



Department of Human Rights and Rule of Law

KOSOVO

**A REVIEW OF THE CRIMINAL JUSTICE SYSTEM
1 SEPTEMBER 2000 – 28 FEBRUARY 2001**

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GLOSSARY

OSCE	Organisation for Security and Cooperation in Europe
UNMIK	United Nations Mission in Kosovo
SRSG	Special Representative to the Secretary-General
LSMS	Legal Systems Monitoring Section
ADoJ	Administrative Department of Justice
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
FRY CPC	Former Republic of Yugoslavia Criminal Procedure Code
FRY CC	Former Republic of Yugoslavia Criminal Code
KPC	Kosovo Penal Code
EJS	Emergency Judicial System
JAC	Joint Advisory Council on Legislative Matters
AJC	Advisory Judicial Commission
NATO	North Atlantic Treaty Organisation
COMKFOR	Commander of Nato-led Kosovo Force
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
KPS	Kosovo Police Service
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CSW	Centres for Social Work

EXECUTIVE SUMMARY

This review is the second public report on the criminal justice system by the *Legal Systems Monitoring Section* (LSMS) of UNMIK Pillar III (*Organisation for Security and Co-operation in Europe* - OSCE). The report covers the period from 1 September 2000 to 28 February 2001.

LSMS has monitored sixty-two of the one hundred and fifty-nine district court trials completed within these dates (38%). Of the completed trials in this period, one hundred eighty-three defendants were convicted and sixty-three were acquitted (75% conviction rate). This report also makes reference to a number of trials that were not completed by 28 February 2001. In totality, in the past 12 months, LSMS has monitored one hundred thirty-nine district court trials (50%). Of all completed trials in this period, three hundred twenty-three defendants were convicted and ninety-two were acquitted (78% conviction rate).

The United Nations Mission in Kosovo (UNMIK) is vested with all executive and legislative powers, which are exercised by the Special Representative of the Secretary-General of the United Nations (SRSG). UNMIK has the mandate to administer the justice system in Kosovo, and the Administrative Department of Justice (ADoJ) is responsible for the overall management of the judicial system and correctional service. The OSCE, as a part of UNMIK, shares the responsibility given by the United Nations Security Council *“to ensure that human rights protection and promotion concerns are addressed through the over-all activities of the mission.”*

This public report provides a comprehensive overview of criminal cases in the district courts from a human rights law perspective. The purpose of this report, in accordance with *UN Security Council Resolution 1244* and outlined in the United Nations Secretary-General’s letter of 12 July 1999 to the UN Security Council, is to assist UNMIK to *“develop mechanisms to ensure that the police, courts, administrative tribunals and other judicial structures [operate] in accordance with international standards of criminal justice and human rights.”* Pursuant to this mandate, the report supports the development of the criminal justice system by identifying concrete problems and providing a strategy to address them in a coherent and comprehensive fashion.

In 1999, UNMIK was confronted with the enormous and difficult task of establishing a criminal justice system that was starting from scratch, with not only a new legal framework, but also new participants. Due to the disenfranchisement of a significant number of the local judiciary for over a ten-year period, nearly all of the current judges and public prosecutors did not have the benefit of using their legal skills or continuing their legal education. Additionally, international human rights laws were disregarded in the local legal framework until the advent of UNMIK. Consequently, until this point, the local judiciary had no exposure to these laws nor other modern European laws and procedures. Moreover, much of the infrastructure of the courts was poor.

Given these obstacles, UNMIK and judicial officials have accomplished much in the past twelve months. The district courts have continued to work through a significant number

of criminal trials. Notwithstanding the problems identified in this report, many criminal cases are being resolved in a just fashion, that is acquittals and convictions that are based on sufficient evidence.

Since the last report, there have been some substantial developments. The greater involvement of international judges and prosecutors has been one of the most significant. In response to the concern of actual or perceived bias against Kosovo Serbs in the criminal justice system, a recent regulation permits parties to request the transfer of a criminal case to a majority international panel. The initial implementation of this regulation, however, has had mixed results. This is mainly due to that lack of a clear policy on which cases merit an international panel which has, in part, led to confusion within the legal community and resentment amongst the judiciary.

In accordance with the concerns of bias, the last report highlighted how the lack of any effective monitoring and disciplinary mechanism has allowed judicial misconduct to pass with relative impunity. On this basis, the judicial inspection unit of the ADoJ was established and is now addressing allegations of judicial and prosecutorial misconduct. As a response to criticisms of the Advisory Judicial Commission, its structure has been under review in order to ensure that there is an effective disciplinary mechanism. Recent cases continue to indicate bias against Kosovo Serbs and such cases require investigation. Two cases of judicial misconduct, highlighted in the last report, *Momcilovic* and *Berisha*, have yet to be addressed.

Despite the emphasis placed on rights of detainees in the past report, there is a continuing absence of any basic *habeas corpus* procedures (by which a detainee may challenge the lawfulness of his detention) and procedures to ensure effective access to defence counsel by detainees. The lack of a *habeas corpus* procedure is particularly concerning in the light of cases of extra-judicial detention by the executive authority and the military presence.

Over the past six months, the majority of the detention centres have come under the control of UN Penal Management. UN Penal Management has made efforts to ensure that juveniles subject to detention are provided the appropriate educational opportunities as well as developing an educational measures institution within the Lilpjan Detention Facility. The use of alternatives to pre-trial detention for juveniles by the courts, however, remains too infrequent. In cases of the detention of the mentally ill, there is a need for a mechanism to ensure the right to appropriate treatment and a fair trial. In this regard, the lack of an appropriate facility for the treatment of mentally ill in pre- and post-trial detention is a serious concern.

The last report highlighted problems with delays in proceedings against detained suspects and defendants. Structural and procedural problems facing the courts continue to hamper their ability to conduct efficient proceedings particularly post-indictment. For example, trials are often delayed because of the failure to conduct forensic testing, assess the defendant's mental capacity or summons witnesses. In many cases, the courts have still not been provided the tools necessary to administer justice fairly and effectively. The

continuing problems with proper service of summons are one example. Moreover, policing has frequently been seen to be ineffective and inconsistent, particularly in the gathering of evidence. The absence of a basic forensic capacity has led to a failure in the effective investigation and prosecution of serious crimes.

The general lack of victim/witness support, assistance services and protection mechanisms have been detrimental to court proceedings. The past report focused on these issues in the context of cases of sexual violence. These problems continue in cases of sexual violence (including trafficking-related offences) and cases of intra-familial violence (including child abuse). The primary institution responsible for juveniles within the criminal justice system, or those who have been subject of abuse, are the Centres for Social Work under the Department of Health and Social Welfare. This institution is intended to play a key role in all cases involving domestic violence and juveniles in conflict with the law. Without this institution functioning, the police and courts have not been able to appropriately handle juvenile criminal cases and cases involving intra-familial violence.

Unlike other civil law jurisdictions, this inquisitorial system needs to develop in order to meet the challenges of international and regional legal arrangements. There remain continuing problems in criminal proceedings with the inadequacy of the questioning of witnesses, the admission of irrelevant and inadmissible evidence, inaccuracy of the investigation and trial records, and the need for clarification in judicial fact-finding. Similarly, defense counsel continue to play a passive role in the representation of their clients. To address these concerns mandatory training, which focuses on the development of essential legal skills, is necessary.

During the past months, UNMIK has reacted with determination to many of the continuing deficiencies in the Kosovo legal system. Indeed, in developing a justice system like this one, troubleshooting becomes a daily necessity. In addition, however, a systematic, strategic approach needs to be developed to address the underlying issues.

Moreover, there is an unnecessary perceived tension between international human rights laws and the need to ensure law and order. The dilemma currently facing the judicial system is not one of a conflict between security and justice, but rather is a stage in the ongoing challenge to innovate procedures and policies so as to address the real needs of the courts and law enforcement agencies – whilst guaranteeing defendants due process and consistency of treatment. Seeking to place limitations upon applicable international human rights laws is unlikely to resolve the problems in the judicial system, nor effectively address existing security concerns. Creating a comprehensive, co-ordinated and clearly planned strategy to address the immediate and long-term needs of the justice system, whilst guaranteeing due process, continues to represent a critical challenge for UNMIK.

This report would not have been possible without the assistance of judicial personnel and legal professionals. OSCE would like to express its gratitude to court staff who have

facilitated the LSMS monitors in performing their tasks. OSCE would also like to express its appreciation to detention centre commanders, UNMIK police and KFOR.

SECTION 1: MONITORING

I. The Mandate of the Legal Systems Monitoring Section

In *UN Security Council Resolution 1244*, the UN Security Council authorised the UN Secretary-General to establish an international civil presence in Kosovo that would provide an interim administration. One of the main responsibilities of the international presence was “protecting and promoting human rights.” (Para. 11 (j))

The UN Secretary-General, in his report to the UN Security Council of 12 July 1999, assigned the lead role of institution-building within UNMIK to the OSCE and indicated that one of the tasks of the Institution-building Pillar (Pillar III) shall include human rights monitoring and capacity building.

The Report of the UN Secretary-General to the UN Security Council, 12 July 1999, instructed UNMIK to develop co-ordinated mechanisms in order to facilitate monitoring of the respect of human rights and the due functioning of the judicial system and added that reporting must be carried out in a co-ordinated manner in order to facilitate the response capacity. In particular:

“UNMIK will have a core of human rights monitors and advisors who will have *unhindered access* to all parts of Kosovo to investigate human rights abuses and to ensure that human rights protection and promotion concerns are addressed through the overall activities of the mission. Human rights monitors will, through the Deputy Special Representative for Institution-building, report their findings to the Special Representative. The findings of the human rights monitors will be made public regularly and will be shared, as appropriate, with United Nations human rights mechanisms, in consultation with the Office of the United Nations High Commissioner for Human Rights. UNMIK will provide co-ordinated reporting and response capacity.” (Para. 87)

A Letter of Agreement, dated 19 July 1999, between the Under-Secretary-General for Peacekeeping Operations of the United Nations and the Representative of the Chairman-in-Office of the OSCE, stated that the Pillar III, OSCE, should develop mechanisms to ensure that the courts, administrative tribunals and other judicial structures operate in accordance with international standards of criminal justice and human rights. Moreover, pursuant to *Regulation 2000/15 ‘On the Establishment of the Administrative Department of Justice’*, dated 21 March 2000, confirmation was received from the Administrative Department of Justice, that the OSCE is an organisation responsible for the independent monitoring of the judicial system and correctional service.

II. Relationship to other Pillars

The OSCE Department of Human Rights and Rule of Law, a part of the Institution-building Pillar, works in close co-operation with UN organisations such as OHCHR, UNHCR and UNICEF. The Department is a key player on both the Task Force on

Minorities, established by UNHCR, and the UNICEF-led Task Force on Juvenile Justice. The Department also co-operates with both local and international organisations such as the Council of Europe, the International Committee of the Red Cross (ICRC) and the American Bar Association's Central and Eastern European Law Initiative (ABA-CEELI).

While the Rule of Law Division of that Department actively supports the Administrative Department of Justice in the development of the judiciary, its Human Rights Division has a unique position in relation to the Civil Administration (Pillar II). Although structurally part of UNMIK, its mandate requires a quasi-independent role to monitor the observation of human rights in Kosovo, including a judicial system that is administered by Pillar II.

As a part of Pillar III and UNMIK as a whole, the OSCE legal systems monitoring mandate includes accurate and immediate reporting within UNMIK on:

- i. current statistics relating to the criminal justice system,
- ii. systemic violations of international law, and
- iii. gross violations of fair trial standards in individual cases that must be immediately remedied.

Accordingly, LSMS, as part of the Human Rights Division, maintains consistent and co-operative relationships with other Pillars and international agencies.¹ It receives requests from the ADoJ and the SRSG's Office, for information on various issues relating to the state of the criminal justice system, such as the status of on-going cases, juveniles in pre-trial detention, and persons indicted. Systematic violations, observed trends, individual problems and issues identified by LSMS are communicated to other departments and agencies within UNMIK. Many of these departments and agencies are charged with the responsibility of finding concrete solutions and remedies to critical problems (e.g. judicial-support needs, security issues, judicial misconduct and the training of, *inter alia*, legal professionals).

III. Right to a Fair Trial

International human rights standards are a part of the applicable law through, *inter alia*, *Regulation 1999/24*, which obliges those holding public office in Kosovo to uphold internationally recognised human rights standards. In addition, the Federal Republic of Yugoslavia is a party to numerous human rights instruments, including the *International Covenant on Civil and Political Rights (ICCPR)*, which, in turn, obliges any governing entity in the territory to ensure the people of Kosovo these rights.

LSMS analyses domestic law and practice for its conformity with international human rights standards for fairness in criminal proceedings. The international standards are detailed, *inter alia*, in Articles 9, 10, 14 of the ICCPR and Articles 5, 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* and other UN non-treaty standards. Domestic law, primarily the *FRY Code of Criminal Procedure (FRY CPC)* and *Kosovo Penal Code (KPC)*, form the basis for any analysis by LSMS. 'Fair trial' analysis under international human rights law starts from the moment

that a person is arrested and/or detained by the authorities, until the final disposition in the case.

LSMS monitors cases that proceed through the criminal justice system, from the moment of arrest and/or detention until trial and appeal. LSMS monitors cases involving serious crimes, the majority of which are designated as priority cases by LSMS, under the jurisdiction of the district courts. Some municipal or minor offences court cases may be monitored if they involve priority issues, such as cases involving minorities, juveniles and women.

Before attending a formal trial proceeding, and where practicable, LSMS monitors' investigate the case to ensure they are able to address all the issues regarding pre-trial rights. This investigation forms the basis for the LSMS monitor's analysis of the trial proceedings. LSMS monitors collect this information by reviewing the file, if accessible; and, interviewing the suspect/detainee, police/KFOR, defence lawyer, public prosecutor, investigating judge and others. LSMS monitors attend trials and report on the practices in the pre-trial and trial proceedings in the light of domestic and international standards.

IV. The Priority Cases

Although the priorities for the past twelve months have remained the same, LSMS deepened its coverage within those priorities. Issues involving access to, and effectiveness of, counsel as well as prosecutorial and judicial misconduct are covered in the context of case monitoring. This is an on-going process since LSMS responds to the issues that arise as the legal system develops:

- i. War Crimes
- ii. Ethnically-motivated crime
- iii. Politically-motivated crime
- iv. The Treatment of Juveniles
- v. Victims of Sexual Violence including victims of domestic violence and trafficked women
- vi. The Treatment of the Mentally-ill
- vii. Detention

LSMS monitors detention centres as they relate to “access to justice” issues. LSMS does not monitor the conditions of detention or ill-treatment since these are covered by OSCE human rights officers and the *ICRC*.

¹ i.e. OHCHR, UNHCR, UNICEF and ICRC.

DISTRICT COURT DISPOSITIONS (1 SEPTEMBER 2000- 28 FEBRUARY 2001)

	Trials	Monitored	Guilty	Not Guilty	Indict. Dropped	Ethnicity
Pristina/Prishtinë 64 defendants	49	24	46	10	8	Defendants: All K/A except 3 K/S. Victims: All K/A except 3 K/S
Gjilan/Gnjilane 47 defendants	36	7	30	13	4	Defendants: 33 K/A, 3 K/S, 1 K/R Victims: All K/A except 5 K/A
Prizren 34 defendants *	17	11	25	9	1	Defendants: All K/A, except 1 K/S, 2 K/M Victims: All K/A except 2 K/M
Pec/Peje 66 defendants *	36	9	51	29	None	Defendants: 62 K/A, 1 K/S, 2 Alb.Nationality. Victims: All K/A
Mitrovice/ Mitrovica 32 defendants *	21	11	31	2	None	Defendants: 27 K/A, 5 K/S Victims: All K/A except 5 K/S, 2 Internationals

* includes defendants indicted for more than one offence.

PR: Murder: 15 Convictions, 2 Acquittals; **Att. Murder:** 2 Convictions, 1 Acquittal; **Rape:** 8 Convictions, 3 Acquittals, 2 Indictments Dropped; **Attempted Rape:** 1 Conviction, 2 Acquittals; **Robbery:** 4 Convictions; **Att. Robbery:** 3 Convictions; **Narcotics:** 1 Conviction, 4 Indictments Dropped; **Gen. Danger:** 1 Conviction; **Weapons:** 9 Convictions, 1 Acquittal, 2 Indictments Dropped; **Plunder:** 1 Acquittal; **Counterfeiting:** 1 Conviction; **Grave Bodily Injury:** 1 Conviction.

GN: War Crimes: 1 Conviction; **Murder:** 9 convictions, 5 acquittals; **Rape:** 1 Acquittal; **Narcotics:** 12 convictions, 3 Acquittals; **Weapons:** 8 Convictions, 4 Indictments Dropped; **Producing Danger:** 1 Acquittal; **Coercion:** 2 Acquittals; **Theft:** 1 Acquittal.

PZ: Murder: 5 Convictions, 3 Acquittals; **Att. Murder:** 2 Convictions, 1 Acquittal; **Att. Aggravated Theft:** 2 Convictions; **Rape:** 1 Indictment Dropped; **Weapons:** 6 Convictions; **Endangering Security:** 1 Conviction; **Falsification of Documents:** 1 Conviction; **Light Bodily Injury:** 1 Conviction; **General Danger:** 1 Acquittal; **Aiding Robbery:** 6 Convictions, 4 Acquittals; **Concealment:** 1 Conviction.

PE: Murder: 3 Convictions, 1 Acquittal; **Att. Murder:** 2 Convictions; **Unnatural Sexual Acts:** 1 Conviction; **Rape:** 1 Acquittal; **Att. Rape:** 1 Acquittal; **Robbery:** 5 Convictions, 2 Acquittals; **Att. Robbery:** 2 Convictions; **Grave Theft:** 1 Convictions, 3 Acquittals; **Grave Body Injury:** 1 Conviction; **Light Body Injury:** 4 Convictions; **Theft:** 1 Conviction; **Counterfeiting:** 2 Convictions; **Weapons:** 25 Convictions, 21 Acquittals; **Inter-mediating Prostitution:** 1 Conviction; **Attempted Kidnapping:** 1 Conviction; **Disturbing Official Person in Performing Official Duties:** 1 Conviction.

