Organization for Security and Co-operation in Europe
OSCE Mission in Kosovo

Background Report

The treatment of minorities by the judicial system

Introduction

This report focuses on the right to equality before the law as relates to proceedings monitored by the Legal System Monitoring Section (LSMS) from the beginning of its monitoring activity on 18 August 1999 until 27 March 2000. Since most District Court trials held thus far have involved Kosovo Albanian defendants and Kosovo Albanian victims, this report will focus primarily on two issues: (1) The potential for disparate treatment of ethnic groups during pre-trial detention hearings; and (2) The difficulty of securing defence counsel, particularly for Kosovo Serbs.[i]

Background

The aggravated violations of human rights that occurred during the war have put a heavy burden on those who are in charge of re-establishing a democratic and multiethnic society. Since the beginning of its mandate, UNMIK has been confronted by many challenges, including the protection and promotion of human rights based on the universal principles of tolerance and freedom. Ethnic violence, harassment, assault, larceny and eviction have led to an increased feeling of isolation and insecurity amongst ethnic groups. Despite the continuous flight of members of ethnic communities, mostly Kosovo Serbs and Roma,[ii] a number of them remained behind living mainly in concentrated areas spread out in the province. These individuals face numerous obstacles; economic and social isolation, insecurity, and difficult access to public services.

In pursuing its mandate, the OSCE mission states that it:

> "will be guided by the importance of bringing about mutual respect and reconciliation among all ethnic groups in Kosovo, and of establishing a viable multiethnic society, where the rights of each citizen are fully and equally respected."[iii]

In this respect, the performance of the judicial system is crucial. Between 2 July and 15 December 1999, the numerous difficulties faced by the Emergency Judicial System (EJS) greatly hindered its work.[iv] As the only court in which lay judges had been appointed, the Prizren District Court was the only court in Kosovo that could hold trials.[v] Although the trial judges in Prizren refused to apply the applicable law,[vi] LSMS monitors concluded that trials held were

otherwise generally fair. However, there were no defendants from any ethnic minorities. By 29 December 1999, the Special Representative of the Secretary General (SRSG) had appointed 301 judges and prosecutors and 238 lay-judges throughout the province.

In the absence of many trials involving ethnic minorities, LSMS has focused primarily on pre-trial proceedings in order to determine what conclusions, if any, may be drawn on the treatment of all ethnic groups. Statements made in this report are based on information that the LSMS gathered through regular visits to prosecutor and judges, from attendance at pre-trial hearings, from meetings and discussions with UNCIVPOL representatives, and KFOR legal advisers, and visits to detainees. Information was reported on a daily and weekly basis. Furthermore, through their contacts in the field, the Rule of Law officers assisted in highlighting sensitive issues.

Despite these efforts, monitors and Rule of Law Officers faced a number of difficulties such as gaining full access to case files, including those related to members of minorities. It was also a problem to be systematically informed on the number of suspects, the indictment, if any, and the motives for the release orders. Finally, monitors were unable to visit the detainees on a regular basis.

This report covers the activity of the EJS from 2 July till 15 December 1999 and the beginning of the new judiciary until 27 March 2000.

Equality Before the Law

The UNMIK Regulations on the applicable law in Kosovo refer expressly to the application of international human rights standards.[vii] Accordingly "equality before law" is at the root of a fair and impartial judicial system.[viii]

This principle has been further proclaimed in most of the international conventions, some of them of particular significance regarding members of minorities. The International Convention on the Elimination of All Forms of Discrimination as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) both condemn all forms of discrimination based on ethnic, racial, religious, linguistic, cultural distinctiveness.[ix]

The ECHR goes further and clarifies conditions of enjoyment of the right to liberty and the right to a fair and impartial trial. Therefore, in accordance with the principle of non-discrimination as recognised in the above-cited Conventions, this analysis will mainly refer to the ECHR. Two articles are of particular importance regarding the functioning of the court proceedings: Article 5 on the Right to Liberty and Security and the Article 6 on the Right to a Fair Trial. Reference will also be made to the national law.

