



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

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**OBSERVATIONS AND RECOMMENDATIONS OF
THE OSCE LEGAL SYSTEM MONITORING SECTION**

REPORT NO. 4

UPDATE ON THE EXPIRATION OF DETENTION PERIODS FOR DETAINEES

This is the fourth in a series of thematic reports released by the Legal System Monitoring Section of the OSCE Mission in Kosovo.¹

Issue

The Criminal Procedure Code of the Federal Republic of Yugoslavia provides for a maximum period of detention of six months before a criminal defendant charged with a crime carrying a sentence of more than five years is indicted.² The maximum period a defendant charged with a less serious crime may be held before being indicted is three months. UNMIK Regulation 1999/26 has modified the existing law by empowering the Supreme Court to extend this period by two additional three month periods in individual cases. This could lead to a period of up to one year before indictment or release in serious cases. This report identifies twenty-six cases in which criminal defendants have been held longer than the applicable limit and recommends urgent action to address those cases.

¹ 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. OSCE'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.

² This is true under the FRY Criminal Procedure Code as it applied on 22 March 1989 and under the FRY Criminal Procedure Code as it applied on 24 March 1999.

Background

In December 1999,³ the Legal Monitoring Section identified eighty-one⁴ individuals being held by KFOR, UN Civil Administration and UNMIK Police who were either approaching the limit of their detention period, or who should already have been released.⁵ The previous report reviewed the applicable law relating to the length of detention and highlighted some areas that may conflict with international standards. Issues of particular concern included the possibility of indefinite detention, the absence of procedures for the accused to participate in and initiate review of custody, and the lack of adequate remedies for unreasonably long detention. Several of these topics will be further addressed in future reports issued by the monitors.

The previous report concluded that the possibility of unreasonably long periods of pre-trial detention necessitated close monitoring of future developments regarding these detainees. This report thus considers the developments regarding the eight-one detainees previously examined, and presents an analysis of the present situation. It will be noted that the context of this analysis is now different in two respects. UNMIK Regulations 1999/24 and 25 have modified UNMIK Regulation 1999/1 to provide that the law now applicable in Kosovo includes the law that applied on 22 March 1989 (instead of 24 March 1999). UNMIK Regulation 1999/26 has provided a special mechanism for additional extensions of detention in individual cases.

Domestic Law

As the previous report highlighted, the relevant provisions of the law applicable on 24 March 1999 consist of Articles 197⁶ and 199⁷ of the Federal Republic of Yugoslavia

³ *Observations and Recommendations of the OSCE Legal System Monitoring Section—Report No. 3: Expiration of Detention Periods for Current Detainees* (17 December 1999). This report, initially released on 17 December 1999, was released more widely on 8 March 2000.

⁴ This group comprised approximately one-third of the 255 individuals then in detention.

⁵ The previous report contained valuable charts distinguishing the severity of the crime prescribed and thus the maximum time individuals can be detained in pre-trial detention, which will be useful to refer to when reading this report.

⁶ FRY Code of Criminal Procedure, Article 197, reads:

- (1) On the basis of the examining magistrate's decision the accused may not be held in pre-trial custody more than 1 month from the date of his apprehension. At the end of that period the accused may be kept in custody only on the basis of a decision to extend pre-trial custody.
- (2) Pre-trial custody may be extended a maximum of 2 months under a decision of the panel of judges (Article 23, Paragraph 6). An appeal is permitted against the panel's decision, but the appeal does not stay execution of the decision. If proceedings are conducted for a crime carrying a prison sentence of more than 5 years or a more severe penalty, a panel of the supreme court of the republic or autonomous province may for important reasons extend pre-trial custody by not more than another 3 months. The decision to extend pre-trial custody shall be made on the argued recommendation of the examining magistrate or public prosecutor.
- (3) If a bill of indictment is not brought before expiration of the periods referred to in Paragraph 2 of this article, the accused shall be released.

("FRY") Code of Criminal Procedure, which provide for the procedure to be followed regarding pre-trial detention, both before (Article 197) and after (Article 199) indictment. The initial time limit set for pre-trial detention is one month, following which a decision must be taken as to whether to extend pre-trial detention. This may be extended for a further two months, after which time indictment or release must follow. However, if the crime concerned carries a sentence of "more than five years or a more severe penalty," a decision may be taken to extend pre-trial detention by another three months, after which time indictment or release becomes necessary. Therefore, under the law applicable in Kosovo on 24 March 1999, the maximum time an individual can spend in pre-trial detention, without being indicted, is six months. In this respect, Article 197 falls within the limits set by Article 24 of the 1992 Constitution of the Federal Republic of Yugoslavia.⁸ A similar provision was in force prior to 1989.⁹

The Impact of Regulations 1999/24 and 25 on the Application of Domestic Law

UNMIK Regulation 1999/24 deems the law applicable in Kosovo to include:

- a. The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and
- b. The law in force in Kosovo on 22 March 1989.