MI: Genocide: 1 Conviction; **War Crimes:** 1 Conviction; **Murder:** 4 Convictions: **Murder Complicity** 1 Conviction, 1 Acquittal; **Att. Murder:** 3 Convictions; **Rape:** 7 Convictions; **Kidnapping:** 1 Conviction; **Kidnapping Complicity:** 2 Convictions; **Sexual intercourse with a person under 14:** 1 Conviction; **Attack against Official person:** 2 Convictions; **Weapons:** 3 Convictions, 1 Acquittal; **Narcotics:** 1 Conviction; **Robbery:** 1 Conviction; **Inter-mediating Prostitution:** 3 Convictions.

A. Average Length of Sentence:

- i. Murder:**
PR: 7 years 3 months; **GN:** 9 years 8 months; **PZ:** 11 years 8 months;
PE: 9 years; **MI:** 7 years 6 months;
- ii. Rape:**
PR: 4 years; **MI:** 1 year 3 months;
- iii. Robbery:**
PR: 1 year; **PE:** 3 years 6 months;
- iv. Weapons Possession:***
PR: 9 months; **PZ:** 5 months; **GN:** 12 months; **PE:** 12 months

*Majority of ethnic-Albanian defendants received suspended sentences

B. Kosovo Supreme Court

Appeals filed

32 Appeals filed

16 Verdicts of first instance courts reversed:

4 verdicts reversed on appeals by public prosecutor
13 verdicts reversed on appeals by defence counsel
(one appeal was filed by both parties)

11 Verdicts of first instance courts confirmed

3 Verdicts of first instance court amended:

3 appeals filed by defence counsel were approved with the resulting conviction or sentence amended
(deciding on length of punishment and legal qualification of the offence).

1 appeal of public prosecutor was withdrawn as “not permitted or terminated.”

1 appeal of defence counsel was returned to the first instance court for re-filing.

C. Other Statistics

- i.** For this Report LSMS interviewed 118 Defendants;
- ii.** LSMS monitored 62 of the 159 completed District Court trials (38%);
- iii.** 159 trials involved 242 defendants;
- iv.** 183 defendants were convicted (75% conviction rate);
- v.** 63 defendants acquitted;
- vi.** 13 indictments dropped;
- vii.** Minorities: **Defendants:** 13 Kosovo Serb, 1 Kosovo Roma, 2 Kosovo Muslim (all were convicted except two K/S). **Victims:** 13 Kosovo Serb, 2 Kosovo Muslims, 2 Internationals.

SECTION 2: THE APPLICABLE LAW

I. Significant developments in the Applicable Law

In the six months covered by this review there have been several significant developments in the applicable law, some of which are outlined below.

UNMIK Regulation 2000/64, On Assignment of International Judges and Prosecutors and/or Change of Venue

UNMIK Regulation 2000/64 primarily seeks to develop a system for the allocation of international judges and prosecutors to cases and to address the need for majority international judging panels to alleviate concerns as to bias. The Regulation envisages that authorised parties, including defence counsel, may apply to ADoJ for a case to be allocated to an international prosecutor and a panel with a majority of international judges. The final decision on allocation is made by the SRSG, after recommendations by ADoJ.

LSMS welcomes the regulation as an effective tool to alleviate concerns as to bias in the judiciary.

UNMIK Regulation 2000/62 On the Exclusion of Persons for a limited Duration to Secure Public Peace, Safety and Order

UNMIK Regulation 2000/62 was enacted on 30 November 2000. The Regulation grants relevant law enforcement authorities the power to issue thirty day exclusion orders where there are “grounds to suspect that...a person is or has been involved in the commission, preparation or instigation of acts of violence which may affect public peace and order within or beyond the territory of Kosovo.”

The Regulation goes on to provide persons subject to an order the power to initiate an adversarial review of exclusion orders before an international judge. LSMS welcomes the introduction of judicial review in the regulation and would urge a similar provision in an amended *Regulation 1999/26*.

UNMIK Regulation 2001/1 On the Prohibition of Trials In Absentia for Serious Violations of International Humanitarian Law

UNMIK Regulation 2001/1 provides for protection against trials *in absentia* that goes further than many jurisdictions. The Regulation is also welcomed because it will ensure the allocation of scarce resources to on-going cases where defendants are in detention.

UNMIK Regulation 2001/2, Amending UNMIK Regulation 2000/6 as amended, On the Appointment and Removal from Office of International Judges and International Prosecutors

Enacted on 12 January 2001, *UNMIK Regulation 2001/2* expands the scope of cases in which an international prosecutor may intervene. Utilising the provisions of the FRY CPC on the rights to conduct private prosecutions, the Regulation allows international prosecutors to continue prosecutions where the public prosecutor may have dropped the case or decided that there are no grounds for prosecution. The expansion of powers in this way is welcomed, particularly in that it provides an extra safeguard against cases being dropped through bias. In relation to cases abandoned prior to the enactment of the Regulation, the international prosecutor may only resume the case pursuant to the Regulation within thirty days of its enactment.

UNMIK Regulation 2001/4 On the Prohibition of Trafficking in Persons in Kosovo

UNMIK Regulation 2001/4 criminalises the activity or organisation of trafficking in persons, carrying a possible sentence of between two and twelve years imprisonment. Where victims are less than eighteen years old there is an aggravated maximum penalty of fifteen years imprisonment. Persons who knowingly use the sexual services of a victim of trafficking also face imprisonment for up to five years.

The Regulation goes further to make special provisions relating to investigations and the confiscation of property or the closure of businesses that relate to trafficking. A prohibition is placed on the admission of evidence of prior bad character or personal history of the alleged victim. Such evidence may, however, be admitted where relevant and probative following an *in camera* hearing.

In order to deal with those cases where victims of trafficking are being deported, the Regulation expressly states that where the defendant is a victim of trafficking, convictions for prostitution or illegal entry shall not be a ground for deportation.

II. Recurring Issues from the Last Review

One of the central problems in relation to the applicable law identified in the first LSMS review was the lack of clarity as to which law to apply and the manner in which to apply it.

Stemming from a growing controversy as to the supremacy of human rights laws, LSMS recommended that the SRSG issue a written instruction to the effect that human rights laws are supreme over all other laws, that judges and prosecutors should not apply conflicting provisions of the domestic laws and that human rights laws could be invoked to fill gaps in the domestic laws. Following publication, this recommendation was endorsed by the ADoJ and the local and international judiciary. At the time of writing this report no clarification has been issued.

The need for official clarification as to the application of the law is not, in fact, addressed at the outset when new laws, called regulations, are enacted or changes made to the existing law. Regulations frequently add further confusion to the applicable law, either through their lack of contextualisation or due to the fact that some regulations are themselves in breach of human rights provisions.

These problems are, at least in part, symptomatic of the legislative process. The drafting and consultation process for new laws often continues to take place in an *ad hoc* manner. In particular, there is no requirement for new laws to carry with them an explanation of their object and purpose, or guidance on their application. The local judiciary and other key legal groups are frequently not consulted on the passage of new laws, nor is there an effective process of public information dissemination. Draft new laws do not systematically receive a review of their compatibility with human right standards from human rights experts or from human rights components of UNMIK.¹

In the context of the Kosovo justice system, where international actors are involved in the domestic judicial system, it is vital that laws are translated quickly. Once passed, however, the laws are not immediately translated and accessible hampering their implementation. According to information available to LSMS at the time of writing this report, none of the UNMIK Regulations passed in 2001 have been officially translated into Albanian and/or Serbian. Additionally, there have been concerns about the quality of the official translations of regulations, highlighting the need for qualified interpreters with the requisite knowledge of legal terminology.

The Joint Advisory Council on Legislative Matters (JAC) involves a consultative and collaborative process between international (UN, OSCE and Council of Europe) and local jurists on long-term legal reform. The JAC has been involved in an extensive review and revision of the criminal procedure and substantive criminal codes. The revised and modernised criminal code is near to completion. The JAC has recently held a conference reviewing their work, in which one of the issues discussed was ways to enhance wider participation in the legal reform process.

The JAC, however, is not systematically consulted on draft regulations. There is no requirement that the SRSG's Office of the Legal Advisor consult the JAC as well as any other aspect of the mission when drafting these laws. It has been stated that regulations of a more "interventionist" character will often not warrant review by the JAC, as their content will as a rule, be much more of a political than of a legal nature. However, there are also numerous examples of "legal reform" regulations that were not submitted to the JAC for review.

A Continuing Lack of *Habeas Corpus*

The lack of any effective mechanism by which to challenge the lawfulness of orders to detain, often referred to as a *habeas corpus* mechanism, continues to represent a basic, but critical omission in the applicable law. Express provision is made for such a mechanism in Article 5(4) ECHR and 9(4) ICCPR, the rationale being to ensure that

detainees can challenge the lawfulness of their detention and review the grounds for their detention where there has been a significant change in circumstances. *All* orders to detain, including executive orders and “COMKFOR “holds,” *must* be subject to such review. Regulation 64 panels, with a majority international judicial presence, alleviate, at least to some extent, concerns over judicial bias.

Despite the fundamental nature of such procedure, the applicable law still does not contain any mechanism for *habeas corpus* review and detainees are unable to initiate a timely examination of the need or lawfulness of their continued detention. The problem of the lack of *habeas corpus* procedures has also been perpetuated by UNMIK Regulation 1999/26. LSMS Report Number 6, *Extension of Custody Time Limits and the Rights of detainees: The Unlawfulness of Regulation 1999/26*, dated 29 April 2000, pointed out that UNMIK Regulation 1999/26 was in breach of human rights law in that it failed to allow for a review of detention orders. This issue was echoed in the first LSMS review. Despite the passage of almost twelve months since the first report, *Regulation 1999/26* has not been amended.

A Continuing Lack of Access to Effective Defence Counsel

Incompatible provisions of the domestic law and a failure to apply international human rights laws, have played a significant role in reducing the adequacy and effectiveness of the defence. Court-appointed defence counsel continue to be appointed at the first investigative hearing, defendants having already been questioned by law enforcement agencies in the absence of legal representation. The information gathered during such interviews forms the basis for deciding whether or not to detain the suspect, initiate an investigation and uncover other evidence to be used in the investigation. Moreover, despite the lack of clear legal authority, cases show that information in police files is often used at trial.

Judges continue to apply provisions of the FRY CPC that are in breach of human rights laws and have a significant effect on the ability of the defendant to prepare his defence. Article 74 FRY CPC allows the investigating judge to monitor and restrict a defendant’s communications with his lawyer. Despite LSMS having highlighted this provision in its first report, Article 74 FRY CPC continues to be applied. In a survey of 41 detainees in Gjilan/Gnjilane, of the 26 that responded to the question, 13 stated that they were not able to communicate privately with counsel. Most indicated that a guard was normally present during the discussions. In Pristina/Prishtine 10 of the 28 detainees stated that they did not have private communications. In Mitrovica/Mitrovice, prior to indictment, all communication is court-monitored. Time restrictions are also placed upon defence counsel visits, often restricting conversations to 5 – 10 minutes. In Pec/Peje and Mitrovica/Mitrovice, all visits require court authorisation.

On 28 September 2000, the ADoJ has issued Circular Justice/2000/17 *On the extension of the Conditions for Court-Appointed Defence Counsel*. The circular states that where a person is charged with an offence which carries a penalty of six months or more then they shall be entitled to defence counsel from the first examination. For offences carrying a

penalty of six months or less, the defendant has the right to counsel where the interests of justice so demand. The circular does not go so far as to deal with access to counsel prior to the first hearing, including during police interviews. ADoJ inform LSMS that such provisions are more suitable for inclusion in a regulation.

The issues relating to access to an effective defence are not new and were in fact highlighted in LSMS Reports Number 7 and 8 *On Access to Effective Counsel*, dated 23 May 2000 and 20 July 2000.² Progress in addressing the various issues identified in the reports has, however, been slow. A working group on “access” was established in August 2000 with representation from OSCE, SRSB, UN Penal Management, UNICEF, OHCHR and the ADoJ. A package of draft laws was presented to the working group in October 2000, addressing basic issues relating to access to defence counsel on arrest and detention, private communications and access to relevant court documents. Following discussions amongst the working group, a final draft was prepared, dated 1 December 2000. This package of laws has not been implemented and it appears that a further re-drafting process has been undertaken by the ADoJ. The new draft seeks to reduce the scope of the rights provided to the defendant, including time restrictions on private communications and the role of defence counsel during interrogations. LSMS is informed that a final draft is with the Office of the Legal Advisor.

III. Working Group on Implementing LSMS First Criminal Justice Review

In response to the first LSMS review of the justice system, the OSCE and ADoJ established a working group to study the recommendations and propose appropriate action to relevant authorities where required. Whilst the working group is not, in itself, responsible for legislative and other legal reforms, the initiative is strongly supported, particularly in the light of the fact that key implementing agencies and actors are brought into the consultative process.

As of February 2001, the work of the joint group has included, amongst other things:

- A proposed review of the provisions of the FRY CPC for inconsistency with international human rights laws. To-date a “Desk Reference” has been produced referencing domestic law and international standards.
- An Administrative Directive/clarification of the supremacy of human rights laws has been drafted. The working group is currently discussing differing approaches as to how to present the concepts.
- The Working Group recommended the establishment of a focus group to consider the way forward on the question of *habeas corpus*. ADoJ inform LSMS that there is a difference of opinion on what approach to take.
- Instructions for detention commanders on the lawfulness of detention have been produced. In addition, UN Penal Management has also proposed to draft procedures to ensure that persons are not detained unlawfully.

- The ADoJ produced Circular Justice/2000/27, dated 19 December 2000, which reminds judges that all decisions on detention must be made on the basis of a fully reasoned written decision.

Other developments:

- Steps have been taken to establish a “Criminal Defence Resource Centre,” following discussion with relevant international and local organisations and actors, particularly the Kosovo Chamber of Advocates. The office is intended to act as a training and resource body, with the capacity to offer direct assistance in cases when required.
- A draft Regulation on the prohibition of domestic violence was presented to the JAC. The draft aims to ensure prosecution and a multi-agency approach to issues of domestic violence. The JAC is presently looking at ways in which to develop the disparate issues raised.
- The Kosovo Judicial Institute held induction courses for new judges and prosecutors in November 2000. These seminars included reference to Articles 5 and 6 of the ECHR. Further training on the FRY CPC took place for local and international judges and prosecutors in March 2001.
- Regulation 2001/8 has established the Kosovo Judicial Council and Prosecutorial Council, which will replace the Advisory Judicial Commission. This nine member council “shall include both local and international members.”
- A working group is presently reviewing the domestic law regarding the detention of the mentally ill. It has consulted various international health and legal experts and proposes to include a patients’ bill of rights in a draft regulation.
- A working group has been established on the protection of victims and witnesses.

¹ For example, the SRSG’s Human Rights and Community Affairs Unit do not systematically review new laws.

² LSMS Report 6, *Access to Effective Counsel: Arrest to the First Detention Hearing* (23 May 2000), LSMS Report 8, *Access to Effective Counsel: The Investigative Hearings to Indictment* (20 July 2000).

SECTION 3: DETENTION

Introduction

The prohibition of arbitrary arrest and detention is a fundamental part of international human rights law. As discussed in the section on applicable law, despite the substantial emphasis placed on arbitrary detention issues in the past report, few steps have been taken by UNMIK to address the widespread problem. The lack of a *habeas corpus* mechanism is particularly concerning, as cases involving the use of extra-judicial detention and the violation of lawful custody time limits have increased over the past 6 months. In addition, some cases of detainees continue to be subject to serious delays mainly due to the administration of the courts. In such cases, the courts need to increase efforts to ensure that cases are treated with urgency. In cases where there is a use of extra-judicial detention by the executive or the military, particular urgency in the proceedings should be required.

The detention of the mentally-ill remains a serious concern as there is no appropriate facility for the treatment and detention of such individuals involved in the criminal justice system. The lack of a facility leaves the courts and the regular detention centres with few options. There are now psychiatric experts visiting detention facilities, but no mechanism exists to ensure that, where appropriate, the diagnoses and mental state of detainees is communicated to the courts. The law regarding security measures requires reform so that mentally-ill individuals are not subject to indefinite detention.

A significant amount of juveniles are involved in serious criminal proceedings. Juveniles continue to be deprived of their rights whilst in police custody. Without a functioning social institution for the welfare and protection of children, courts appear reluctant to order the numerous alternative measures to detention provided for the law. In cases where juveniles need protection or removal from their home environment, there is presently no such facility for their placement other than the detention centre and an “educational measure institution.” Efforts to ensure that juveniles are treated in line with international human rights standards regarding juvenile justice and that juvenile crime prevention is effective are presently hampered by the lack of a functioning social protection and welfare institution for children.

I. Extra-Judicial Detention

The executive authority, SRSG, and the military presence, KFOR, continue to detain individuals outside judicial proceedings. The cases of extra-judicial detention discussed in this report involve the use of the executive and military authority to detain persons who have been released by a judicial authority, or who should have been released as their cases were not in the judicial system. Both the ECHR and the ICCPR provide that no one should be deprived of their liberty except on such grounds and in accordance with procedures established by law. Moreover, anyone deprived of their liberty should have the right to challenge the lawfulness of their detention in a court of law. In cases where a court finds that an individual has been unlawfully detained, that person has an

enforceable right to compensation. In cases of extra-judicial detentions, international human rights law requirements are not being met.

Executive Orders to Detain

LSMS is aware that the SRSG on an extraordinary basis, when all other legal avenues have been exhausted exercises his executive authority to detain individuals.