Pre-trial Custody and the Right to Liberty and Security[x]

Article 5 (1) of the ECHR proclaims:

> *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.*

The right to liberty and security protects citizens against arbitrary arrest or detention. In this respect, international standards are view detention as the exception rather than the rule for suspects awaiting trial. Article 9 (3) of the International Covenant on Civil and Political Rights (ICCPR) states:

> *It shall not be the general rule that persons awaiting trial shall be detained in custody.*

However, some circumstances may justify recourse to detention.[xi] Therefore the ECHR puts restrictive conditions on the implementation of the right to order detention by the lawful judicial and police authorities.[xii]

Pursuant to UNMIK Regulation No 1999/1 section 3,[xiii] the Yugoslav Law on Criminal Procedure (FRY LPP), the Criminal Code of the Federal Republic of Yugoslavia (FRY PLC), and the Serbian Criminal Code (SPC) as of 29 March 1999 were the applicable law.[xiv] However, UNMIK Regulation 1999/24, section 1.1(b) changed the applicable law to "the law in force in Kosovo 22 March 1989", and the change of the law was made retroactive to 10 June 1999, pursuant to UNMIK Regulation 1999/25.[xv] Thus, the law now includes the Kosovo Penal Code.

The laws relating to pre-trial custody appear to be in accordance to ECHR. According to Article 182 (1) of FRY LPP, pre-trial custody is one of the measures that may be taken against an accused to guarantee his presence and the successful conduct of criminal proceedings.[xvi] Article 42 (1) of the FRY LPP sets out a general principle[xvii] relating to custody that is expressed in Article 191 (2) of FRY LPP.[xviii]

The EJS had to respond to an emergency situation, where the nature of offences varied from weapons possession to murder, war crimes and genocide. The high level of violence had to be stopped; this may explain to some extent the number of arrests and detentions.[xix] In such a context, the application of the law concerning pre-trial custody is of particular importance.

While comprehensive statistics on the number of persons heard and released either by the prosecutor prior to handing over the case to the investigative judge, or by KFOR prior to hearings conducted by mobile units are not available, some specific cases raise concern.

Ethnic considerations may have mainly motivated orders to release suspects or to maintain them in custody.[xx] The nature of the offence/crime alleged, the delay and the legal grounds to issue an order of release, the ethnicity of the defendant and of the victim and the nature of evidence are the elements that will be examined.

LSMS reviewed a variety of cases, ranging from murder to weapons possession[xxi] to the unlawful eviction of members of minorities. As for the latter, LSMS noted an increase in such activities the first months of this year, especially against the Muslim Slav minority in Pec/Peja district.[xxii]

In its review, LSMS identified two trends in the legal system:

i. Kosovo Serbs may be treated in a more severe way than Kosovo Albanians;
ii. Kosovo Albanians who are detained for the same or similar crimes as Kosovo Serbs are often released when the victim was Kosovo Serb.

One specific case currently under observation raises serious issues of potential bias. Three persons from the same family have been detained for more than eight months in relation to the death of a Kosovo Albanian, claimed to be a KLA "war hero". LSMS has viewed a video in this case, which purports to show five Kosovo Albanian men approach the defendant's business premises. They are all armed. A gunfight ensues between the parties. At some stage US-KFOR are also engaged in the return of gunfire. The gun battle left two Kosovo Albanian males dead and two injured. US-KFOR apparently admits that in self-defense, they killed one Kosovo Albanian male. There is no forensic evidence linking any members of the family to the death of the other male. On the face of it, the case raises a number of issues including the use of lawful self-defence (assuming the family in fact shot and injured anyone). While such issues are for the fact-finder, it is unclear from a legal perspective why the three Kosovo Serb family members remain in detention and the five Kosovo Albanian males were released.[xxiii] The failure by the Investigating Judge to continue the detention of the Kosovo Albanian or indict them is one of the questionable aspects of the case.[xxiv] Considering the apparent ethnic motivation of the aggression; aggression against a Kosovo Serb family without any other apparent ground than its ethnic origin, the legal ground to release the Kosovo Albanians may indicate ethnic bias.