This regulation is deemed to have entered into force as of 10 June 1999.¹⁰

UNMIK Regulation 1999/24 does not purport to have retroactive application previous to 10 June 1999.¹¹ Thus, the application of the law in force between 1989 and 10 June 1999 remains valid for this period in time.

⁷ FRY Code of Criminal Procedure, Article 199 (4/77 and updated June 16, 1993) reads:

- (1) Once the bill of indictment has been presented to the court and until the end of the trial custody may be ordered or terminated only by decision of the panel of judges after hearing the public prosecutor if proceedings are being conducted on his petition.
- (2) At the end of 2 months from the date when the last decision on custody became valid, even in the absence of motions by the principals, the panel shall examine whether the grounds still exist for custody and shall make a decision to extend or terminate custody.
- (3) An appeal against the decision referred to in Paragraphs 1 and 2 of this article shall not stay execution of the decision.
- (4) An appeal is not permitted against the decision of the panel which rejects a proposal to order or to terminate pre-trial custody.

⁸ Constitution of the Federal Republic of Yugoslavia, Article 24(4), reads:

The detention ordered by a first instance court may not exceed three months from the day of arrest. This time limit may be extended for a further three months by order of a higher court. If by the end of this period charges have not been brought, the suspect shall be released.

⁹ See Article 178 of the 1974 Constitution of the Federal Republic of Yugoslavia.

¹⁰ UNMIK Regulation 1999/24, Section 3.

¹¹ In addition, "[a]ll legal acts ... and the legal effects of events which occurred"¹¹, since 10 June 1999, "pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 ...", remain valid according to Section 4 of UNMIK Regulation 1999/24. For example, the law

Articles 197 and 199 in force in 1989 were in fact identical to those in force prior to 10 June 1999 in Kosovo.¹² No amendments were made to these two provisions since the promulgation of the FRY Code of Criminal Procedure in 1977. UNMIK Regulation 1999/24 thus does not change the application of Articles 197 and 199 of the FRY Code of Criminal Procedure.

UNMIK Regulation 1999/26

UNMIK Regulation 1999/26 of 22 December 1999 provides, in Section 1, for the extension of pre-trial detention periods for detainees accused of certain crimes. This procedure must be conducted by the Supreme Court,¹³ and there are limits on the application of the regulation 1999/26.¹⁴ For the purposes of this analysis it is assumed that the Ad Hoc Court of Appeal and Supreme Court are invested with the same powers. Firstly, the regulation and provision for the extension of detention can only be applied for those crimes that carry a maximum pre-trial detention period of six-months. This depends on the gravity of the offence.¹⁵ Secondly, the detention can only be extended by three months, after which a further petition must be made for subsequent extension. Thirdly, it is arguable that the order for the extension of detention must be issued by the Supreme Court before the original detention period expires.

in force as regards criminal matters from 10 June 1999 to 12 December 1999 included the Criminal Code of the Republic of Serbia. The validity of cases tried during this period are specifically provided for by Section 4. The question of whether Regulation 1999/24 is in line with international law regarding retroactive application of criminal offences, i.e. the 1989 law being applied as of 10 June 1999, will not be further addressed in this report.

¹² The monitors have traced back the amendments of the FRY Code of Criminal Procedure since its promulgation in 1977 in order to find the applicable law as of 22 March 1989. One general amendment to the code was found, which dates from 1986. Articles 197 and 199 remain unchanged. It should be pointed out that the official issue of the Gazette, which provides for this amendment contains an error in the Albanian version. The provision for extension of pre-trial detention for three months under Article 197 (2) does not appear. However, this is due to a printing error as found from comparison with the Serbian version and the reading of the text in Albanian.

¹³ Previously called the Ad Hoc Court of Final Appeal.