LSMS is informed that the guidelines followed in connection with the issuance of executive orders to detain are as follows:

First, the *merits of the case* must be strong enough to warrant executive intervention. This requires information or evidence to support a decision by the executive that an individual should be detained for particular criminal conduct.

Second, there are grounds for an assessment that the release of a person from custody would pose a *menace* to public security taking into account the serious nature of the alleged crime.

And third, there is a basis for the belief that executive intervention is necessary to correct or prevent *manipulation* in the prosecution of the case by judicial or other officials, leading to miscarriages of justice, due to bias, misconduct, or security concerns.

The orders do not provide more than a general basis for the decision and this is insufficient.

There is a legitimate concern that there is no mechanism for a suspect or his defence lawyer to challenge the grounds for issuance of an executive order. At present, in fact, the issuance of executive orders is arbitrary without any reasoning or standards behind them. It is a fundamental aspect of international human rights law that a person deprived of their liberty be able to challenge the lawfulness of his detention. Judicial review of executive detentions would ensure that they are not arbitrary.

Recently, in the case of three suspects, executive orders to detain were issued despite the decision of an all-international judge panel, in a case prosecuted by an international, that there was insufficient basis to detain these individuals. In these cases, it is not possible to know how the third prong of the test, the potential or threat of judicial manipulation of the case, was satisfied.

Clearly, exceptional use of an executive order to detain should not be used for indefinite periods or undefined legally justified objectives. The case in question ultimately must be able to proceed through the judicial system. This was a concern in the case of a detainee who was subject to executive detention despite the fact the competent district court, including an international judge, and the Supreme Court, including an international judge, had confirmed that there was insufficient evidence for the international prosecutor to resume the case. *Regulation 2001/2* was promulgated, at least in part, to modify the

applicable law to allow for the resumption of the case against the detainee, despite these decisions.

An executive order to detain pre-trial, while a lawful police or court investigation is ongoing, provides that a suspect will appear at trial, if indicted, and will not be able to commit any crimes during this period. Ultimately, however, an independent court will still decide on the guilt or innocence of the detainee and sentence him or order his release accordingly. For example, in one case, an executive order was issued overturning the Supreme Court's decision, that included an international judge, to release.

In light of the fact that the intrusive and extraordinary nature of executive orders to detain is clearly recognized, it would appear that cases of persons subject to such orders should be processed with utmost urgency. The courts and the police involved in the investigation of such cases should be under a clear duty to treat them with utmost priority so that the use of an executive order is for the shortest time necessary to bring the case on to a judicial track. This is a concern in one case where a request under *Regulation 2001/2* to re-open the investigation was successful but the basis of his detention was not resolved. Although the person has been detained for 10 months, the majority of this time under the extraordinary measure of executive detention, he has not been indicted by the international prosecutor.

Moreover, due to the nature of such orders, their use should be closely monitored and kept under regular review. This is a concern as in the case of one detainee, an executive order to detain expired on 12 February 2001 and no new executive order was issued. This detainee was not released despite the fact that he was not subject to any detention order. As a result, this detainee was held 8 days without any basis.

In addition, when executive orders are issued, all the relevant information concerning the decision should be provided to the individual subject to them and to their defence lawyers. This includes the decision itself. This has not happened in the majority of the cases. The knowledge and possession of all relevant information in the order, and the reasoned basis for its issuance in the specific case is essential for the detainee and his defence counsel to be able to challenge it.

COMKFOR holds

In the last report, LSMS stated that KFOR's practice of detaining individuals despite a lawful order to release by a judge is a clear violation of the prohibition on arbitrary detention. Once KFOR places persons within the civilian criminal justice system, they are required to abide by the decisions of the judiciary made in accordance with the procedure prescribed by law. *UN Resolution 1244* does not provide KFOR with the power to violate international human rights standards. In fact, as a military force under the auspices of the United Nations they are obligated to uphold UN standards.

The use of COMKFOR holds continues, however, in cases where a judge has lawfully ordered persons released. Eight persons, one a juvenile approximately 15 years old, are

still detained by KFOR even though an investigating judge ordered their release. As these persons are detained despite an order for their release, they are currently subject to arbitrary detention by KFOR.

Obilic/Obiliq 9

In one case, a member of the executive, under the auspices of the SRSG, verbally ordered the detention of persons outside the judicial system.

On 27 November 2000, nine suspects were arrested on suspicion of murder and detained in Pristina/Prishtine Detention Centre. Two days after, the police file was given to an international prosecutor. None of these detainees were brought before a judicial authority within 24 or 72 hours of their arrest in violation of the law. Based on his assessment of the evidence, the international prosecutor did not request the court to initiate an investigation and for further detention of the suspects.

Seven days after their arrest, four of the nine detainees, who were juveniles, were released. By 5 December 2000, the remaining five males were still subject to detention, but they had not been heard by an investigating judge. That day, the Police Commissioner sent a memo to the Detention Centre ordering their release. They were not released since according to an UNMIK police memo, the Principal Deputy of the SRSG had ordered that one of the detainees remain in custody for “a medical and psychiatric assessment” and that the other detainees should be released on 7 December 2000.

After the detainees were released they were given *Regulation 2000/62* exclusion orders. A UN official stated to LSMS that these exclusion orders were signed by the Principal Deputy, despite the fact that the law provides that only law enforcement authorities (KFOR and UNMIK police) can authorise such orders. This case illustrates an inappropriate executive interference with law enforcement authority and the independence of the courts.

II. Custody Time Limits and Extended Periods of Pre-trial Detention

The prohibition on arbitrary detention involves, in part, the obligation on authorities to ensure that a person is not detained longer than the period mandated by the law. The law in Kosovo sets out these custody time limits as follows: first, every detainee must be brought before a judge within 24 hours after their initial arrest (or 72 hours in exceptional circumstances); second, adult suspects cannot be detained for longer than 12 months without being indicted and; third, if held in pre-trial detention, they are entitled to trial within a reasonable time or release. The domestic law requires judges to treat cases where the defendant is subject to pre-trial detention with utmost urgency.

(a) Right to be brought promptly in front of a judicial authority

In the last report, LSMS discussed in detail both the domestic and international law concerning this right and highlighted that the law is almost universally ignored in

Kosovo. The domestic law requires that law enforcement authorities ensure that a detainee is brought before an investigating judge within 24 hours of his arrest. However, the exceptional provisions of the domestic law, in particular Article 196 of the FRY CPC, which allow the police to detain a person for 72 hours before bringing them in front of a judicial authority has become the general rule. This is particularly concerning as in December 2000, the Yugoslav Constitutional Court declared Article 196 of the FRY CPC unconstitutional as it permits detention ordered by law enforcement officials rather than the court.

Incoming UNMIK police officers are now trained explicitly on the 24-hour police custody limit and ADoJ has stated that they have set up a roster of judges to be permanently on call for this reason. However, despite the fact that the UNMIK Police Commissioner issued a memorandum outlining the law on this point, the problem continues.

Additionally, LSMS has observed that even the “72 hour rule” continues to be violated in many cases. Cases described in the last report demonstrated that law enforcement authorities were failing to bring detainees in front of a judicial authority within 72 hours often on the basis of verbal orders to extend detention from public prosecutors and investigating judges. Such violations of the applicable law remain. For example, in Prizren, LSMS has documented ten such cases where persons were held beyond 72 hours, in most cases 5 days, in the period from December to February 2001. In fact, the detention centre in Prizren confirmed to LSMS that the practice of exceeding the 72 hours by orders of judges or public prosecutors continues regularly and has “always occurred.” Although it was recommended in the last report that detention centres be instructed to release persons not subject to a lawful order to detain, such a policy was only implemented in March 2001. The policy states that any so-called category A prisoners cannot be released unless ADoJ consents.

(b) Right to release under domestic law

When a court does not act within periods defined by law, in particular, when a suspect is not indicted within twelve months of detention, the law requires release. However, in these cases no such remedy has been given despite the fact that the court has not met legal requirements or has not served release orders in a timely manner. As mentioned above, the detention centres were not releasing persons who are not subject to a lawful order to detain.

Prizren

Lulzim, Bajram and Agim Gashi were detained on 7 October 1999. Pursuant to *Regulation 1999/26*, they were held in detention for twelve months prior to indictment. Despite the fact that the *Gashis* were not indicted within the 12-month period, a panel of the Prizren district court, including an international judge, extended their detention until 31 October 2000.

Stojan Jovanovic and Bogoljub Misic were detained on 31 January 2000. Although their 12-month period of detention prior to indictment expired on 31 January 2001, and no indictment was issued on time, they were not released. The indictment in *Jovanovic's* case is dated 1 February 2001 and the *Misic* indictment is dated 5 February 2001, both indictments arrived at the Prizren district court on 6 February 2001.

Enver Buzhala was detained on 2 November 2000 and his detention was ordered for one month until 2 December 2000 as required by law. Another order for detention for 3 days was issued, expiring on 6 December 2000. On 8 December 2000, the defence lawyer and the detention centre received a new detention order for *Buzhala* dated from 6 December 2000 to 6 February 2001. It was confirmed by the President of the district court at the time, that the detention order was dictated by an international judge on 8 December 2000 but backdated to 6 December 2000. The FRY CPC provides that an order for the extension of detention after the one month period, can be made for up to a maximum of two months by a panel.¹ The order for three days combined with the backdated order for two months, violates this time limit.

Agim and Asllan Gashi were detained on 4 December 2000. They were heard by the investigating judge on 7 December 2000. Although their order for detention is dated 7 December 2000, LSMS observed a judge, not the investigating judge, dictating the detention order decision on 8 December 2000. The detention centre records confirm that this order was delivered on that date. This order appears to have been backdated in order to meet the legal requirements.

Mitrovica/Mitrovice

Individuals have been held in detention many days after they have been ordered released by the courts due to communication problems between the Mitrovica/Mitrovice District court and the Dubrava and Lipljan Detention Centres. The case of *two juveniles in pre-trial detention* provide an example of this problem as they were detained for a period of **nine** days because the order to release them was not communicated to the detention facility in a timely manner. The failure to ensure an efficient system for the service of release orders throughout the area has resulted in unlawful detentions.

(c) Right to trial within a reasonable time or release from detention

The applicable law mandates that a detainee has the right to be tried within a reasonable time or released from detention.² In concluding whether or not the period of pre-trial detention is reasonable, the state must show “special diligence” in the conduct of proceedings.³ Similar provisions are set out in the FRY CPC, which states that “the duration of custody must be kept to the shortest necessary time” and that the state must proceed with “particular urgency” if a detainee is in custody.⁴ The domestic law also requires the court to set trial dates within two months from the indictment. There is widespread violation of all these provisions, as the district courts often exhibit a lack of urgency in listing and completing criminal trials. For example, cases are often adjourned because of a failure to conduct/request forensic tests, many months after the indictment.

Besim Hasani was detained on **13 October 1999** and indicted on 22 March 2000 for murder. In August 2000, his trial date for 12 December 2000 was set. On that day, the trial was adjourned because the defence objected to the injured party's representative in court and secondly, forensic tests had not been completed. The next trial date was set to take place in January 2001, but was adjourned twice for security reasons. The trial was completed in February 2001.

Dragan Sekulic was detained since **14 October 1999** and indicted on 7 January 2000 for the murder of his son. He had earlier been convicted of seriously assaulting his daughter. The Pristina/Prishtine district court adjourned numerous trial dates. Various reasons have been given including insufficient number of judges and the failure of witnesses to attend. Two witnesses were heard on 10 November 2000 before a panel that included an international judge. After further delays, the trial was re-set for 7 February 2001. On this date, the trial was postponed without any official explanation. Although the court was waiting, the international judge failed to come into court to explain the basis for another delay. The international judge later informed the LSM that in a private meeting with defence counsel, the judge had requested a forensic report. In order to assist in its preparation, defence counsel had agreed to obtain the autopsy report from the Nis Hospital. A medical report relating to cause of death was previously completed by KFOR. This report was before the court on the 10 November 2000. The trial was completed in February 2001.

Zoran Stanojevic was detained on **14 August 1999** and indicted on 9 May 2000 for the murder of a Kosovo Albanian during the *Racak* incident in January 1999. The first trial session took place on 25 July 2000 but was postponed indefinitely since the injured party's representative and witnesses failed to attend court. The second session (before a new panel) was held 24 January 2001 but postponed due to a power cut. The trial was adjourned again to 6 February 2001, when on procedural grounds, it was adjourned again to an unknown date because two alleged victims had not been notified by the public prosecutor that their allegations were dropped from the indictment. The trial re-started on 19 February 2001 but was adjourned because the defendant was not brought to court. The trial has now re-started.

The genocide trial of *Igor Simic*, who was detained in **August 1999** and indicted in June 2000, began 5 December 2000. It has encountered numerous delays for a variety of reasons: inadequate heating in the courtroom, the failure of the translation equipment and the failure of both UN staff and witnesses to attend, primarily for security reasons. Since the trial began, new witnesses have also come forward to implicate *Simic* in crimes for which he was indicted, adding further delays to the trial. On 14 February 2001, the presiding judge informed the court that the translations of the investigative hearings were so poor that they would have to be re-translated, resulting in further delays. In April 2001, the international prosecutor abandoned the indictment. *Simic* was released.

Bashkim Hajdari was detained on **11 December 1999**. An indictment was issued on 18 July 2000. Although his trial has begun on 20 November 2000, it was adjourned to 19

January 2001 and again adjourned due to the lack of a medical report. Since then the trial was again adjourned to 9 March 2001 in order for a forensic doctor to compile an analysis of the medical reports from the incident which occurred in November 1999. On 9 March 2001, the cases was yet again adjourned due to the lack of the ordered analysis.

Agron and Osman Mejinolli were detained on **19 September 1999** and have been indicted since 10 December 1999 by the Pristina/Prishtine district court. Their trial started on 1 November 2000 and they were convicted in December 2000.

Igor Stanimirovic has been detained since **27 March 2000**. He was indicted on 21 April 2000 for robbery, an offence to which he has confessed. There have been constant delays because the international judge would not set a trial date until UNMIK police confirmed, in writing, that the co-defendant escaped from custody in September 2000. The FRY CPC permits the separation of criminal proceedings “*for important reasons or reasons of expediency.*”⁵ No date has been set.

Halit Guri was detained on **9 July 1999** and a “proposal for security measures” on the basis that he is mentally ill was issued on 20 December 1999. Although the trial in his case began on 13 March 2000, it was adjourned for further psychiatric reports on the defendant until 18 October 2000. The trial resumed and the public prosecutor had no witnesses to present, other than the medical experts on the suspect’s mental health. Because the crucial Kosovo Serb witness had not provided testimony to the investigating judge, the public prosecutor requested that the witness statement to the police be read out in court. Although the defence counsel objected, the panel of judges approved the proposal. When the court reconvened on 17 December 2000, the panel withdrew their approval of the public prosecutor’s request. At this point, the proceedings did not move forward as the public prosecutor stated he would appeal the panel’s decision. According to the public prosecutor the Supreme Court approved his appeal. Despite the two psychiatric evaluations completed by the Pristina/Prishtine Hospital, the international prosecutor has ordered a new mental health evaluation. The trial continues.

Appeals of detention orders are significantly delaying investigations into cases creating a perverse incentive for individuals not to appeal such orders. In Gjilan/Gnjilane the **original case files** are sent to the Supreme Court in Pristina/Prishtine for appeals of detention orders by district court panels. As a result, the case file cannot be worked on until it is returned. In the case of one juvenile, the defence counsel appealed the detention order at the end of November 2000. The case file was not returned to the district court until 7 January 2001. Detainees have confirmed to LSMS that defence counsel advise their clients not to appeal, as they will have a greater chance of being released earlier.

III. The Detention of the Mentally Ill

It appears that the largest number of persons subject to arbitrary detention are in fact those suspected of being mentally ill, who largely fall outside the criminal system. Over 280 persons are detained in the Shtime/Stimlje Special Institution, and at least 20 persons are similarly prevented from leaving the Institute for the Elderly in Pristina/Prishtine.

Both institutions are under the responsibility of the UN-administered Department of Health and Social Welfare. In all cases, although the patients are detained, a court has never heard their cases and they remain detained by the decision of the institutions itself. However, the Shtime/Stimlje Institute is now taking measures to bring all cases to the court for review of detention, and it has submitted four cases to the Ferizaj/Urosevac court for this purpose. These cases were rejected by the court, which claimed that it did not have jurisdiction over them. ADoJ and OSCE have been actively working to address this issue and ensure that the large case load proceeds through the judicial system. In these cases, it will be necessary to ensure that legal representation is available for all the detainees.

The detention of the mentally ill remains a serious problem within the criminal justice system, particularly because there is no appropriate facility for detention and treatment both pre and post-trial. Principle 20, of the *UN Principles for the Protection of Persons with Mental Illness* states that persons who are serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations “have the right to the best available mental health care.” Those persons who are mentally ill “shall be treated with humanity and respect for the inherent dignity of the human being.” The authorities have a duty to implement a system through which possibly mentally ill persons are identified, particularly for those in detention, in order to ensure adequate treatment and a fair trial.

There are four issues regarding the mentally ill in criminal proceedings. The first issue is whether the person has the capacity to stand trial, i.e., to understand and participate in the proceedings against him. The FRY CPC does not directly address this question, but does provide for the dismissal or temporary suspension of criminal proceedings in cases of mental illness.⁶ In cases of mentally ill defendants, LSMS has observed that cases are not dismissed at early stages even if the defendant may not understand the proceedings, but they proceed through investigation to trial. This part of the domestic law requires reform.

The second question is whether the person at the time of the alleged criminal conduct had the required *mens rea*, mental state, in that he had the ability to understand the repercussions of his conduct. The domestic law provides for this.⁷ Defendants who are not criminally responsible should be acquitted of the criminal conduct under Article 350 (2) of the FRY CPC.