Preliminary evidence in other cases indicates there may be a systematic problem within the legal system. In one case a Kosovo Serb suspect was arrested and detained following the questionable statement made by three witnesses,[xxv] whereas in other cases other compelling evidence was not enough to order the detention of Kosovo Albanian suspects.[xxvi]

Furthermore, in cases involving illegal possession of arms, defence lawyers for Kosovo Serb detainees allege discrimination on the part of judges in pre-trial detention hearings. Unlawful possession of weapons currently carries a sentence of 12 months imprisonment.[xxvii] In relation to cases of detainees currently under investigation in Kosovska Mitrovica/Mitrovice for such offences, their lawyers claim that many of these cases are characterised by unreasonable and unjustifiable delay on the part of the investigative judges to conclude the investigative process. Indeed, many of the detainees under investigation have been in custody since July 1999 which gives cause for concern, since according to article 191 (2) of the FRY LPP, custody may amongst others be ordered against persons if the crime is one for which a prison sentence of ten years or more may be imposed.[xxviii] Seemingly most Kosovo Albanians are released pending trial, while Kosovo Serb defendants stay in custody, pending investigation or trial.[xxix]

The handling of some cases relating to property issues may reinforce the feeling of discrimination amongst the members of minorities. In the Pec/Peja district, notwithstanding the fact that suspects are difficult to identify, complaints made by victims against intimidation/harassment are not prosecuted.[xxx]

The Right to Legal Assistance

Article 6 of the ECHR provides, amongst other things:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
(3) This right comprises the minimum rights for everyone charged with a criminal offence:
a. to have adequate time and facilities for the preparation of his defence,
b. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require,
c. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The right to defence counsel is part of the most universally recognised rights of detainees. In this respect, the FRY LPP is generally in accordance with international standards.[xxxi]

In many cases, Kosovo Serb detainees complain about not having directly or through their family, access to a lawyer of their choice.[xxxii] Some show scepticism on the impartiality of their Kosovo Albanian defence counsel.[xxxiii] Some have asked for lawyers who, following the end of the war moved to Serbia.[xxxiv] Furthermore, security reasons in some regions prevent Kosovo Serbs representatives to go to detention facilities to meet their clients. The situation may improve since a few defence counsel returned back to Mitrovica the past few weeks. However, their numbers are few and mostly located in one district of the province: Kosovska Mitrovica/Mitrovice.[xxxv]

These claims raise concerns about the respect of the right to defence counsel and the right to communicate with him. Of course, security reasons prevent detainees to meet "without delay." However, no exception or derogation is accepted to the enjoyment of this right.[xxxvi]

As long as security problems do not allow the presence of Kosovo Serb lawyers chosen by detainees in compliance with the applicable law, at least the presence of an interpreter should be guaranteed.

Kosovo Serbs are not the only ones facing such difficulties. According to a statement made during a meeting attended by both OSCE Human Rights Officer and Democratisation Officer, Roma are particularly isolated from the system.[xxxvii] They lack access both to lawyers, and to courts. Considering that Roma have been targeted by vengeance acts since the end of NATO bombing, this access is also crucial.[xxxviii]

Trial Observation

Thus far, only one trial involving minorities has been observed.[xxxix] The observations, therefore are in no way conclusive, but do raise possible concerns about future trials. The case involved a Kosovo Albanian charged with murdering a Kosovo Serb.