¹⁴ Section 1 of the Regulation provides:

1. In addition to the six months maximum period of pre-trial custody permitted pursuant to the applicable law, a panel of the Ad Hoc Court of Final Appeal may, in order to ensure the proper administration of justice, extend pre-trial custody by not more than an additional three (3) months, and may subsequently further extend pre-trial custody by not more than an additional three (3) months.
2. The extensions of pre-trial custody provided for in Section 1.1 of the present regulation shall be applicable only where proceedings are conducted for a crime carrying a possible prison sentence of more than five (5) years.
3. A decision on extending pre-trial custody under Section 1.1 of the present regulation shall be made on the recommendation, with supporting reasons, of the investigating judge or the public prosecutor.

¹⁵ See LSMS Report No.3.

One further provision (Section 4) provides that the regulation will apply to criminal proceedings initiated since 10 June 1999.¹⁶ Care should be taken to apply this provision in a way that does not offend international standards against the retroactive application of substantive criminal law.¹⁷

Current situation

Of the eighty-one detainees pointed out as approaching or having passed the deadline for indictment in the December study, this update revealed that eighteen are still in custody and not indicted. The pre-trial detention of seven of these detainees was extended under UNMIK Regulation 1999/24.¹⁸ Thus, eleven detainees from the original study should now have already been released, having been in pre-trial detention for over the specified period without indictment.

Data obtained from the detention facilities in Mitrovica, Pristina, Camp Bondsteel and Prizren, which includes the above mentioned eleven detainees, is shown in the following table.¹⁹

DETENTION FACILITY	NUMBER OF DETAINEES WHO SHOULD HAVE BEEN INDICTED, EXTENDED OR RELEASED BY 15 MARCH 2000	NUMBER OF DETAINEES DUE FOR INDICTEMENT, EXTENSION OR RELEASE BETWEEN 15 MARCH AND 30 APRIL 2000
Mitrovica	8 (6 other detainees had their pre-trial	13 (1 other detainee had his pre-trial

¹⁶ Section 4 (Transitional Provision):

Sections 1 and 2 of the present regulation shall apply also to criminal proceedings initiated between 10 June 1999 and the date of the present regulation.

¹⁷ European Convention of Human Rights (1950);

Article 7:

1. 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

International Covenant on Civil and Political Rights (1976):

Article 15:

1. 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

¹⁸ From examination of the data collected, it appears that one of the extensions is not in accordance with UNMIK Regulation 1999/26, the detention having been extended for more than three months.

¹⁹ Data was provided by UN Civil Administration, UNMIK Police and KFOR. The Legal System Monitoring Section does not exclude the possibility that actual figures differ somewhat from the data shown.

	detention extended pursuant to UNMIK Regulation 1999/26)	detention extended pursuant to UNMIK Regulation 1999/26)
Pristina	4 (including one detainee whose maximum pre-trial detention period permitted was 3 months)	0
Camp Bondsteel	10	6
Prizren	4	6
TOTAL	26	25

From the data available, twenty-six detainees should already have been released as they were not indicted. The monitors will follow-up on the twenty-five other detainees whose detention periods are due to expire before the end of April.²⁰

Availability of compensation

In addition to being released as required by the applicable law, claims for compensation can be made under the Chapter XXXII of the FRY Code of Criminal Procedure for wrongful pre-trial detention.²¹

The procedure to be followed for claiming compensation entails applying firstly to “the body designated by statute” – formerly the Ministry of Justice.²² If the petition is rejected, the injured party may then apply to the competent court.²³

²⁰ The indictment numbers for these detainees are available from the Legal System Monitoring Section. For the sake of brevity, they are not included in this report.

²¹ Article 545(1):

An individual shall also be entitled to compensation for damage in the following cases:

2. if because of an error or illegal act by a body or agency he has been falsely arrested or kept for a prolonged period in custody or in a correctional institution or other institution for confinement;

²² This role may now fall within the mandate of the UN Civil Administration.

²³ FRY Code of Criminal Procedure, Articles 542 and 543.

Recommendations

The Legal System Monitoring Section recommends the following:

- i. That the unlawful detention of any individual is unacceptable in a justice system based on the rule of law.
- ii. That the appropriate remedy in such cases is for the detainee to make an application before the courts for their immediate release from detention and for the court to take prompt and appropriate action.
- iii. An urgent and immediate judicial review of the further twenty-five cases with a view to either releasing these individuals, extending their detention or indicting them. If the judicial authorities possess sufficient information to indict, there is no justification not to do so, but action must be taken immediately.
- iv. Further, the Legal System Monitoring Section recommends the paying of appropriate compensation to those held unlawfully.