The third issue is in the case that the person can be held criminally responsible for his conduct but he has some mental illness which mitigates his culpability and thus, may impact sentencing decisions. The domestic law also adequately addresses this issue by providing for reduced punishment in cases of limited capacity.⁸ Persons who are found criminally responsible for their conduct but have a mental illness have a right to treatment in detention.

Finally the fourth issue is if a person fulfils these criteria, i.e., he is not criminally responsible for his conduct, or his culpability is diminished, but he is a threat to himself and others, there is a need for proceedings to detain him for treatment. In such cases, the

criminal courts have the authority to order “security measures” under the FRY CC which include “mandatory psychiatric treatment and custody in a medical institution” and “mandatory psychiatric treatment outside of prison.”⁹ The procedure for the application of a security measure is spelled out in Articles 493- 498 of the FRY CPC.

(a) The use of “security measures”

The domestic law regarding the application of security measures does not conform with international human rights standards in that a criminal court can order the *indefinite* detention of a mentally ill person.¹⁰ Under the ECHR, persons detained on the basis that they are mentally ill, i.e., they constitute a threat to themselves or others, must have their detention reviewed at regular intervals and the detainee should have the right to initiate such a review.

At present the domestic law does not meet these standards in that it does not provide for a mandatory review of the security measure but places the emphasis on the medical institution to inform the court when the person has completed treatment. The court, however, has the obligation to monitor the application of the measure in some way. At present, there is no medical institution as envisioned in the law that can provide the appropriate treatment and make representations to the court on the state of the treatment.¹¹ Lipljan detention facility is intended for juveniles, women and mentally ill prisoners.¹² One entire block is being refurbished at the detention facility for the mentally-ill. At this time, seven mentally ill persons, including three cases of persons sentenced to security measures are accommodated at Lipljan. All persons subject to security measures either detained in Lipljan or regular detention facilities, however, are entitled under human rights standards to receive, at a minimum, regular treatment.

Zenel Berisha was charged with the murder of an eight-year-old boy. The incident was alleged to have been the result of a group of young boys teasing the defendant. From 21 July 1999, *Berisha* was held in the US KFOR detention facility, and diagnosed by a US KFOR clinical psychologist as schizophrenic. The doctor, however, assessed that *Berisha* could nonetheless understand the nature of his crime and was able to distinguish right from wrong. On the request of the public prosecutor during the trial, *Berisha* was ordered to be evaluated by the neuro-psychiatric clinic in Pristina/Prishtine. The report from the neuro-psychiatric clinic found that *Berisha* at the time of the crime “did not realise the importance of his act and could not control his behaviour.” The report further concluded that he presented a threat to society and should be institutionalised. The court ordered *Berisha* detained for “mandatory psychiatric treatment and custody in a medical institution” as a security measure. *Berisha* was eventually transferred from US KFOR detention to Lipljan.

Florim Domaci was charged with causing general danger and grave acts against the general security for setting fire to two houses, including those of his family members. During the trial, *Domaci* testified but his statement was incoherent and confused. A doctor from the neuro-psychiatric clinic testified on the basis of his examination of *Domaci* and his medical records from the psychiatric clinic in Nis where he was

previously detained, concluding that *Domaci* suffers from paranoid-schizophrenia and was a danger to himself and others. He recommended that *Domaci* be detained at a closed psychiatric institution, as he had escaped from other institutions. *Domaci* was ordered detained as a security measure to mandatory treatment in a medical institution. He is currently detained in Pristina/Pristine.

Vojislav Stevic was charged with throwing a grenade into the room where his wife, daughter-in-law and his mother-in-law were, severely injuring them. A US KFOR doctor testified that in his opinion *Stevic* was mentally ill and did not understand his actions at the time. When *Stevic* was asked whether he wanted to testify or remain silent, he replied that he did not know. He seemed to barely understand the questions put to him and his statements were confused. At one point he stated that he wanted to kill himself by throwing the grenade but also that he did not trust his daughter-in-law not to poison his food. The court ordered that *Stevic* receive mandatory psychiatric treatment in an out-patient program and be released. It is unclear whether such a programme exists.

Zeqir Basha was charged with murdering his wife. When he was called to testify at trial he agreed with his defence counsel that he would not give a statement but then proceeded to say that “at the moment, my conscience was lost. It could have been a bigger catastrophe, only my heart knows.” The evaluation of *Basha* from the neuro-psychiatric clinic stated that the defendant, at the time of the crime, was experiencing “emotional chaos and his ability to control his actions was essentially diminished.” They concluded that *Basha* was a danger to himself and/or others and, therefore, should be institutionalised. The court ordered *Basha* subject to a security measure of mandatory psychiatric treatment in a medical institution. Both the presiding judge and the experts during the trial stated in court that there was no appropriate facility for the defendant.

As there is no appropriate facility, mentally-ill persons may be released. In one case, defendant “*K*” was tried for assault against police officers and based on a neuro-psychiatric expert report was ordered subject to security measures. The report stated that “*K*” has an aggressive and impulsive type personality, and he exhibits anti-social behaviour for which he is not responsible. Despite the order for mandatory treatment in a medical institution, “*K*” was released pending appeal. He is now charged with a murder and attempted murder committed after his release and is not detained.

(b) The right to treatment in detention

As with some of the above mentioned cases, officials within the regular detention centres identify that suspects in pre-trial detention may be mentally-ill. *The UN Standard Minimum Rules for the Treatment of Prisoners* provides that at every institution there should be at least one medical officer with some knowledge of psychiatry. There should be a psychiatric service for diagnosis and, where appropriate, the treatment of “abnormality.” The medical service provider in a prison should report to the Director of the institution “whenever he considers that a prisoner’s ... mental health has been or will be injuriously affected by continued imprisonment or any condition of imprisonment.” For this purpose, UN Penal Management has engaged, in co-operation with the health

sector, psychiatrists and nurses to visit Pristina/Prishtine, Lipljan and Prizren detention facilities. This approach has recently been extended to detention centres in Gjilan/Gnjilane and Peje/Pec. In Mitrovica, a French KFOR psychiatrist visits the facility regularly.

There is no mechanism set in place for the detention centres to communicate their assessments of detainees' mental health, where appropriate, to the court, in order to ensure appropriate treatment and that the court is aware of any mental health issues affecting the defendant. The lack of an appropriate institution for mentally ill defendants is the primary concern. In all of the cases described in this section, the mentally ill defendants were detained in regular detention facilities pending trial. In the majority of cases, the public prosecutor argued only at the end of the trial that the defendants were not criminally responsible, but should be subject to security measures. Understandably, the regular detention facilities have not been able to provide the kind of care necessary for mentally ill detainees.

Dragan Milosevic was charged with murder for shooting two Kosovo Serbs in a bar after a fight. In the investigative hearings, *Milosevic* admitted that he habitually smoked marijuana and that he had done so that night. He stated that he did not remember what happened after he left the bar and went back to his house to get an automatic rifle. While in the Pristina/Prishtine Detention Centre, he displayed signs of serious behavioural problems and was examined by a doctor. According to the detention centre, this doctor diagnosed *Milosevic* as "psychotic." Although the detention centre recognised that his condition was deteriorating in detention, the detention centre did not inform the court or public prosecutor of his condition in detention. At no point during the trial process was his mental health raised, except by the defence counsel in his closing speech. He argued that *Milosevic* may have been temporarily insane as he had consumed large amounts of alcohol and drugs on the night of the incident. Although alcohol and drug consumption is not a defence to criminal culpability under the law, the court may order appropriate treatment in such cases. *Milosevic* was convicted and sentenced to 14 years imprisonment.

Ismail Avdyli was charged with murdering his father by hitting him on the head with a wrench. His brothers testified that after the incident *Ismail* was in a state of shock and lacked awareness of the circumstances. In the police report, it was indicated that the accused had a serious heart disease and needed his pacemaker replaced. Although there was an order for a psychiatric assessment, it appeared that there was none done. At the end of the trial, the public prosecutor reduced the charge from murder to "murder of the moment." Although the indictment mentioned the brothers' testimony, there was no reference to a psychiatric assessment. After the trial, the judge stated to LSMS that there was a psychiatric report which stated that *Ismail* was competent, but this alleged report is not in the file and was never entered into the trial record.

Adem Namiliqi was arrested for setting fire to his own house and injuring his family members. Although the police attempted to hand the file to the municipal court public prosecutor, he refused stating that the case was a matter for social welfare not the

criminal courts. *Namiliqi* was detained at the Prizren Hospital in the psychiatric section guarded by police officers. There had been no detention order or a proceeding for his detention on mental health grounds. A doctor of the psychiatric section of the hospital informed LSMS that he could detain *Namliqi* on mental health grounds without any judicial process. The expert analysis of *Namiliqi* stated that he was mentally ill and a danger to society. The public prosecutor eventually took the case and *Namiliqi* was transferred to the Pristina Hospital.

Kadri Krasniqi was under suspicion by the Kamenica municipal court for serious assault on his family members. He was placed in the Gjilan/Gnjilane detention centre. LSMS attempted to interview *Krasniqi* however, due to his mental state, it was impossible to communicate with him. The cell and Mr. *Krasniqi* smelled of his own faeces. The court ordered *Krasniqi* subject to security measures in a mental health institution.

IV. Juveniles in Detention

In the last report, LSMS highlighted issues regarding juveniles held in detention on suspicion of committing criminal offences. International human rights standards provide that juveniles in conflict with the law should be treated differently than adults, in that all actions by authorities should be taken with the best interests of the juvenile in mind. Additionally, the detention of juveniles should be used as a measure of last resort. ADoJ, as a result of work of the Task Force on Juvenile Justice, has issued three circulars on this and related issues, the most recent of which informs judges that pre-trial detention periods should be taken into account when timing a review of educational measures.¹³

Although progress has been made on ensuring that the lengths of pre-trial detention of juveniles meet the statutory limit of three months, concerns regarding the detention of juveniles continue as juveniles are frequently coming before the courts. Over the past twelve months, 180 juveniles have been indicted for serious offences by the district court. 63 serious cases involving juveniles have been completed. As there have been 414 defendants tried in this period, and 272 completed cases, juveniles were involved in 23% of all cases. Juveniles tend to commit lesser crimes and although statistics for the lower courts are not available, it is reasonable to assume that juvenile crime is a considerable problem.

There remains a systematic failure on the part of UNMIK police to ensure that juveniles are questioned in the presence of parents and a legal representative. Of 36 juveniles interviewed by LSMS, 34 stated that their parents were not present during their questioning. These juveniles complained that neither the police nor the investigating judge informed them of their right to remain silent. One juvenile complained that an investigating judge yelled at him when he did not want to give a statement.

During police questioning, seven juveniles have complained to LSMS that they were subjected to some abuse, such as hitting, slapping or handcuffing to chairs by KPS officers. The majority of the reports come from juveniles in Gjilan/Gnjilane region and the problem has been raised with the Regional Commander. In some of the cases

international police officers have intervened, in others international officers have not been present.

In addition to detentions of juveniles on the basis that they are suspected of committing criminal offences, juveniles are also being detained by US KFOR on suspicion that they are members of an insurgent group. These juveniles are subject to potentially indefinite detention without any mechanism for judicial review. There have been approximately 16 juveniles between the ages of 15 and 18 detained in this way between the middle of December 2000 and the end of February 2001. In two cases, the juveniles had *Regulation 62* orders of exclusion issued to them, without the presence of their parents or a legal representative.¹⁴ US KFOR consider that these juveniles are at risk and would be handled more appropriately by a civilian social program. No such program exists as the institution responsible for child welfare, the Centres for Social Work, are not functioning in this regard.¹⁵

As highlighted in the last report regarding an alleged juvenile offender charged with genocide, the publication of the identity of a juvenile involved in criminal proceedings is a violation of both domestic and international laws. Such problems have continued over the past six months. One local paper was able to enter the Lipljan detention centre and publish names and pictures of juveniles in detention.¹⁶ In addition, the media has repeatedly published the identity of a young boy recently indicted for the killing of a Russian KFOR soldier as well as for other criminal offences.¹⁷

The use of detention, in particular pre-trial, in cases of juveniles for some period still appears to be the norm, rather than the exception. Pre-trial detention is still being used in cases where juveniles are suspected of petty crime, such as minor theft. There is presently no alternative facility in the community to detention for juveniles who are in need of protection or removal from their home environment.¹⁸ The use of the many other forms of alternatives to detention and diversion measures provided for by the law is still too rare.¹⁹

The applicable law states that the detention of a convicted juvenile as punishment is the exception and must be for at least one year in cases involving senior juveniles, i.e., those between the ages of 16 and 18 at the time of the commission of the offence.²⁰ The Vitina/Viti court of minor offences in two cases has subjected juveniles to detention periods, for some days or weeks, as a punishment for failure to pay a fine.²¹ In such cases, judges should recognise that special laws regarding juveniles pre-empt the use of this sanction, and an alternative to detention, such as accepting employment and participating in youth groups, would be more appropriate.

The reluctance of judges to use alternatives to detention provided for by law may stem, at least in part, from the lack of properly functioning Centres for Social Work (under the Department of Health and Social Welfare).²² This social institution is supposed to play a key role in criminal proceedings regarding juveniles and supervising juveniles in the use of alternatives to detention. It is generally accepted that juveniles who are in the community involved in socialisation and integration programs are less likely to repeat

criminal conduct. However, the CSWs suffer from deficient resources, staff, professional capacity, and even sometimes commitment, to meet their legal obligations regarding children who come into conflict with the law. Without substantial reform and development of this institution, there is little possibility for progress in reaching international standards regarding juvenile offenders or juvenile crime prevention.

¹ See Article 197(2) FRY CPC.

² Art. 5 (3) ECHR and Art. 9 (3) ICCPR.

³ *Tomasi v. France*, 27 August 1992, 241-A Ser. A para. 84.

⁴ Art. 190 (2) FRY CPC.

⁵ Art. 33 (1) FRY CPC.

⁶ See Art. 143, Art. 169 (1), (4) Art. 170 (1) (2) FRY CPC.

⁷ Article 12 (1) of the FRY CC states, “a person who has committed a criminal act is not considered responsible if at the time of the commission of a criminal act he was incapable of understanding the significance of his act or control his conduct due to a lasting or temporary mental disease, temporary mental disturbance or mental retardation.”

⁸ Article 12 (2) of the FRY CC states that if due to lasting or temporary mental illness or mental retardation, “the capacity of the offender to understand the significance of his act or his ability to control his conduct was substantially reduced, the court may impose a reduced punishment.”

⁹ Art. 63 and Art. 64 FRY CC.

¹⁰ Although the use of the criminal court to make determinations on the detention of the mentally ill creates confusion as to the basis of the detention, whether it is a punishment for criminal activity or whether it is for the protection and treatment for mental illness, this is not a strictly a violation of human rights standards.

¹¹ A working group is presently drafting a regulation to reform the law regarding the imposition and review of security measures.

¹² UN Penal Management, however, has stated that this is not now the appropriate facility for persons subject to security measures.

¹³ “*The Use of Pre-trial Detention in Cases involving Juveniles*” Justice 2000/26, 19 December 2000.

¹⁴ The Task Force on Juvenile Justice has requested KFOR to adopt specific guidelines for the use of *Regulation 2000/62*. KFOR has not committed to ensuring that parents and legal representatives are informed about the juvenile’s arrest or present when a *Regulation 2000/62* order is served on the juvenile.

¹⁵ UNICEF and the SRSG’s Human Rights and Community Affairs Unit who function as the Child Protection Advisor to the SRSG have been working with the Department of Health and Social Welfare to address this issue.

¹⁶ UN Penal Management stated that they would ensure in the future that the media did not have access to juveniles in detention.

¹⁷ An “indictment” in criminal proceedings against a juvenile is called “a proposal for educational measures.” See Art. 74 FRY CC.

¹⁸ See Art. 473 FRY CPC.

¹⁹ Alternatives to educational measures in a facility are those under the supervision of parents, another family or “tutelage organ”(the Guardianship Authority of the CSW) outlined in Art. 17 KPC.

²⁰ See Art. 77 and Art. 78 FRY CC.

²¹ The international judge who is a specialist in juvenile justice has stated that the issue in these cases is whether the judge orders alternatives to a fine. The judge points out that these alternatives are not used as social services support to monitor alternatives as required in law are almost non-existent.

²² UNICEF, as chair of the Task Force on Juvenile Justice, sent a letter to the SRSG on 20 March 2001 to highlight the needs of the CSWs’ in order for them to fulfil their role in addressing the problems of children in conflict with the law as well as their wider obligations regarding child protection (see Section 7: Victims of Intra-Familial Violence).

SECTION 4: THE COURTS

I. STRUCTURAL ISSUES

Introduction

The past six months have seen the district courts continue to work through a significant number of criminal trials.¹ Many criminal cases are being resolved in a just fashion, that is acquittals and convictions that are based on sufficient evidence. The issues, however, identified in the previous report persist throughout Kosovo and they are multifaceted. They include inadequacies with the questioning of witnesses, the admission of irrelevant and inadmissible evidence, inaccuracies in the investigation and trial records, and the need for clarification in judicial fact-finding.

Due to the disenfranchisement of a significant number of the local judiciary for over a ten-year period, nearly all of the current judges and public prosecutors did not have the benefit of using their legal skills or continuing their legal education. Additionally, international human rights laws were non-existent in the local legal framework until the advent of the UN Interim Administration. Consequently, until this point, the local judiciary had no exposure to these laws nor other modern European laws and procedures. In October 2000, LSMS was informed by the president of the Mitrovica/Mitrovice district court that such standards are not part of the applicable law and will not be applied by his judges.