The case raised two concerns. Firstly, there was an apparent failure by either the court or UNMIK police to summons the witnesses to court. The witnesses were both Kosovar Serb and

had fled to Serbia after the crime. UNMIK police advised that they could have assisted in bringing the witnesses to trial, as well as arranging for protection with KFOR. LSMS was informed by UNMIK police that the judge informed them that the witnesses were "too scared" to attend the trial. LSMS has been unable to confirm these with the trial judge. Moreover, LSMS has seen a document from UNMIK police to the judge which states that the witnesses will not attend the trial because they are in Serbia and cannot be traced. In any event the judge made no inquiries as to what steps were taken to locate the witnesses, nor did he adjourn the case to locate the witnesses. The witnesses were of critical importance to the prosecution case because one had identified the defendant as the culpable party in a police ID parade.

At trial the defendant, a former KLA member, testified that he was in detention in Pec/Peja at the time of the murder. A witness was called to support this assertion. KFOR informed LSMS that this was false and that they had documentation that was passed to the prosecutor. The prosecutor clams he was unaware of this documentation because it was sealed by the judge. According to KFOR, the documents state that the defendant was arrested the day following the murder. No attempt was made at trial to introduce this evidence, either by adducing it as part of the state case or using it to discredit the defendant and his witness. In any event with the absence of the crucial witness the case of the prosecution collapsed and the defendant was acquitted.

This case exhibits either gross incompetence by the judicial authorities or utter dishonesty due solely to the victim's ethnicity. There remain many unanswered questions in this case and LSMS recommends an urgent review by the Advisory Judicial Commission.[xl]

This case sets a dangerous precedent for future trials. If no efforts are made to obtain witnesses, cases will collapse with the potential result that the guilty will be set free. A failure to obtain critical evidence that is potentially available or at minimum to attempt to do so, is a failure for the system that will undermine the confidence of minorities in the system.

Conclusions:

LSMS believes there is a growing tendency by both the judiciary and prosecutors to introduce ethnic bias to the detriment of the minorities into judicial proceedings. Although the current evidence emanates from pre-trial detention hearings, if it continues in the criminal trials the whole legal system could be endangered.

LSMS fears that the lack of impartiality may also be linked in some cases with the pressure put on judges and prosecutors, whatever their ethnicity. LSMS appreciates that Kosovo Albanians work under especially difficult conditions in the sense that the political background may impair an absolute liberty to act impartially and neutrally. There is much agreement that the present concerns have to be alleviated: security for prosecutors and judges; the resignation of all Kosovo Serb judges and prosecutors under the Emergency Judicial System; the lack of participation of minorities in the new judiciary; and the fears repeatedly expressed by witnesses too afraid to testify. These facts are indicative of the actual weaknesses and pressures put on the various actors in the judicial system.

LSMS appreciates that the number of cases set out in this report is not comprehensive. Nevertheless they indicate the dangers that the judicial system faces: the inability to implement

basic rights of each Kosovo resident, notwithstanding his or her ethnicity, their political affiliation and their beliefs. A system that cannot ensure that its minorities get full access to justice is in danger of denying access to all its citizens.

Recommendations

i. First it is necessary to support in a systematic way the presence and effective participation of minority representatives in the judicial system. If the security preoccupations of most of Kosovo Serb judges and prosecutors are well known, it is still unclear why such few steps were taken to respond to it. Furthermore, it is also unclear whether a systematic search for members of minorities as judges and prosecutors has been organised. It should be noted that access of the minority communities to media outlets remains a serious problem.

ii. Furthermore, it seems inappropriate to expect the regional, municipal, local and judicial authorities as well as from other bodies in the legal community to recommend members of the Kosovo Serb or Kosovo Roma community.[xli] It appears that candidates only applied, with strong scepticism, in multiethnic areas, because some representative associations of such group still act on their behalf. This is especially true for Mitrovica. This highlights the need for the international community to take concrete steps to compensate for the lack of communication and for the isolation of minorities, in order to enlarge their participation in the judicial system. It may be necessary to not rely only on the local proposals, but to put in place a strategy allowing the recruitment of other potential available candidates. Indeed, the contacts made by the Rule of Law Officers with the Serbian community in the field had permitted in the region Pristina to propose the application of three Kosovo Serb lay-judges.

