Judge to disallow the witness.[49]

RECOMMENDATIONS

LSMS recommends that:

i. The **accused must be immediately informed as to his right to defence counsel** upon his arrest and/or detention and that this right continues throughout the entire criminal process.

[45] Article 159(3) FRY CPC.
[46] Article 159(5) FRY CPC.
[47] Article 267(1) FRY CPC.
[48] Article 270 FRY CPC.
[49] Article 281(1) FRY CPC.

ii. Adequate **facilities must be made available** to the accused by which to exercise his/her right to counsel, such facilities may include, for example, access to telephones or to a relative or friend.

iii. The authorities must ensure that the accused and his/her defence counsel **are able to communicate freely**, without time or other restrictions, at all stages of the criminal process. The accused and his/her defence counsel must **be guaranteed confidential communications**, whether written or oral, at all stages of the criminal process. Oral communications may take place within the sight, but not the hearing, of others. The relevant authorities, including those in charge of the detention facilities, must, accordingly, provide all necessary facilities for such communications. Article 74(2) FRY CPC must be amended or abolished accordingly.

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

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

vi. 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.

vii. All relevant personnel, including judges, prosecutors and defence counsel, must be **provided practical training** on their roles and responsibilities and the rights of the accused during the investigative proceedings. In this regard, the Office of the Defence should be established and be made available to act as a resource and assistance centre for defence counsel.[50]

viii. Defence counsel must be provided with **material resources**, including official translations of all relevant international human rights instruments.

ix. A **Code of Ethics** is essential for providing guidance as to the conduct and responsibilities of prosecution and defence counsel, particularly court appointed defence counsel. The Draft Law Advocates Code of Ethics is currently under review by representatives of The Kosovo Bar Association, with the assistance of the OSCE

[50] The Office of the Defence is an OSCE initiative intended to act as a resource centre for defence counsel in certain cases. The Office will seek to provide, for example, expert assistance on case preparation and strategy and other more general assistance.

Legal Community Support Section.[51] It is essential that this code provides, amongst other things, **a prohibition on requesting money** in court appointed cases, guidance as to the **duties of disclosure** and the **attendance** of hearings.

x. The Disciplinary Council of the Bar Association should be empowered so as to properly address **complaints made** by defendants, judges and other relevant authorities, regarding **allegations of misconduct** on the part of defence and prosecution counsel. It is essential that the composition of this body is representative of Kosovo's advocates and legal community. Accused persons must be fully informed as to their right to bring complaints and procedures must be easily accessible.[52]

[51] See Kosovo Chamber of Advocates, *Draft Law Advocates Code of Ethics*, May 1980, Pristina/Prishtine and *The Law on Advocacy and Other Legal Assistance*, OG No.48, 24th December 1979.
[52] See, for example, the Chamber of Advocates under Chapter V of the *Law on Advocacy and Other Legal Assistance*, OG No.48, 24th December 1979.