I. Approaches to Legal Reasoning

(a) Investigating judges and trial judges require training in legal skills in the questioning of witnesses

The lack of developed skills in questioning leads to the presentation of irrelevant evidence and the failure to examine relevant issues in a case. Witnesses are often asked cursory questions about crucial events. This failure at the investigative stage then impacts any subsequent trial since many trial panels ask a witness whether or not they stand by their statement before the investigating judge. Most witnesses do, resulting in the panel's failure to inquire into, or develop further, the evidence. For example, in Pristina/Prishtine, one international judge often reads the prior statement into the trial record with few, if any, follow-up questions.

Shaban and *Hasan Selimi* were indicted in relation to an incident in a bar where one man was injured and another threatened. The presiding judge informed the court since the international judge was going on leave the trial had to finish in one day.

The case against the two men revolved around an argument in the bar, which resulted in the one defendant allegedly attempting to murder one of the victims. A number of issues arose in the trial that included who was responsible for what injury, the nature of the injuries sustained and whether the defendants were acting in lawful self-defence (the

defendants raised this defence in front of the investigating judge). But during the trial, no attempt was made to get a clearer picture of what happened during the fight. Consequently, witnesses were asked general questions about crucial aspects of the events leading up to the incident. There was no exploration of the prosecution theory that the defendant was attempting to murder the victim. Nor was there an attempt to explore the defendants' case that they were acting in lawful self-defence. Nor was there any questioning about the causation of injury to the victim. Such questioning may have explained whether the indictment for attempted murder was a more appropriate charge than bodily injury. There was no evidence as to whether the injuries sustained were life threatening. In his apparent haste to complete the trial in one day, the presiding judge rejected many questions put by the public prosecutor and defence counsel. The international judge asked no questions throughout the whole trial.

In the attempted rape trial of three juveniles, there were significant inconsistencies between their testimony before the investigating judge and their trial testimony. The presiding judge asked which statement they relied on. There was no further questioning in order to explain their inconsistencies.

In the murder trial of *Refki Bytyqi*, the defendant confessed to shooting dead someone he knew. Witnesses to the killing could not explain what may have been the motive. The question of motive was never explored at trial. A psychiatric report stated that the defendant was suffering from “*a light degree of being mentally retarded...[and had] some tendencies of impulsiveness...and a diminished ability to accept and understand the danger of his behaviour.*” At trial, the expert testified that the responsibility of the accused was only “*lightly diminished.*” The trial panel, including the international judge failed to explore in any detail the central issue of criminal responsibility. In fact, the international judge asked no questions.

Another concern in this case is that the proceedings were conducted in a language the defendant did not understand. The presiding judge was Bosnian. As a result, the trial was primarily held in Bosnian notwithstanding the fact that the defendant informed the court that he did not speak Bosnian (or Serbo-Croatian) (both the prosecutor and defence counsel spoke Bosnian). The defendant's testimony and that of Albanian witnesses was translated into Bosnian and then into English for the international judge. Other parts of the trial were not translated into Albanian.

(b) Irrelevant and Inadmissible evidence

The FRY CPC makes clear that it is the “*duty of the presiding judge to see that the subject matter is fully examined, that the truth is found, and that everything be eliminated which prolongs the proceeding, but does not clarify the matter.*”² The FRY CPC specifically provides for the exclusion of questions and answers which are irrelevant and inadmissible.³ The admissibility of evidence is a matter for regulation by national law and as a general rule it is for the domestic courts to assess the evidence before them. Notwithstanding this, international human rights standards look at the proceedings as a

whole, including the way in which evidence was taken when analysing whether the proceedings were fair.

A significant number of district court trial panels often permit the prosecution to present testimony that is without any substantive value, but irrelevant and prejudicial. This results in delays to trials and injustice to the defendant.

The most egregious example occurred in the *Momcilo Trajkovic* case where the trial panel (including an international) permitted the public prosecutor to present evidence of previous acts of torture allegedly committed by the defendant on occasions between 1982-1984, including an allegation that he had thrown a man out of a window. Testimony was also presented that the defendant's son, with policemen, had beaten persons on a bus in 1998. The indictment refers only to allegations of criminality committed in 1999. The defendant was given no prior notice that this evidence would be presented and at no stage did the public prosecutor attempt to amend the indictment. *Trajkovic* was convicted and sentenced to twenty years imprisonment.

In *Bajrush Berisha*, the trial panel (including an international) permitted the defence to introduce a petition from the village where the murder occurred. Defence counsel informed the court that "*the whole region is against [the victims] family and does not want them to live here because of their collaboration with the Serbs forces in 1998 and 1999.*" The petition, signed by 156 villagers, stated that the victims and family were Serb collaborators. LSMS is unsure of the relevance of this document. According to the international judge, the panel did not have the right to refuse the admission of evidence that concerns the victim's family. LSMS assumes the judge meant that it was admissible because it did not prejudice *the defendant* i.e. it did not harm his defence.

In the murder trial of *Shefqet Rrahmani*, the trial panel allowed into evidence two letters that supported the defendant. One letter, from the defendant's village, was in the form of a petition that highlighted the good behaviour of the defendant. The second letter was from the defendant's co-fighters in the KLA. It stated that "*the two victims were collaborators of the Yugoslav regime and they did a lot of harm to the defendant, as they turned him in to the Serbian police. The defendant was beaten and threatened by the Serbian police, but instead of collaborating with the Milosevic regime, he chose to...join the KLA...[the] KLA itself investigated the circumstances of the murder at that time, and found the defendant not guilty.*"

In the aggravated weapons possession trial of *Nebojsa Djukic* and *Lazar Vukovic*, the presiding judge started to question one of the defendants about facts related to a charge that had been dropped, namely Preparation of Acts of Terrorism. Defence counsel objected and the judge relented.

(c) Clarifying the approach to fact finding

Indictments, particularly in large criminal cases, fail to articulate in an efficient and coherent manner the prosecution's case. Public prosecutors do not, as rule, set out the

specifics of the offence alleged. Indictments generally recount incidents, allege that the defendant participated and then fail to explain what exactly the defendant did. This failure puts the defence in a disadvantage because a defendant is entitled to know, in advance and in detail, the case he is to answer.⁴

Although the burden is on the prosecution and the defendant is presumed innocent, the FRY CPC mandates that the defendant is questioned first.⁵ In trials monitored by LSMS, the practice seems to be the following. A defendant recites his background, he is then asked if he confesses to the offence and, assuming he denies culpability, is questioned, not always, about specifics. In more complex cases, this approach loses any sense of order or coherence.

In *Sava Matic*, a war crimes case, the defendant was asked about his whereabouts, conduct and so on during two very distinct periods, July 1998 and from March 1999 to June 1999. The presiding judge (an international) did not place into context his questions and since the prosecution witnesses had yet to testify, *Matic* provided responses that were general and not issue specific. In cases involving a considerable number of witnesses and incidents (i.e. *Trajkovic* and *Kolasinac* where there are to be up to 90 witnesses) it is almost impossible to get a grounded sense of who is alleging what, when and where. As mentioned earlier, this problem is exacerbated when the trial panels ask a defendant only whether he accepts or rejects a witness's testimony. When this occurs, the defendant is not given an opportunity to expand on his denial or challenge in any meaningful way a witness's assertions.

The FRY CPC permits the panel to depart from "*the regular order of business because of the particular circumstances and especially because of the number of defendants, the number of crimes and the amount of evidence.*"⁶ (emphasis added) A more coherent approach would be for the prosecution to present **all** relevant testimony at the outset of the trial. This affords the defendant an opportunity to not only hear and understand the allegations he faces but also decide whether or not he wishes to testify and rebut some or all of the prosecution evidence. Of course, during the investigative hearings, defendants, assuming they are present, are given notice of the prosecution case. But practice indicates that defendants are not usually present and that it is not unusual for the prosecution case to develop significantly post-indictment.

(d) Legal reasoning by judges

Such reasoning is basic to the coherent development and presentation of any criminal case and is manifested, amongst other things, in the consideration of issues relating to detention, the examination of witnesses, the deliberation of evidence and sentencing.

For example, in **pre-trial detention decisions** the FRY CPC requires a written decision that sets out the legal basis and "*a brief substantiation in which the basis for ordering custody is specifically argued.*"⁷ ADoJ produced Circular Justice/2000/27, dated 19 December 2000, which reminds judges that all decisions on detention must be made on the basis of a fully reasoned written decision. The circular is, in itself, insufficient in the

absence of effective training and courts still fail to set out, in full, the reasons for detention. Detention decisions continue to mirror the wording of the grounds for detention under the FRY CPC without providing facts or reasoning that supports a decision to deprive someone of their liberty.

Written verdicts also fail to articulate, in any understandable way, the elements of the offence. LSMS has observed that most set out the facts of the offence, the defence raised, if any, and a declaration that the defendant either committed or did not commit the offence. There is no exploration of the **elements** of the offence.

Dragan Nikolic was indicted for being complicit in “aggravated” murder.⁸ The indictment alleged that on 5 April 2000 FRY armed personnel and civilians in military and police uniforms, entered a village looking for weapons and money as well as ordering the inhabitants to leave the area. In one instance, this group of men, including the defendant, entered the Ademi house and forced the family to leave. As the family left the house, they were told to face a wall while one of their number was taken away and shot dead. No one witnessed the murder. The family recognised *Nikolic* as their dentist.

The law on complicity is set out in Article 22 of the FRY Criminal Code. It states that “*if several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.*” After a recitation of the trial testimony, the written verdict simply states that *Nikolic* was convicted because “*he was in a group with 7 others organised, they’ve decided all together and have acted on*” committing murder. Notwithstanding the alibi defence raised by *Nikolic*, there was sufficient evidence that *Nikolic* was armed and with the group of men present at the crime scene.

The written verdict failed to explain in detail how *Nikolic* either participated or “*in some other way*” was complicit in the crime. For example, the written verdict does not set out precisely how this group of armed men “*decided all together*” to commit murder. During the trial there was evidence of a *pattern of behaviour* by the group, in that there was testimony from a number of villagers that this group of armed men were sweeping the village, forcing families to leave their homes and shooting the men. This could be considered evidence of an agreement between the defendant and others to pursue a course of conduct that included murder and therefore could have formed part of the written verdict.

(e) The role of lay judges

The cases monitored by LSMS have shown lay judges to be uninterested in proceedings and have nominal responsibilities in decision-making. LSMS has observed that often professional judges do not consult them on decisions made during trial. Moreover, in a number of trials, lay judges have either arrived late or left during the proceedings. In the genocide case of *Igor Simic*, one lay judge was not wearing translation equipment although the proceedings were conducted in English. It was confirmed that the lay judge understood no English. In *Veselin Besovic*, one of the lay judges began a conversation

with the prosecutor during defence counsel's closing argument. The murder trial of *Latif Zymi* was conducted in Albanian. One lay judge, a Bosniac, informed LSMS that he speaks little Albanian and could not understand the proceedings, presided over by an international judge.

II. Procedural Problems

(a) Removing co-defendants from the courtroom

Although referenced in the last report, LSMS continues to observe that trial panels are still requesting co-defendants to leave court during the trial testimony of another defendant. This is permitted by the FRY CPC which further obligates the presiding judge to "familiarise" a defendant with the testimony of co-defendants.⁹ In all cases monitored by LSMS, however the presiding judges have not recounted this testimony to co-defendants. This provision in the FRY CPC violates a defendant's right "to be tried in his presence."¹⁰

(b) Lack of a verbatim trial record

LSMS continues to monitor a large number of cases in which the presiding judge reads into the court record a *summary* of a witness's/defendants trial testimony, rather than a *verbatim* account. Most civil law codes, including the FRY CPC only require the summarising of evidence.¹¹ The current practice in Kosovo, however, leads to inaccuracies in summaries and translations in the investigation and trial record. This is particularly concerning in cases that involve the use of three languages. Inaccurate trial records leave the trial process open to manipulation and deprive the defendant of a critical tool for the preparation of any appeal.

On the initiative of ADoJ, a pilot project was initiated in Gjilan/Gnjilane district court for the production of *verbatim* records of proceedings. The project applies to only cases heard by the international judge and involves simultaneous recording of testimony into a computer. There are no plans at present to extend this project to other regions.

Afrim Xheladini was indicted in relation to a grenade attack on a Kosovo Serb shop in Viti/Vitina. KFOR soldiers testified that they witnessed the defendant throwing the grenade and then fleeing at which time they immediately arrested him. LSMS is concerned with the circumstances surrounding the presiding judge's summary of the trial testimony, in that the summary appeared to be less incriminating than the actual testimony of the KFOR witnesses. The summary of the testimony by the presiding judge was not translated for the KFOR witnesses. With a number of KFOR witnesses, the presiding judge simply stated for the record that "*the witness testified as in the minutes to the investigating judge of this court.*" This approach to establishing facts may impact on any later appeal, since the appellate court will be in the dark as to whether a witness expanded upon his statement before the investigating judge, at trial. Such trial testimony may be important even if the changes are minor.

In *Sava Matic*, on trial for war crimes, an international judge paraphrased, inaccurately, a witness's testimony into the record and on occasion actually testified on behalf of a witness. The public prosecutor asked a witness why he needed the permission of the Serbian authorities to go out to a field. The international judge responded that this was due to "the regulation." The international judge then placed into the court record, "*to the next question of the prosecutor, the witness answered: this was done because of the regulation.*" The public prosecutor then asked the witness why villagers were afraid to leave their homes. The international judge responded that "*the witness just answered that that was because of the regulation.*" The witness then interjected that they remained inside because they were too afraid of the paramilitaries. This *was* placed into the record.

In the murder trial of *Latif Zymi*, the summary of evidence that was entered into the trial record was not translated into English for the international judge. In the attempted rape trial of three juveniles, and without objection from the trial panel, the public prosecutor read parts of a defendant's testimony into the trial record and then his own closing argument.

(c) Statements "read" into the record

The practice continues of attaching statements to the record without reading the statements or disclosing the content to the defendant. This also includes the practice of inviting the witness to "*give the same evidence as you did before the investigating judge,*" without reading the statement in open court for the defendant or lay judges to hear. The witness statement is then attached to the court record. These practices may deny the defendant the right to a fair and public trial.

In Prizren, for example, in the trial of two juveniles, although a witness attended the hearing, he was only asked if he had anything to add to his statement before the investigating judge. He responded no. The presiding judge then read into the trial record that this witness's statement before the investigating judge was read out, although it was not. A similar incident occurred in the trial of another juvenile when the public prosecutor proposed to read out statements of witnesses that had not appeared in court. Defence counsel objected. The presiding judge, without consulting the lay judges, then dictated into the trial record that the witness statements had been read out, although they had not.

III. The Right to Effective Legal Representation

(a) The applicable law

Defence counsel are obligated to protect the rights of their clients. They must take such action as is necessary to protect their client's rights and interests, and assist their clients before the courts. Their obligation includes upholding human rights and fundamental freedoms recognised by both domestic and international law. In Kosovo, the relevant standards are enshrined within the FRY CPC, UNMIK regulations and international human rights standards.

(b) The conduct of defence counsel and effectiveness

Defence counsel still continue to reflect the role of the defence in the prior legal system in that they are often passive. Defence counsel often do not take steps to remedy their client's extended pre-trial detention. There is, in many cases, no attempt to effectively investigate the prosecution or defence case. It appears that this stems mainly from the low level of pay as a significant number of defendants informed LSMS that court-appointed counsel demand cash before continuing to work on their cases.

(c) Monitored cases

Of the sixty-two cases monitored, the pattern of ineffectiveness detected in the last six-month review persists throughout Kosovo. Defence counsel continue to:

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

Pristina/Prishtine

In *Igor Stanimirovic*, during a break in the hearing of 31 October 2000, defence counsel asked his client to remind him of the facts of the case and the indictment. In *Sekulic*, defence counsel visited his client on four occasions in one year, with one meeting, according to the defendant, lasting three minutes. In *Milosevic*, defence counsel requested payment although he was court-appointed.

In *Zeqiri*, on trial for attempted rape, both the public prosecutor and defence counsel left the courtroom, albeit at different times. Defence counsel left court during the defendant's testimony. The trial panel did not suspend proceedings during these incidents.

In *Besart Muriqi*, the defendant was indicted for unnatural sexual acts with a child, aged five. At trial, the defendant denied the offence although he had confessed to the police. Although there was medical evidence on behalf of the victim, there was no psychiatric report requested for the defendant. During the trial, defence counsel remained silent. In his five-minute closing speech, defence counsel requested exclusion of criminal responsibility without stating more.

Florim Domaqi, mentally ill, was detained on 6 September 1999 and stood trial on 3 November 2000 in relation to the burning of his uncle's property. Because court-appointed defence counsel was absent, the presiding judge asked court staff to find another lawyer whose office was near to the court. The court waited while this happened. New counsel arrived and the trial began. Newly appointed counsel had not read the file and knew nothing about the case. The defendant's testimony was utterly incoherent. A psychiatric report described him as delusional and schizophrenic. During the trial the

previously court-appointed counsel arrived but left since stating his services were no longer required.

Prizren

An international judge has informed LSMS that public prosecutors regularly take part in deliberations. In the trial of *Halit Guri* for murder, the trial panel left the courtroom to deliberate about whether *Regulation 2000/17* applied. A few minutes later the public prosecutor left the courtroom returning some 45 minutes later with the panel. LSMS appreciates that this may have been a coincidence, but nevertheless it gives the appearance of impropriety.

In *Sava Matic*, the public prosecutor requested the court to read into the trial record two witness statements, one of which implicated the defendant in theft and “maltreating” the local populace. Although these witnesses had testified before the investigating judge, neither the defendant nor defence counsel were present. Notwithstanding the fact that the defence had no prior notice of their evidence or an opportunity to question them in the trial, they did not object to the admission of these prejudicial statements.

In *Stojan Jovanovic* and *Bogoljub Misic*, referred to previously, defence counsel took no steps to challenge the lawfulness of their detention until one week later.