iii. The above cannot be performed without guarantees of security. The lack of freedom of movement, the daily pressure put on judges, prosecutors and lay judges impedes the access and the effective presence of minorities' representative within the courts. Considering the bias that minorities suffer, this lack of representation increases the risks of lack of impartiality. After eight months, the absence of systematic security measures is unacceptable. A comprehensive policy to implement such measures should be set up without delay.

iv. A procedure of appeal against detention and release orders, as well as provision to make representations at such hearings would prevent suspicion on the ethnic bias and impartiality of judges and prosecutors. LSMS suggests the establishment of an appeal panel that includes international judges.

Endnotes

[i] This is the fifth in a series of thematic reports released by the Legal System Monitoring Section of the OSCE Mission in Kosovo. The OSCE Mission in Kosovo's Department of Human Rights and Rule of Law has the lead role in monitoring, protecting, and promoting human rights in Kosovo. The Department's Legal System Monitoring Section has observed court proceedings; met regularly with judges, prosecutors and defence counsel; and has otherwise been in close contact with those involved in the legal system to monitor its functioning. Legal system monitors serve as independent, unbiased monitors. They do not represent the civil administration, any defendant, or any other group or individual. Thematic reports released by the Legal System Monitoring Section have the goal of protecting and promoting human rights, encouraging improvements in the administration of justice, and suggesting systemic changes to the legal and judicial systems as necessary and appropriate.

[ii] On 15th October 1999, the Yugoslav Red Cross and local authorities indicated that the total number of registered internally displaced persons from Kosovo to Serbia and Montenegro stood at 230,884. According to the 1981 census, the ethnic make-up in Kosovo was as follows:

Albanians 77.5%	Turks 0.8%
Serbs 13.2%	Muslims 3.7%
Montenegrins 1.7%	other 3.7%

Although not all ethnic groups were mentioned in the census, it did reflect the multi-ethnicity that characterised the population in the years previous to the war. A majority of ethnic Albanians boycotted the 1991 census conducted by the Yugoslav Institute of Statistics that raised the number of ethnic Albanians in the province.

[iii] OSCE, Permanent Council Decision No 305, 1 July 1999.

[iv] When UNMIK began its mandate at the end of June, there was no functioning judicial system in the province. Following UNMIK Emergency Decree No 1999/1 and UNMIK Emergency Decree No. 1999/2 an Emergency Judicial System (EJS) was established. UNMIK Emergency Decree No 1999/1 (28 June 1999) provided the legal basis for the establishment of the Joint Advisory Council for Provisional Judicial Appointment (JAC/PJA); UNMIK Emergency Decree No 1999/2 (28 June 1999) appointed members of the JAC/PJA. *See* Observations and Recommendations of the OSCE Legal System Monitoring Section: Report 2 – The Development of the Kosovo Judicial System (10 June through 15 December 1999).

[v] Provisional district courts and prosecutors offices were set up in Prishtina/Pristina, Kosovska Mitrovica/Mitrovice, and Peja/Pec and mobile units operating out of the Prishtina/Pristina District Court had covered areas that were not served by a regular court, such as the district of Gnjilane/Gjilane**.** Nevertheless trials were held in only one region, Prizren/Prizreni.

[vi] Observations and Recommendations of the OSCE Legal Systems Monitoring Section: Report 2-The Development of the Kosovo Judicial System (10 June through 15 December 1999), published 17 December 1999, page 3, "Despite Regulation 1, judges and prosecutors have applied the provisions of the Kosovo Criminal Code which was annulled in 1989-90. All trials held thus far have been conducted under the FRY Criminal Procedural Code, Kosovo Criminal Code and the FRY Criminal Code."

[vii] Regulation No 1999/24 (12 December 1999). *See* section 1-3.

[viii] Article 7 of the Universal Declaration of Human Rights states: All are equal before law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination.

[ix] Article 5 of the International Convention on the Elimination of All Forms of Discrimination proclaims:

> state parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the Law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all others administering justice,
>
> (b) The right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

Furthermore, according to Article 6 of the International Convention on the Elimination of All Forms of Discrimination: states shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any act of racial discrimination which violates human rights and fundamental freedoms contrary to this convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

[x] It should be noted that references made to international or national law concentrate only on the provisions whose application raises concerns regarding members of ethnic minorities involved in cases presented below. This report does not intend to review all aspects involved by the application of the right concerned.

[xi] According to the *UN Human Rights Committee* decisions, the detention may be ordered: to prevent flight, interference with witnesses and other evidence, to prevent the commission of other offences (or when the suspect) constitutes a clear and serious risk to society which cannot be contained by any other manner.
Human Rights Committee, Volume II (A/45/40), 19990, at 115. This should be taken as a valid interpretation of the International Public Law, since the majority of states ratified the ICCPR as well as the European Convention on Human Rights and Fundamental Freedoms.

[xii] Restrictive conditions to the lawful detention of a person are prescribed by article 5 (1) of the ECHR, amongst which:

a. The lawful detention of a person after conviction by a competent court,
b. The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law,
c. The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

[xiii] UNMIK Regulation No. 1999/1 (25 July 1999) on the authority of the interim administration in Kosovo. Section 3 states: the laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNMIK under UN Security Council Resolution 1244 (1999), or the present or any other regulation issued by UNMIK.

[xiv] UNMIK Regulation No. 1999/24 (12 December 1999), section 1.1(b)

[xv] UNMIK Regulation No. 1999/25 (12 December 1999), section 1 *"Section 3 of UNMIK Regulation 1999/1 of 25 July 1999 is hereby repealed"* and further section 2 "*the present regulation shall be deemed to have entered into force as of 10 June 1999."*

[xvi] Article 182 (1): The measures which may be taken against an accused to guarantee his presence and the successful conduct of criminal proceedings are the summons, compulsion to appear, the word of the accused that he will not leave the town where he lives, bail and custody.

[xvii] The court shall fix the punishment for a criminal act . . . taking into account: all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and in particular, the degree of criminal responsibility, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.

[xviii] Article 191 (1): custody need not be ordered if the circumstances indicate that in the particular case involved the law prescribes that a less severe penalty may be pronounced (article 42 (1), of the Criminal Code of the Socialist Federal republic of Yugoslavia).

Finally, pursuant Article 191 (2) custody may be ordered against a suspect:

(1) if he conceals himself or his identity cannot be established ( ) particular circumstances suggest the strong possibility of flight,
(2) if there is a warranted fear that he will destroy the clues to the crime or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, fellow defendants or accessories after the facts,
(3) if particular circumstances justify a fear that the crime will be repeated or an attempted crime will be completed or a threatened crime will be committed,
(4) if the crime is one for which a prison sentence of ten years or more severe penalty may be pronounced under the law if because of the manner of execution, consequences or other circumstances of the crime there has been or might be such disturbance of the citizenry that the ordering of custody is urgently necessary for the unhindered conduct of criminal proceedings or human safety.

[xix] In mid-January figures for arrest, detention and releases revealed that a total of 3,747 persons had been detained by KFOR.

[xx] Political considerations might also unduly influence the decisions to release suspects. The effect of political influence in the criminal justice system is not addressed in this report.

[xxi] As of 6 March 2000, out of nine Kosovo Serbs detained at Camp Bondsteel (district of Gnjilane/Gjilane); three are charged with murder, four with attempted murder, three with weapons possession, one breaking and entering. One Montenegrin is charged with murder/attempted murder. Most of other Kosovo Serbs detainees are in Kosovska Mitrovica/Mitrovice: out of ninety-three indicted detainees, sixty-two are Kosovo Serbs (thirty-two of whom are charged with war/ethnic crimes-related offences).