During the investigative hearing of X and Y, while witnesses were being questioned, defence counsel left stating he “*had another trial.*” In the murder trial of *Refki Bytyki*, defence counsel, during the trial, used his mobile phone on four occasions. The presiding judge made no observations.

Pec/Peje

In *Viktor Prepepaj*, indicted for attempted kidnapping and other serious offences, the defendant, who was in custody, had failed to retain counsel. The defendant had earlier represented to the court that he would obtain the services of counsel. At trial, the court appointed new counsel and following a short adjournment, the trial began. The defendant complained that he had only met with his new counsel for five minutes. The court stated that defence counsel had read the file and was prepared to continue. During the trial, defence counsel repeatedly answered his mobile phone.

Gjilan/Gnjilane

During the investigative hearings into alleged weapons possession by alleged members of the UCPMB, a total of thirteen defendants were brought before the court. Three defence counsel were appointed to represent them. None of these counsel spoke to their clients before the investigative hearing. During the questioning of the defendants, counsel would repeatedly leave the courtroom, returning 10-15 minutes later.

IV. Training

The OSCE established the Kosovo Judicial Institute (KJI) to develop and facilitate the training of judges, public prosecutors and other relevant legal personnel. Training seminars have been conducted for judges and public prosecutors, the first being in November 1999.¹² In May 2000, practitioners received training, in a joint Council of Europe/OSCE seminar, on Articles 5 and 6 of the ECHR. Similar training took place in September 2000 and induction training for newly appointed judges and public prosecutors took place in November 2000. These later seminars used a new model with working groups and a more interactive format. In March 2001, KJI provided training on the FRY CPC to all judicial officials, both local and international. LSMS particularly welcomes a training program for international judges and prosecutors.¹³

As for the defence bar, in September 2000, the OSCE, in co-operation with the American Bar Association and the Council of Europe, conducted a pilot-project seminar for defence counsel called “*Effective Representation of a Criminal Defendant in the Kosovo Courts.*” This pilot project was also extended to Peje/Pec and Prizren, and in the coming months will take place in Gjilan/Gnjilane and Mitrovica/Mitrovice.

The OSCE Legal Community Support Section has also created a “*Desk Reference for Kosovo Defence Counsel on Criminal Procedure,*” described as a tool for trial counsel. It combines domestic law with international standards and is accompanied with brief comments by European legal scholars.

Despite these efforts, there remains a continuing need for intensive training. However, training in accordance with the current approach is not sufficiently effective. Given the problems highlighted in this report, this approach must be re-structured. Consideration should be given to a “back to basics” approach, that includes training on the questioning of witnesses and legal reasoning, including the weighing of evidence. Training should also be mandatory. LSMS would also recommend the use of mock trials.

¹ A six-week period between December 2000 and January 2001, saw the Pristina/Prishtine district court list 17 murder trials.

² Art. 292 (2) FRY CPC (*see also* Art. 322)

³ *See* Art. 219, 318, 327 FRY CPC

⁴ Art. 73 (1) FRY CPC, Art. 14 (3) (b) ICCPR, Principle 21 of the Basic Principles on the Role of Lawyers.

⁵ Art. 316 FRY CPC

⁶ Art. 292 FRY CPC

⁷ Article 192 (2) FRY CPC “Custody shall be ordered in a written decision containing the following: the first and last name of the person being taken into custody, the crime he is charged with, the legal basis for custody, instructions as to the right to appeal, a brief substantiation in which the basis for ordering custody shall be specifically argued, the official seal, and the signature of the judge ordering custody.”

⁸ Art. 30 (2) KPC in connection with Art. 22 KPC.

⁹ Art. 319 FRY CPC.

¹⁰ Art. 14 (3) (d) ICCPR.

¹¹ Art. 222 FRY CPC.

¹² Seminars and workshops for the newly appointed judges and public prosecutors took place in March, July and August 2000. All participants were provided with ECHR basic texts and case-law material (text of the Convention, Short Guide to the Convention, Case-summaries and Key Extracts, all in Albanian).

¹³ In *Hysen Qerimaj et al*, the presiding judge, an international, prior to questioning a witness, stated that in his country, the witness would have the right to remain silent but that he did not know what the procedure was in Kosovo.

SECTION 5: THE COURTS

II. THE ADMINISTRATION OF JUSTICE

Introduction

This section discusses concerns regarding the administration of justice in the courts and, in particular, focuses on the fact that the courts have not been provided the tools with which to administer justice fairly and effectively. A lack of forensic capacity has hampered the ability of the courts to investigate cases comprehensively. Further, the system for the service of summons has resulted in the failure of witnesses to appear before the court, at both the investigation and trial stage. In addition, there are concerns that judges and public prosecutors are subject to intimidation.

There remains a gap in ensuring accountability for judicial actors in that unprofessional behaviour, to date, has not been sanctioned. Since the last report, however, the UN Judicial Inspection Unit has been established and is currently investigating allegations of judicial misconduct.

I. Investigatory Tools, Forensic Capabilities and Witness Summoning

(a) Police investigations, evidence gathering and analysis

One of the significant obstacles to effective crime prosecution has been the quality of investigations by the police. Effective policing is based on the investigative skills of police investigators and the existence and quality of scientific analysis of evidence. UNMIK police have yet to develop a sophisticated and modern form of investigation and evidence collection, one that includes a surveillance capacity and the utilisation of informants and undercover police agents.

Effective police investigations and judicial proceedings that instil confidence in the judicial system rely heavily on the collection and analysis of physical evidence. There is presently relatively no capacity for this and investigating judges are playing little, if any, role in the preliminary investigation of cases.¹ To date, there is no “scenes of crimes” unit that systematically collects forensic and other physical evidence. Due to financial and logistical constraints, there is also a reluctance and even a refusal by the forensic experts in Kosovo to provide services, such as attending scenes of crimes and providing testimony in courts. This has hampered the functioning of the courts.

One UNMIK regional police station informed LSMS of the problems regarding forensic and other evidence gathering. There is often no feedback on forensic evidence forwarded to Bulgaria for analysis. This is confirmed in many of the trials monitored by LSMS. Due to the lack of resources, police stations can rarely take blood and breath samples. They further do not possess enough field drug kits. Although portable finger print equipment is available, there is insufficient ink. In this particular police station, they have two cameras, however, one is broken and they are not being re-supplied with film and lithium batteries.

(b) Cases

Besim Hasani was detained on 13 October 1999 and indicted on 3 March 2000 for the murder of an elderly Kosovo Serb woman. His first trial date was 13 December 2000 in the Mitrovica/Mitrovice district court. The trial was adjourned because forensic tests had not been completed on crucial blood evidence and the defence objected to the injured party's representative. A forensic test was needed because blood was found in the defendant's vehicle after his arrest. Following the court adjournment it emerged that the doctor who performed the autopsy in October 1999 had failed to preserve a sample of the victim's blood. While being questioned by the police, in absence of defence counsel, the defendant confessed to the murder. He had also confessed, in the presence of counsel, before the investigative judge. At trial, he claimed the confessions were coerced and that someone else murdered the victim.

In the Gjilan/Gnjilane district court, *Shaban Beqiri* and *Xhemajl Sejdiu* were tried for the murder of two Kosovo Serbs. Following the killings, two eyewitnesses informed KFOR that *Beqiri* and *Sejdiu* were the culprits. They also described clothing and a letter previously sent by *Beqiri* that was marked "*ultimatum...KLA warns you [to] deliver weapons at 20.00hrs...[otherwise] violent force will be conducted against you.*" According to the KFOR report, eight to ten hours later, KFOR detained *Beqiri*. He was wearing clothing similar to the clothing described by the eyewitnesses, including a yellow or gold t-shirt. *Beqiri* admitted he was in the KLA.

The court file contained the KFOR report, in English, which mentioned the clothing. At trial, the public prosecutor made no reference to the clothing or letter. The trial panel (including an international judge) asked no questions relating to the clothing or letter.

In *Momcilo Trajkovic*, the defendant was alleged to have fired a weapon at two Kosovo Albanian males in Kamenica. The defendant denied any involvement. The day following the alleged incident, KFOR recovered shell casings from the crime scene. More than two months later, KFOR arrested the defendant and recovered weapons and ammunition from his house. KFOR informed the court that they are not in possession of the recovered items so no forensic test could be completed. It is common practice for US KFOR to destroy weapons and ammunition they recover.

In *Myrtez Starabanja*, the defendant was indicted for murder. The victim was shot dead while in his home by someone standing outside the house. There had been a dispute over property between the parties. A witness saw the defendant near the house just after the incident. Shell casings were found near the crime scene but no weapon. The defendant was arrested shortly thereafter. Almost *one month* later, paraffin swabs from the defendant's hands were taken in order to detect gunpowder residue. According to the police expert, who testified at trial, the tests proved worthless because swabs need to be taken within *three hours* of a weapon being discharged.

Muhamet Kqiku was indicted in relation to two grenade attacks on Kosovo Serb property. At the first incident, UNMIK police retrieved a footprint impression. Following the

second incident, the defendant was arrested near the scene. According to UNMIK police, the footprint matched the defendant's shoe. This report, which was in the court file, was apparently not translated. This evidence was not presented by the public prosecutor at trial.

Veselin Besovic, a Kosovo Serb, was convicted for robbery and weapons possession including the possession of explosives. Prior to his trial there was much local coverage in the media that he was a war criminal. An investigation by UNMIK police discovered no such evidence. The case against *Besovic* revolved around a dispute over allegations of illegal woodcutting. The victims claimed that while they were cutting wood on land that adjoined the defendant's, *Besovic* and another man arrived with a weapon and hand grenade. According to these witnesses, the defendant then ordered them onto their tractor and forced them to come with him. They eventually escaped, with the defendant firing an automatic rifle in their direction. The defendant then stole their tractors, trailers and a chainsaw.

The defendant claimed he caught the two men cutting wood on his land, and was attempting to bring them to KFOR, when they escaped. He denied being in possession of a firearm. He claimed to have then brought one of the two tractors and both trailers left at the scene of the incident to a KFOR checkpoint in a nearby village. The tractor and two trailers were recovered by UNMIK police and returned to the owners. Both parties claimed to have contacted UNMIK police. UNMIK police deny that *Besovic* contacted them. The defendant also claimed to have contacted KFOR to report the incident. The court secured no witnesses from either UNMIK police or KFOR, and nor did they take steps to verify whether the defendant did take the tractor and two trailers to the village. No witness testified as to whether a rifle or a hand-grenade was found on the *Besovic* premises. Defence counsel's request for the court to inspect the site of the incident was denied.

In *Bahtije Beqiri*, on trial for murdering her husband, the presiding judge placed into the court record a ballistics report from Bulgaria. Defence counsel's objection to its introduction based on the inadequacy of the report was rejected. As there was no possibility for defence counsel to get an alternative analysis, there was no opportunity to challenge potentially crucial evidence. Counsel informed LSMS that they would have preferred their own expert, adding that there is no forensic facility in Kosovo.

(c) Evidence in sexual violence cases

Cases involving sexual violence pose particular difficulties for the courts in part because there are usually no other witnesses to the event other than the defendant and alleged victim and they involve issues of culture and custom. As a result, a crucial component of such cases for the fact-finder is the existence and quality of the medical and forensic evidence. Presently, there is no dedicated facility for the examination of rape victims and the existing arrangements could be characterised as degrading. Additionally, the current medical reports regarding sexual violence are extremely brief and lacking in details.

Rarely is an expert called to elaborate on the findings and their significance at trial. In some cases no medical report is taken.

In a case scheduled for trial in the Pristina/Prishtine district court, four defendants are indicted each for rape of one victim. The victim allegedly was threatened into a car by one of the defendants with a gun who then took her to a bar and picked up the other three defendants. At the house of two of the defendants, the victim was then allegedly raped by each defendant in turn. The victim was then allowed to leave at 3:00 am. The next day, the victim reported the incident to the police. The defendants did not deny the intercourse and admitted that they were drunk but claimed that they remembered that the victim had agreed. On the day after the incident, an UNMIK police officer filled in a report, "Visual Examination of the Victim." The report states: "The victim took her clothes off and [the officer] searched for visible marks on her body. After the visual examination of the victim, no marks have been observed." Other than this "examination," no medical report was done on the victim by a doctor. Despite the crucial nature of medical evidence in such cases, the investigating judge never ordered a medical examination.

Many of the cases involving sexual offences are reported well after the alleged incident increasing the difficult nature of these cases for the fact-finder. In such cases, medical and forensic evidence is of limited utility leaving judges with credibility assessments as the sole basis of decisions. In order to clarify circumstances and assess the credibility of the parties, there is a particular need to hear all witnesses who may have relevant testimony. LSMS has monitored many cases where potentially relevant witnesses were not heard by the court. For example, in one case the victim alleged that the defendant took her to a restaurant-hotel, threatened her with a gun and raped her over night. The victim stated that the defendant forced her up the stairs and to the room. In the police report, the manager of the restaurant-hotel stated that the couple was arguing in some way. This witness was never called to testify at the trial. Additionally, the victim reported that after the incident she was with friends and the defendant came to force her in a car. This incident was never followed up by the court. Moreover, no effort was made to confirm whether the defendant was in possession of a gun.

In the rape trial of *Hasim Demiri*, the defendant claimed that he had a long-standing consensual sexual relationship with the victim, which included a liaison in a local motel. The victim denied this and asserted she was a virgin prior to the rape. The presiding judge made a written request to the motel for confirmation that the two stayed there. The motel replied that the couple had indeed stayed one night and this fact was logged in the motel's register. A copy of this register was presented to the court. The victim vigorously challenged the document stating that it did not contain a signature. Although the defendant had earlier testified that his friends worked at the motel, the court and the public prosecutor accepted this crucial document without further inquiry. The public prosecutor withdrew the indictment and the defendant was acquitted.

(d) The summoning of witnesses

A significant number of district court trials are delayed or court investigations hampered, by witness summons being either improperly served or not served at all. A lack of clear guidelines on the process of serving summonses and inadequate co-ordination between the courts and the police has frequently resulted in the failure to issue a summons or the service of a summons at the wrong address. This is a widespread problem that appears in many cases. In cases involving Kosovo Serbs, there are considerable logistical problems in notifying witnesses since most have left the jurisdiction and those who are located refuse to attend court without guarantees as to their safety. On occasions the courts have even asked LSMS to serve summonses.

In *Trajkovic*, a war crimes trial, defence witnesses living in Serbia refused to attend the trial in Gjilan/Gnjilane because the court could not guarantee that they would not be arrested. The presiding judge (an international) canvassed the option of taking their testimony in another jurisdiction (Vranje), which is permitted by the FRY CPC.² Because the public prosecutor opposed travelling to Serbia, the idea was dropped but resulted in further delays to the trial.

Mihrije Gashi was detained on 5 October 1999 and indicted one month later for murder. The trial was postponed on three occasions between 5 May 2000 and 18 September 2000 because witnesses and the injured party representative failed to attend.

In *F.H.*, the defendant was indicted in relation to the rape of one daughter and the attempted rape of another daughter and the murder of the two babies born as a result of the rape. Only one of the daughters was found and was prepared to testify. The first summons was sent to her work address, which was with the non-governmental organisation called ADRA. According to the court file, the summons was not delivered but she was contacted by telephone. On 31 March 2000, the summons was delivered to her new work address at the U.S. Office in Pristina/Prishtine. She attended the investigative hearing and testified. The alleged victim provided further testimony on 14 April 2000.

The first session of the trial began on 26 June 2000. The witness summons for the victim was sent to ADRA. She failed to attend. The defendant and defence witnesses testified. The summons for the second trial session was sent to ADRA on 16 July 2000 notifying the witness that the next trial date was 24 July 2000. The victim arrived at court only to discover that there would be an adjournment because the presiding judge and the defendant were absent. The presiding judge later explained to LSMS that he had been informed that the witnesses could not be found so he attended a wedding. Defence counsel did appear and at one stage approached the victim outside the courtroom. She informed the victim that the defendant's continued detention was detrimental to his health, that the family was upset by the victim's allegations and that her brother had stated the father was innocent. The next trial session was set for 8 December 2000. On 29 November 2000, the witness summons was sent to the defendant's address in Lipjan. The victim did not attend court. The trial was postponed to 19 December 2000 and a

summons was sent to ADRA. On 19 December 2000, police informed the court that the witness could not be found at ADRA and “*requested more information.*” On this date, a new public prosecutor took conduct of the case. The defendant and defence witnesses testified for a second time, presumably because of the delay to the case. The public prosecutor abandoned the indictment. In the written verdict, the only reference to the witness’s whereabouts is that the family claim the daughter is in “*Pristina working for...ADRA.*”

On 17 April 2000, a shoot-out in the middle of Pristina/Prishtine resulted in the death of a well-known TMK Commander and the fatal wounding of another man, H.M. The incident is alleged to have been the result of a dispute between H.M. and the TMK Commander over property.

On 22 May 2000, defendant B was summonsed and attended the first investigation hearing. In addition to four principal witnesses involved in the dispute prior to the shootings, the police interviewed at least twenty other witnesses with potentially relevant testimony. Only some of these witness details were provided to the court. It then emerged that UNMIK police had failed to provide the investigating judge with the names of all relevant witnesses. This error was corrected in July 2000. In October 2000, the court heard two more witnesses. On 7 November 2000, UNMIK police wrote a memorandum to the court outlining the contact information that they had received including phone numbers of the witnesses. On 11 November 2000, four of these eight witnesses testified.

II. Intimidation of the Judiciary

Pec/Peje

Bajrush Berisha, a former KLA member, was acquitted of murder but convicted of robbery and sentenced to 6 years imprisonment in a highly charged trial that took place in November 2000. In the months prior to the trial, defence counsel informed LSMS that the defendant had threatened the president of the district court and other judges. The victims had also come under attack and moved to Montenegro for protection. As a result the trial was adjourned until an international judge could be appointed to the panel.