[xxii]As of 9 March 2000, out of twenty-two cases of intimidation registered by UNCIVPOL since 1 January 2000, approximately 50% are minorities and mostly located in Vitomirica. Five involve Muslim Slav families, five Roma, one Egyptian, one Montenegrin. These statistics do not include cases registered by KFOR. Between November and December 1999, out of twenty-eight cases registered with UNCIVPOL, seven targeted Muslims Slav's, three Roma, and one Albanian Catholic.

[xxiii] Although a viewing of the video seems to indicate that the Kosovo Serb family were acting in lawful self-defense LSMS appreciates that this is a matter for the fact-finder and the case is serious enough to warrant detention of those involved. By this, it is meant participants; both Kosovo Serbs and Kosovo Albanians should be detained pending the resolution of this case. A Kosovo Serb investigative judge that one cannot suspect of ethnic hatred issued the first detention order. The subsequent extension was decided in compliance with article 23 (6) of FRY PLC by the three-judge panel and then by Ad Hoc Court of Appeal until 10 January 1999, when the three Kosovo Serbs were indicted for murder, attempted murder and firearms possession. As stated above, all Kosovo Albanians were released from custody.

[xxiv] One of the Kosovo Albanians has been indicted for the attempted murder of three US KFOR soldiers, the other two have not been indicted. None of them have been charged with the attempted murder or assault against the Kosovo Serb family.

[xxv] After a thorough investigation conducted by KFOR, there appears to be great inconsistency between eyewitness. Despite this the prosecutor decided that the Investigative Magistrate should continue his own investigation. Case 99706, Bondsteel. KFOR Memorandum, 18 October 1999; *see* also the case of a Kosovo Serb arrested 24 September 1999, following the statement of six persons, that while giving his name as a war crime suspect, were unable to identify him as the man they saw committing the crime. As of 17 March 2000, the suspect is still in custody. LSMS memo. No. 00/009.

[xxvi] (1) (District of Gjilan/Gnjilane) A Kosovo Albanian detained in connection with both the kidnapping and the disappearance of two Kosovo Serb teachers, was released following the order of a three-judge panel on 1 September

1999. Compelling circumstantial evidence was presented to the investigative judge but he found no reason to maintain the suspect in custody, stating that "investigations would continue". Memorandum KFOR, 18 October 1999.

(2) (District of Gjilan/Gnjilane) On 4 October 1999, the investigative judge had issued an order of release for two Kosovo Albanian detainees who had admitted the attempted murder of a man they believed to be Kosovo Serbs. The suspects had been in detention since 1 July 1999. The Judge said he was acting on behalf of the Prosecutor, from whom he had received a hand written note. As of 29 February 2000, these release orders are pending; KFOR refuse to honour an order that the Prosecutor did not take in official capacity. Memorandum KFOR, 18 October 1999.

(3) (District of Gjilan/Gnjilane) Furthermore, a three-judge panel issued an order of release for two K/a males charged with the murders of two Kosovo Serbs following the proposal of the prosecutor. The investigative judge, on the basis of compelling evidence had proposed the maintaining in detention: written statements of three eyewitnesses from the victim's family. KFOR refuse to honour the order. Rule of Law, Weekly Report, 29 November-5 December.

(4) (District of Prishtina/Pristina) On 27 October 1999, even though the Kosovo Serb victim, a 77 years-old male identified his aggressors – he was kidnapped and severely injured by two young Kosovo Albanian, the prosecutor did not find the testimony credible that a Kosovo Serbs "walks in the streets," and rejected the statement of the witness as "unreliable." A medical examination had confirmed injuries. The suspects have been released. LSMS Memo 3 February 2000.

[xxvii] Article 199, Kosovo Penal Code.

[xxviii] LSMS Weekly Report, Mitrovica District, 25 – 3 March 2000, and LSMS Report, Mitrovica District March 9, 2000. Five cases have been identified. *See* below.

[xxix]

(1) One detainee arrested 24/01/00 on suspicion of illegal possession of weapons for which he claims to have a license is still in custody. The investigation is apparently not complete although the defendant has admitted possession.
(2) After four months, and despite allegedly new evidence, a detainee arrested the 6/10/99 for suspicion of arson and theft is still in custody. He is alleged to have burnt down a house. According to defence counsel, photographs show that the property and those in the immediate vicinity are intact. As of the 01 March 2000, the investigative judge did not terminate the investigation.
(3) In a case of suspicion of disturbing public order/robbery (arrest on the 20/12/99), according to defence counsel only one witness out of eleven has been heard in two months, whereas all the remainder are apparently available and accessible. According to the lawyer all attempts made by the lawyer to speed up the investigative process have been without success.
(4) A Kosovo Serb whom records show have been detained since 20/10/99 (although his lawyer claims he has been detained since 02/07/99) has still not been indicted nor has the investigatory procedure been terminated. Three others are detained with him for charges relating to genocide/war crimes and murder weapons offences (two of the others were detained on 17/08/99 and the other on 11/08/99) and have been neither released nor indicted. Allegedly the judge has interviewed 32 suspects and none have categorically identified the suspects, and it is suggested that some interviewed have given conflicting evidence, according to the defence counsel.
(5) A Kosovar Serb has been held on suspicion of causing malicious damage to international vehicles since 08/02/00. The police caught him in the act, yet the investigative process remains inexplicably open and no efforts have been taken by the court to terminate proceedings and indict the suspect.

[xxx] HR Report; intimidation/eviction cases, 24 February 2000.

[xxxi] Article 11 of FRY LPP guarantees that: the accused has the right to present his own defence or to defend himself with the professional aid of defence counsel, whom he shall himself select from among professional attorneys:

> (2) If the accused does not engage defence council on his own, in order to provide for his defence the court shall appoint a counsel in the cases specified by this law.

(3) The accused must be furnished sufficient time to prepare his defence.

Article 67 of FRY LPP provides:

(1) the accused may have defence counsel throughout the entire course of criminal proceedings,

(2) before the first examination the accused must be instructed that he has the right to engage defence counsel and that his defence counsel may attend his examination. Furthermore, Article 67 (3) explicitly recognises the right of the relatives to act in behalf of the accused.

[xxxii] Daily Report, District of Prizren, 31st August 1999 (Rahovac/Orahovac): the same Albanian lawyer represented three Kosovo Serb detainees. They were complaining that they did not choose him. Rule of Law, Weekly report, 25 – 31 October 1999, District of Prizren.

[xxxiii] Even though some Kosovo Serb detainees first accepted to be assisted by Kosovo Albanian lawyers, this is now an exceptional. At the beginning of August, the presence of judges and prosecutors from the same ethnicity as Kosovo Serb detainees was perceived as an implicit guarantee of the impartiality of the system. In this framework, some Kosovo Serb detainees accepted the assistance of Kosovo Albanian counsel.

[xxxiv] LSMS Daily Report, Bondsteel, 28 September 1999.

[xxxv] LCSS Weekly Report 1 – 7 March 2000 – Eight defence counsel in Kosovska/Mitrovica, two in Prishtina/Pristine, one in Gracanica, one in Suva Reka/Suhareke, two in Kosovo Polje/Fushe Kosove, one in Kosovska Kamenica/Kamenice.

[xxxvi] Principle 18 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, stipulates the following: the right of a detainee or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and order.

[xxxvii] Rule of Law Division, 3rd November 1999, Meeting with HR and Democratisation Officer.

[xxxviii] They have been seen as collaborators of Kosovo Serbs during bombings; Report OSCE, Kosovo/Kosova, *As Seen as Told*, June to October 1999.

[xxxix] Observations of the OSCE Legal Monitoring Section, 21 March 2000

[xl] S*ee* Regulation No. 1999/7.

[xli] For instance, in Prishtine/Pristina, a proposal of a list of laying judges dated from the 01.09.99 made by the previous President of the district court included no K/s or Roma.