The trial took place under intense security and included an international presiding judge. The second day of the trial was moved to UNMIK Police Regional Headquarters so as to ensure the safety of the prosecution witnesses. One prosecution witness that implicated the defendant was badly beaten following his testimony. He refused to identify his assailant.

As mentioned earlier in this report, the trial panel allowed the defence to introduce a petition from the victim’s village, which asserted that the victim’s family had collaborated with Serb forces in 1998 and 1999.

At the trial, two witnesses testified to seeing the defendant shoot and kill the victim. One other witness on hearing shooting arrived at the scene and saw a vehicle leaving the area.

Other witnesses stated that on arriving at the crime scene, the eyewitnesses informed them that the defendant had committed the crime.

The written verdict makes no reference to the petition introduced by the defendant. Second, it references various inconsistencies in the testimony that moved the court to acquit. Witness Bashkim, aged 13, claimed at trial that his sister, Ljulja, aged 19, witnessed the shooting with him. His sister gave the same testimony. According to the written verdict, Bashkim had stated before the investigating judge that he alone witnessed the shooting of the victim and that his sister and others arrived shortly after. In his statement before the investigating judge, Bashkim testified that *“I was the only one who was watching the critical event...mother and sisters came out after the event.”* But he then states that *“at the moment of the murder...it is possible that [Ljulja] could see from that distance.”* The content of the written verdict indicates that this inconsistency was significant to the trial panel, however, the trial panel did not question the witness on the inconsistency.

The written verdict also makes reference to the fact that Ljulja stated at trial that the defendant *“emptied two bullet magazines.”* According to her brother and the UNMIK police officer that arrived at the scene, only nine shell casings were found. This apparent error, according to the written verdict, *“questions [her] presence at the scene of the crime as an eyewitness.”* On the substantive matter of whether she saw the defendant shoot the victim, her testimony at trial was consistent with her statements before the investigating judge: she witnessed the murder. The trial panel did not ask the witness any questions on the issue of shell casings despite the significance placed on it in the written verdict.

Following the murder, the victim was placed in a vehicle and taken to Pec/Peje hospital. On route they came upon a convoy of cars being stopped by KFOR. In the convoy they saw the defendant. The witnesses stated that they did not inform KFOR because they did not speak Italian. According to the written verdict, *“they were obliged to report the case”* and since they did not, the court concluded that the defendant was not the killer. Finally, the written verdict states that when the police arrived at the crime scene, the witnesses who were present, did not mention the defendant’s name. But the trial panel failed to question the UNMIK police officer as to whether he asked them who the perpetrator was or what, if anything, was discussed. The witness did state that Ljulja, who was present, was in a state of shock.

This case raises concerns as to whether security issues influenced the verdict.

Prizren

On 2 October 2000, the victim’s property was destroyed by explosives. Prior to the bombing, the defendant, X, a political party chairman, with others, had allegedly threatened the victim, claiming the property was his. One of those present and allegedly issuing threats was a TMK commander. This incident was also witnessed by the victim’s brother. Workers at the house were also threatened. Later, persons including other TMK members returned to the premises and threatened the victim. Following the arrest of X,

police found detonator devices in his flat and a “construction” map in a friend’s car that was parked on his property, the keys to which were found in his house. UNMIK police have confirmed that no forensic analysis has been done in this case.

A TMK commander was apparently summonsed but not found at the address provided to the police (this TMK Commander is now under investigation by the UNMIK police in Prizren for kidnapping two persons who had blackmailed two Kosovo Albanians). The son of the victim, who allegedly witnessed the defendant and another placing objects into the house two days prior to the explosion, was not summonsed. The international judge initially informed LSMS that his testimony was not relevant, though later he stated that he could not recall this part of the testimony. The international judge also confirmed that he took no investigative action regarding items found in X’s house. As for the workers at the building site who were allegedly threatened, the international judge stated that the victim had failed to provide the names and addresses of these persons. The investigation was abandoned. The public prosecutor has informed LSMS that the threats against the victim should be reviewed by the new international prosecutor.

Following a police investigation in the alleged rape of two victims, aged 16 and 19, by members of the PU (military police of the KLA), on 16 November 2000, the international prosecutor requested an investigation and detention of the defendants because they were a flight risk, may repeat the offence and interfere with witnesses. The suspects allegedly forced the victims into a KLA “police building” and then sexually assaulted them. The president of the district court states that the file was immediately handed over to the international judge and has confirmed that this was around the middle of November 2000. The international judge did not begin an investigation. In February 2001, he returned the case stating he was too occupied with producing the written verdict in *Sava Matic*.

Concerning threats and intimidation, one local judge informed LSMS that “*we have to live with it.*” The investigating judge in a robbery case reported to the UN that he was threatened by the defendants, their relatives and by anonymous telephone calls. The public prosecutor in another case was threatened with death, if he did not speed up the trial and release the defendant.

Pristina/Prishtine

In October 2000, a public prosecutor was approached in her office by a former defendant. He was aggressive and claimed that the public prosecutor was responsible for his extended detention of eight months. He demanded compensation. Court police officers were notified and the man was removed from the building. Another public prosecutor informed LSMS that he has received repeated death threats over the phone that related to the arrest of five former KLA members. He claimed his staff have also been threatened. One public prosecutor resigned because of the threats.

III. The Judiciary

(a) Procedural irregularities

Prizren

In one juvenile case a lay judge left the trial for five minutes. In another juvenile case involving three defendants on trial for robbery, one of the designated lay judges did not attend the hearing. The case proceeded in his absence.

In the murder trial of *Zeqir Basha*, a mentally ill defendant, the public prosecutor was seen reading a newspaper during the trial and on one occasion actually left the courtroom to smoke a cigarette although a witness was testifying. He also failed to attend the pronouncement of the verdict.

There had also been a delay in this case that resulted in the trial having to begin again. The presiding judge then stated for the trial record that the indictment, witness statements and a psychiatric report were read in court, which complies with the relevant provisions of the FRY CPC. But this was inaccurate because the presiding judge did not read this material into the trial record.

Gjilan/Gnjilane Region

In *Afrim Xheladini*, a lay judge arrived one hour into the testimony of a witness. He had been occupied in another hearing in another part of the court building. In a case involving a juvenile, the investigating judge issued a detention order. Defence counsel appealed to a three-judge panel who rejected the appeal. In violation of the FRY CPC, the investigating judge was part of the appeal panel.³ In the war crimes case of *Momcilo Trajkovic*, one lay judge left the panel and was replaced by another, who with the exception of one day, 24 November 2000, had been present in court as a stand-by. But in violation of the FRY CPC, the court failed to re-read, for the benefit of the new lay judge, the testimony that had occurred on the 24 November 2000.⁴

Pec/Peje

The right to remain silent during interrogation and trial is implicit in two internationally protected rights: the right to be presumed innocent and the right not to be compelled to testify or confess guilt. A right to silence is also provided for in the FRY CPC.⁵ In *Veselin Besovic*, the investigating judge directed the defendant that it "would be better for him to testify." In *Nikqi*, the defendant was informed that "it is in your own best interest to testify."

In the attempted murder trial of *Zef Bezhi et al*, the public prosecutor left the courtroom for fifteen minutes to attend the attempted rape trial of *Villson Doqi*, where she read out the indictment. She then returned to *Bezhi*, which had continued in her absence.

In *Shaban* and *Hasan Selimi*, prior to testifying, neither defendant was informed about his right to silence. In fact, the presiding judge informed one of the defendants' that "you have to tell what occurred."

Pristina/Prishtine

In *Hilmi Ajeti*, the defendant collapsed in court at the beginning of his trial. Following a fifteen-minute break, a doctor informed the court that the defendant was suffering from low blood pressure and would have to be taken to hospital. The presiding judge informed defence counsel that the trial should continue. Defence counsel agreed, the trial continued and the defendant was convicted. In the investigative hearing of two juveniles, the investigating judge appointed the defendants counsel but then proceeded to question them although no counsel was present. One juvenile was also without a family representative.

In *Joksimovic*, on trial for the attempted murder of a Kosovo Albanian, the trial began on 27 September 2000 and a substantial amount of evidence was heard. The trial was adjourned to 17 October 2000. On that date, due to other commitments, the international judge was excused and replaced by another international judge. According to the applicable law, the trial must re-start if the membership of a panel has changed or if the presiding judge is replaced.⁶ The trial continued

In *Enver Berisha*, the trial for aggravated weapons possession began and was completed although one of the two lay-judges was absent. Equally concerning was the fact that once the public prosecutor read the indictment, he left the court. In his absence and on his behalf, the presiding judge made the closing speech and entered it into the record. The public prosecutor did not return to the trial.

In the Pristina/Prishtine District court, there have been instances of *ex parte* communication. A rape trial set for 13 February 2001 was adjourned although there was no court session. The three defendants who had attended court were called into the presiding judge's room and left following an agreement on a trial date. On 14 February 2001, a similar event with the same judge happened in the rape trial of H.M. The trial was postponed following a private meeting with the victim and the judge in his office.

(b) Competency of the court

In October 2000, LSMS was informed that three judges and a public prosecutor in the Gjilan/Gnjilane region did not have the required judicial qualifications. The three individuals did not fulfil the minimum qualifications to become a judge in that they had not passed the relevant examination for candidates for the judiciary as required by *Regulation 1999/7* (since superseded by *Regulation 2000/57*). One of the judges informed LSMS that he passed *part* of the *judicial* examination but did not complete it. The second judge informed LSMS that he only passed the *professional* examination, which makes him eligible for the minor offences court, although he was in fact sitting in the municipal court. The third informed LSMS that he did not pass either the *professional* or *judicial* exam. The public prosecutor also lacked the required qualifications to be appointed.

ADoJ was aware of this information from October 2000. Notwithstanding the seriousness of this issue, no steps were taken by the AJC to address the problem until judicial contracts came up for review in December 2000. On 22 December 2000, ADoJ recommended to the SRSG that the persons discussed above not be re-appointed and their appointments were not extended beyond 31 December 2000. It has now emerged that a total of thirteen judicial officials were without qualifications.⁷ LSMS is informed by the courts involved that they are unable to determine the number of cases affected.

Decisions rendered before a tribunal that was not lawfully constituted may result in any subsequent acquittal or conviction being void. According to Article 2 of the FRY CPC, criminal penalties may only be pronounced by a “competent court” following procedures instituted in accordance with the criminal procedure code. The FRY CPC requires that proceedings are conducted by “authorised prosecutors” before trial panels composed in accordance with Article 23 FRY CPC.⁸

The provisions of the FRY CPC dealing with the *disqualification* of judges do not specifically mention the lack of appropriate qualifications. Improper composition of the court will, however, amount to an essential violation of the criminal procedure for the purposes of appeal.⁹

The *Law on Regular Courts* (1978) forms part of the applicable law that governs the criteria for the appointment of judges. Article 69 states that judges must be Yugoslavian citizens who have finished the faculty of law. For judges at the Municipal and District court level, they must also have completed the “exams of jurisprudence.” Where a judge is found not to possess the relevant qualifications, they must be dismissed.¹⁰

The *Law on the Public Prosecutors Office* (1976) forms part of the applicable law dealing with the appointment and dismissal of public prosecutors. According to Article 24 public prosecutors at the municipal court and district court level must be citizens of Yugoslavia, who have graduated in law and completed the judiciary exam. Public prosecutors found not to fulfil the requirements must be dismissed and provision is also made for suspension during investigation.¹¹

Criteria for the selection of candidates as judges and prosecutors is also outlined in *UNMIK Regulation 1999/7 On Appointment and Removal from Office of Judges and Prosecutors*. Section 6 demands that judges and prosecutors *must*, amongst other things, have a university degree in law and have passed the judiciary exams (or for minor offence court judges, have passed the professional exam). Fulfilment of these criteria is a precondition to being sworn into office.

Article 6(1) ECHR and Article 14(1) ICCPR require that trials involving criminal charges take place before a *competent tribunal established by law*. There is little European Court of Human Rights jurisprudence on the interpretation of the meaning of “established by law.” The composition of the courts must, however, comply with domestic law and, additionally, international law requirements of independence and impartiality.¹² Principle

10 of the *Basic Principles on the Independence of the Judiciary* requires that persons selected for judicial office be individuals “with appropriate training or qualifications in law.”¹³

¹ LSMS is informed that a crime laboratory, under the auspices of UNMIK police, will be operational later this year.

² Art. 330 (1) FRY CPC

³ Art. 39 (5) FRY CPC

⁴ Art. 305 (1) FRY CPC

⁵ Art. 218 (2) FRY CPC

⁶ Art. 305 (1) & Art. 305 (3) FRY CPC

⁷ Six judicial officials from the municipal court and seven from the minor offences court.

⁸ Article 17 FRY CPC.

⁹ Article 363 (1) and 364 (1) FRY CPC.

¹⁰ Article 78 (9) FRY CPC.

¹¹ Article 33 (9) and 42 FRY CPC.

¹² See generally *Belilos v Switzerland* (1988), Series A No. 132 at para. 64.

¹³ *Basic principles on the Independence of the Judiciary* (1985), as endorsed by General Assembly Resolution 40/32, 29 November 1985 and 40/146, 13 December 1985.

SECTION 6: THE RIGHTS OF VICTIMS

I. SEXUAL VIOLENCE

Introduction

Applicable international standards define “victims” as “persons who...have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws.”¹ Such victims are entitled to access mechanisms of justice and to prompt redress for any harm suffered. Access to justice and fair treatment for victims involves ensuring that they are aware of their role and scope in the proceedings and that their views and concerns are presented and considered.² The FRY CPC provides injured parties with certain rights throughout the criminal proceedings. These rights include “during the examination to call attention to all facts and suggest evidence” as to the crime and to property claims and at trial “to propose evidence, put questions to the accused, witnesses and expert witnesses, and to make remarks and present clarifications concerning their testimony, and also to make other statements and make other proposals.”³ In cases where children are victims, the FRY CPC provides that they should have the assistance of their legal representatives throughout the criminal proceedings.

The last report emphasised the need for victim’s representation, assistance and protection in the context of sexual offences and identified significant problems regarding the conduct of these cases. It discussed, in particular, conduct of judicial personnel which would suggest discrimination against alleged victims of sexual offences and the lack of victim representation in the courtroom. In addition, the cases revealed the lack of protection and support services for alleged victims, the problem of exclusion of the public and family members and the failure of judicial personnel to clarify, in court, allegations of threats to victims and/or reasons for victim’s withdrawing statements. The report highlighted that the development of victim representation bodies, consisting of appropriately trained personnel, to provide for protection of vulnerable victims throughout the criminal proceedings would assist in ensuring that victims provide essential testimony, balanced with the protection of their rights, including privacy.

In some cases, victims and witnesses require protection in order to fulfil their right and obligation to participate in criminal proceedings. In such cases, authorities are required to take “measures to minimise inconvenience to victims, protect their privacy and, when necessary ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.”⁴ Although the right of a defendant to examine witnesses against him or her is one of the principal rights involved in a fair trial, the European Court has recognised that in certain cases, it is necessary for the authorities to take steps to protect victims and witnesses.⁵

In cases of severe sexual and domestic violence as well as cases involving children, there is a need for measures to shield victims, such as video-links, screens or in-camera reviews. In particularly sensitive cases and those involving organised criminal activity, more substantial mechanisms for the protection of victims and witnesses are essential,

such as the provision of immunity and longer-term protection of key witnesses (including, for example, a relocation programme). At this time, UNMIK has not yet formulated any guidelines for the protection of victims and witnesses in the courtrooms, nor established any mechanisms or programs for substantial witness protection. Working-groups led by UNMIK police have been established to address these issues.

I. Victims of Trafficking-Related Crimes

In Kosovo, the majority of trafficking-related offences involve the movement and sale of foreign women for the purposes of forcing them into prostitution.⁶ Most of the criminal conduct which constitutes trafficking involves group or organised criminal activity, which is criminalised in certain respects by the domestic law.⁷

One of the first such cases tried in the district court was in Gjilan/Gnjilane where, on 14 June 2000, three defendants were convicted of “intermediation in the exercise of prostitution” based on the statements of four foreign victims from Eastern Europe made in front of an investigating judge. Although the attention of the international community has been focused primarily on the trafficking of women across borders, there are trials in the district court against persons for the movement of young girls within Kosovo for the purposes of forcing them to prostitute themselves. Since the beginning of the UNMIK administration, there appears to have been a shift by the courts from merely prosecuting victims of trafficking for prostitution to prosecuting perpetrators of trafficking-related offences.⁸

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates UNMIK to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” In this regard, UNMIK promulgated *Regulation 2001/4 On the prohibition of trafficking in persons in Kosovo*.

(a) Failure to ensure victim’s testimony in the court

In cases involving trafficking-related offences, organisations involved in victim assistance have placed emphasis on ensuring that women who desire to return to their home country are repatriated as quickly as possible. As there is no witness protection mechanism, it is unsafe for the victim to stay any longer than necessary for repatriation. However, this practice of quickly repatriating alleged victims of trafficking has, in some notable cases, left the courts and the defendant without the ability to hear victims’ testimony. In cases where the victims of trafficking-related offences have only provided statements to the police without the presence of the defendant or the defence counsel, and their testimony is the primary, or only evidence for the prosecution, the introduction of such statements at the trial will result in a violation of the defendant’s right to a fair trial.

Regulation 2001/4 may address this problem, in part, as it provides for temporary safe housing, measures for witness protection, and other victim’s assistance that should support victims of trafficking related crimes while staying in Kosovo for the purposes of

assisting in the prosecution of perpetrators or to protect victims of trafficking within Kosovo during the judicial process. However, there has yet to be any implementation of the victim's assistance and protection aspect of the Regulation, despite the fact that the assistance element was discussed at length for a significant amount of time.⁹

Although the substantial emphasis on protecting victims in these cases - where multiple crimes are perpetrated against them - is understandable, this emphasis has impacted the effectiveness and integrity of court proceedings and resulted in impunity for some perpetrators. There has been less focus on ensuring that the court proceedings are expedited in these cases, that victims have secure housing and that the appropriate victim protection measures are developed for victims to provide testimony in the courts generally, and particularly, at trial. In addition, there has been little emphasis on guiding the courts and police on conducting adequate investigations in these types of cases.¹⁰ Efforts now should be focused in this regard.

H

In September 2000, two women, twin sisters from Moldova, alleged to the police that they were sold to a man named "N," who took their passports and forced them to work as prostitutes in his cabaret bar in Pristina/Prishtine. While working in the bar they met another man, Ramadan, who helped them escape from Pristina/Prishtine to Prizren. On 24 September 2000, they were discovered by three named and one unknown persons who worked with "N." These persons forced the two victims and Ramadan to an apartment owned by the defendant. The victims stated to the police that these four men took drugs and raped them multiple times. In the morning, the defendant, *H* allegedly pointed a handgun at one of the girls and raped her as well.

Ramadan told the police that the next day he was asked to pay 5,000 DM for the two victims and he forfeited his passport, his watch and two rings as a down-payment. He was caught on the street by the four men and they threatened to kill him. Ramadan then contacted UNMIK. Only the defendant was arrested on 1 October 2000 as the other four suspects had disappeared. On 4 October 2000 the defendant, *H* was released from detention.

The file from UNMIK police was handed to the district court public prosecutor who refused it as it dealt with prostitution. The minor offences court also refused the file as it involved criminal offences under the jurisdiction of the district court. On 11 December 2000, *H* was heard by an investigating judge, after his second arrest. During this hearing, he identified the last name of one of the four suspects and stated that he had allowed them to stay in his apartment for a night. *H* denied having been at the apartment. No forensic and medical exams were made on the two victims.

During this period, the two victims were voluntarily repatriated to Moldova. As a result, they never provided statements to the court. The court made an effort to summons Ramadan but after the police identified his whereabouts, no further effort was made to bring him to testify. Although the court requested that the police investigate the four other suspects from Pristina/Prishtine, the police replied that there was not enough

information to identify them, as the court had not informed the police that the defendant had provided the full name of one suspect. The indictment of the defendant for rape was issued on 10 January 2001, proposing that the court read the police statements of the two victims and Ramadan.

Y et al.

On 16 October 2000, an UNMIK police car was stopped on the road between Kosovo Polje/Fushe Kosova and Pristina/Prishtine by three young women who requested assistance. These young women, all Romanian citizens, along with a young Moldovan citizen told the police that each on separate occasions were sold by two unknown Serbs in Belgrade to another two Serbs. These two Serbs brought them to Mitrovica/Mitrovice and, one of them, defendant *Y* would beat them in order to force them to have sexual intercourse with “clients.” All of the young women stated that they were brought by *Y* from Mitrovica/Mitrovice to Kosovo Polje/ Fushe Kosova in a white UN vehicle driven by a Russian UN staff member and placed in the Tejecki Hotel. One of the girls begged the hotel owner to allow her to work as a bartender, but *Y* kept harassing her and threatening to kill her. The hotel owner was arrested by the police, but was released following his statement that he had only tried to help the girl by providing her with employment and he verified that he had heard *Y* threaten her.

The other three girls told the police that they were forced by *Y* and his wife, a Moldovan citizen, to go to a shop owner by the third suspect, NT (who was not indicted) where *Y* would bring “clients.” They were then brought to different locations to have sexual intercourse. Two of the girls stated that they had tried to escape many times but that *Y* had taken their passports. The passports were found in the residence of *Y* by the police.

The three suspects are charged with “intermediation in the exercise of prostitution.” All three denied the charge, the wife of *Y* claiming that she had come to Kosovo as a prostitute, but was not involved in pimping for prostitution. The owner of the shop claimed that he knew *Y* and had seen the girls a couple of times in his shop but that he had no idea what was going on. A third witness, a waiter at the hotel, verified that the girls were living there and that he had seen *Y* coming and taking them from the hotel.

On 4 December 2000, after hearing the suspects, the investigating judge requested to hear the victims. Sometime between October and December, the three Romanian girls were voluntarily repatriated, and the third girl disappeared. The investigating judge sent the file back to the prosecutor without having taken the victim’s statements. Despite this, the public prosecutor issued an indictment on 17 January 2001.

(b) Adequacy of investigations in trafficking-related cases

Even in cases where victims have provided testimony during the investigative hearings prior to the trial, there continue to be problems with the adequacy of the investigations regarding trafficking-related offences. In the majority of cases, the victim’s testimony in front of the investigating judge has been read at trial. During investigation hearings,

investigating judges summarise testimony into the record which is then used at trial.¹¹ In two cases, this process has allowed for potential manipulation or inaccuracy in the record.

Additionally, the result of this process is that the victims are not present at trial to testify in front of the panel of judges who ultimately decide on the verdict and the sentence. As trafficking-related offences usually involve forced prostitution, there are concerns that judicial personnel may harbour some prejudices. The large number of prosecutions of foreign women in Kosovo for prostitution appears to support these concerns. Without the victim present, it is more difficult for judges to assess the credibility of the testimony or to assess the impact and gravity of the offences on the victim.

The investigations in these cases are further hampered by the fact that there is no protocol for the medical examination of victims of trafficking-related offences for the courts. Despite the fact that these cases tend to involve long-term abuse and degrading living and working conditions, LSMS is not aware of any case in which these women have been given forensic medical examinations for the purposes of criminal investigation. In a case discussed above, there was no medical examination of the victims even the day after they claimed they were raped multiple times.

Furthermore, these cases usually involve groups of persons contributing to the various illegal activities included in trafficking. Although the victims in these cases identify multiple perpetrators, it appears that there is often no on-going investigation in these cases. In Pec/Peje, many suspects who were arrested by the police during bar raids, had their cases dropped by the district court because the victims did not directly implicate them in individual criminal acts.

Deme Nikqi

On 2 February 2001, *Nikqi* was convicted of one charge of “intermediation of prostitution,” three charges of rape and one charge of falsification of documents. The case against *Nikqi* was based on the testimony of two women from Moldova during the court investigation who alleged that they were brought to Pec/Peje without documents and sold to *Nikqi* who forced them to work in his restaurant as waitresses and prostitute themselves. They further testified that *Nikqi* raped them on separate occasions. One of the women stated that when she refused to prostitute herself, *Nikqi* beat and raped her to “teach her what happens when she doesn’t do what she is told.” The women testified that customers informed them that they were charged 100-150 DM per hour or 200-300 DM per night and this money was given to *Nikqi*.¹²

During the investigation hearings, despite the degrading and brutal circumstances of the victim’s experiences, which involved descriptions of multiple beatings, rape and forced prostitution, the investigating judge ordered that the two victims separately confront the defendant, *Nikqi* with their testimony. The confrontation between *Nikqi* and one of the victims dissolved into a shouting match which the investigating judge did not intervene to stop and he appeared to find the interaction entertaining. Neither of the two victims changed their original statements despite the confrontation, although both women appeared traumatised by the experience.

Between the time of the investigating hearing and the trial, the two victims from Moldova were voluntarily repatriated to their home country. Their statements made in front of the investigating judge were read at the court. After the trial, one of the trial judges indicated that he found it difficult to assess the credibility of the victims and to get a sense of the gravity of the offence because the victims did not testify at the trial. *Nikqi* was sentenced to three years and six months imprisonment for three rapes and pimping and released pending appeal.

P and Q et al.

On 3 November 2000, P & Q were indicted for “intermediation of prostitution” and, against Q, for unauthorised sale of narcotics and illegal weapons possession, in part, based on statements provided to the court by seven foreign women from Moldova and Ukraine. One of the victims testified in an investigation hearing as to how she, with three other women, was brought through Serbia by two named Serbs to Djakovica/Gjakova.¹³ Despite the fact that they did not speak Albanian, they signed contracts in which they understood that they were to receive 1,000 DM per month for topless dancing, and they would have access to medical care and good living conditions. The witness testified that none of these conditions were met as they were beaten and were not paid except a few hundred DMs to buy food and necessities. When the women attempted to escape they were beaten with a belt and threatened that if they attempted to escape again they would be shot.

The women further testified that while working in the bar, “Marilyn Monroe,” they were forced to prostitute themselves with approximately one to two clients per day and four to five per night. The rate for their services was around 200-300 DM per hour and 500-600 DM per night. They testified that defendant Q received the money and defendant P provided the security. The victims named the man, *EC*, as the organiser of the operation and the one who kept their passports. *EC* was indicted separately on 13 February 2001 by the Peje/Pec District Court.¹⁴ The charges against the other five men arrested during the raid on the bar were dropped.

The investigative hearings of the seven victims were expedited due to the fact that there is no safe house around Pec/Peje and the victims had to be transferred to Pristina/Prishtine. Although it has not been confirmed, most, if not all, of the victims have probably been voluntarily repatriated to their home countries or have disappeared. The trial has yet to take place.

R et al.

On 12 January 2001, five men were indicted for multiple offences relating to trafficking. All were indicted with “intermediation in the exercise of prostitution” and for “falsification of documents.” Three have also been indicted for rape. The indictment is based on the statements of four women, two from Moldova and two from Serbia, who allege that the defendants were involved in buying many girls for around 2000DM and

selling girls for around 4000DM. The group of girls that worked for the defendants, one victim estimated around 14 or 15 were forced to prostitute themselves in the Hotel Herzegovina. Despite this testimony, the defendants were not investigated for the charge of buying and selling persons, i.e., “establishing slavery conditions.”

During the investigation hearings at Prishtine/Prishtina District Court, the victims provided extensive testimony regarding being raped as a way to force them to work, of the large amount of clients, the rates and that two of the defendants were their bosses and kept the money. One of the victims also described transactions with Russian KFOR soldiers for prostitution, including taking girls to their camp. This victim also testified that she was beaten by these two defendants. Two of the victims stated that their passports and identification cards were taken by one of the defendants. She further stated that the defendants used drugs and that they gave drugs to many of the girls. One of the victim’s in the case stated that she was originally sold when she was 14. Many other girls who were being forced to prostitute themselves by these defendants are named in their testimonies.

The two victims from Moldova were voluntarily repatriated after providing their testimony to the court. One of the other victims is thought to be mentally ill. One Serb victim did appear to testify at the trial proceedings heavily guarded. She provided a coherent statement against the defendants. Unfortunately, as there are no witness protection guidelines for the courts, she was asked to give her address and place of employment (in line with procedure). In addition, according to the procedure, the defendants were allowed to question her directly. The trial continues.

II. Sexual Offences

Since September 2000, there have been 19 completed sexual offence trials (12% of all completed trials), involving 29 defendants, and 18 indicted cases, involving 20 defendants, that, as of 28 February 2001, had not been completed. In total, there had been 37 *indicted* sexual violence cases, involving 49 defendants, in the district courts over the past 6 months. The cases of alleged sexual offences are often handled superficially by the courts illustrating disregard for the serious nature of such cases for both the alleged victim and the defendant. Many of the problems in the conduct of sexual offence cases highlighted in the past report continue and these concerns are heightened by the fact that the majority of these cases continue to involve juvenile victims.

Due to the frequency and complex nature of these cases, an overall approach to improving the judicial proceedings requires training of court personnel as well as the development of psycho-social support, protection measures and medical/forensic services that can assist the courts in adjudicating such cases fairly. There has been no practical training of judicial, police or social services personnel on issues of sexual violence, including heightening sensitivity towards alleged victims. Over the past six months the average sentence for sexual violence cases has declined from three years to one year. These sentences send a message to the society and, in particular, to victims regarding how seriously the justice system considers sexual violence.

(a) Conduct suggesting judicial discrimination against victims in sexual offence cases

In some cases, judicial authorities have manifested discriminatory attitudes towards alleged victims of sexual violence. Such bias has been illustrated by prejudicial remarks made by judges prior to trials regarding the validity of victims' allegations, clearly inappropriate questioning of victims, and the failure to protect victims from irrelevant and humiliating comments and questions by witnesses and defence lawyers.

One case involved an allegation by a victim that she was hit and raped by a defendant that she was dating in his bedroom. During the investigation, the investigating judge recorded a statement by a witness that the witness had *heard* that the alleged victim in the case "is not very clean because she is going out with a lot of guys." The presiding judge in the case stated to LSMS before the trial that *the majority of rape cases are fabricated by the alleged victims, seeking revenge or trying to pressure the defendant to force a marriage proposal. He added that in general women should be more cautious about putting themselves in potentially dangerous situations.* During the trial, the presiding judge did not intervene when one of the witnesses verbally harassed the alleged victim directly stating that she was not the right woman for the defendant and he would never marry her. The defendant was found guilty of rape and sentenced to one year imprisonment.

In another case, a juvenile victim alleged that the defendant (who was married) took her to a restaurant-hotel with friends, threatened her with a gun and raped her. During the trial, the presiding judge questioned the victim, as to whether she knew why he had taken her up to a room where she was allegedly raped. She replied that the defendant wanted to hurt her. The presiding judge replied, "No, but because he liked it." In response, the victim stated that, "I wanted to jump out of the window." The presiding judge replied speaking of the window, "nothing would have happened to you, the hotel wasn't that high." *Before the trial, the presiding judge stated to LSMS that he thought the victim may have fabricated the case since he believed that she had only claimed the rape after she found out the defendant was married* (despite the fact that there was testimony in the record by parties and witnesses in the case that the victim was aware that the defendant was married at the time of the event). The defendant was convicted of rape and sentenced to three years imprisonment.

In one case, a juvenile victim alleged that she was pressured into sexual intercourse with two defendants in their car during a trip to the lake. She stated that one of the defendants had a knife. Two defence counsels questioned the victim, one did so in a loud and authoritarian tone, obviously intimidating the victim. Without intervention from the panel of judges, the other defence counsel put clearly humiliating questions to the victim, such as "in what position did you have sex?" and similar ones to the defendant, such as "did the victim have an orgasm?" and "did she enjoy it?" The medical report on the examination of the victim shortly after the event stated that there was a perforation of the hymen, tracks of blood and indicates the findings are consistent with violent intercourse. The defendants were convicted of rape and sentenced to five years imprisonment each.

During a trial involving a victim who alleged that her fiancée had raped her, the proceedings were interrupted several times by the presiding judge answering the telephone and the prosecutor requesting trial dates for other cases. This conduct continued throughout the testimony of the victim, who had since married the defendant, as to the circumstances of her then fiancée forcing her to have sexual intercourse. The victim clearly stated that she did not want the defendant (her husband) prosecuted. At the end of the hearing, the presiding judge openly questioned, apparently ironically, whether it was fair that the law only criminalises forced sexual intercourse with a female, and not with men. The defendant was found not guilty as the victim withdrew her accusation.

(b) Victim's advocates

Concerns regarding the conduct of judicial personnel and other principals in these cases toward alleged victims of such crimes is heightened by the fact that, in the vast majority of cases monitored, the alleged victim has not been represented by a victim advocate. The lack of victims' advocates is particularly striking in cases where the victim is a juvenile. Additionally, juveniles often appear at court without a legal guardian and are, nonetheless, asked to testify. In the few cases where victim's advocates have been present in the proceedings, they have played a passive role indicating a need for training of victim's representatives in such cases.

The FRY CPC entitles injured parties to have representatives and to be present at the trial, to participate and to put questions to the defendant.¹⁵ During trials, however, the practice is to exclude the victim from hearing the testimony of the defendant. By excluding the victim during the defendant's testimony when they do not have legal representatives, the victims are denied by the court the entitlement to participation in these cases. In many cases, family members of the victim have been excluded from the courtroom during the victims' testimony. Family members may be voluntarily providing testimony in the case and therefore excluded. Alternatively, as cases involving sexual violence present complicated issues of culture, shame and family image, family members may even have a harmful effect on the victim's testimony. For these reasons, judges may decide to request family members to leave the courtroom during the victim's testimony. However, the FRY CPC provides that exclusion of the public should not include victim's representatives. In cases where the victim is a juvenile and only has family support, exclusion of family members conflicts with this provision. Victim's advocates, however, do not have a conflicting role in the courtroom and thereby can ensure that the best interests of the victim are protected throughout the entire proceedings.

In one case a fifteen year old victim alleged that she was forced by a group of boys to an apartment where three of the boys forced her to perform fellatio on each of them. Pictures of the victim after the incident displayed bruises on her chest as a result of some violence against her during the incident. Despite the degrading and humiliating aspects of the case, the victim did not have a victim's representative to intervene, other than her father, who was excluded from the courtroom during her testimony. While she was testifying and crying throughout, the three defendants were sitting close enough to her to interfere with her testimony and verbally intimidate her, and as a result a fight broke out between the

boys and the victim. Only after some time of total chaos in the courtroom did the panel quiet the defendants. The father then returned to testify that the victim was being treated for psychological problems since the incident. The three defendants were found guilty of aggravated attempted rape, two of the defendants were senior juveniles and sentenced to one-year imprisonment and the other was sentenced to educational measures.

(c) Victim's psycho-social support and protection

These cases also raise concerns regarding the availability of psychosocial services and protection for alleged victims of sexual violence. In addition to the obligation on authorities to ensure that victims receive the appropriate medical and psychological assistance, the mental state of the victim is important to the judicial process, as the victims' testimony forms a critical part of the evidence in the case. The current procedure requires that a victim provide a statement to the police, to an investigating judge and at trial. Regardless of the credibility of a victim's statement, this process can result in re-traumatisation or severely impact an alleged victim's reputation in her community. Psycho-social services as well as protection measures in certain cases are crucial for an alleged victim throughout this process.

In the first case referenced above, after the alleged rape the victim stated that she told her mother about the rape, tried to commit suicide by drinking washing liquid and was taken to the hospital. During an investigation hearing, one witness stated that he was told that the victim's father beat her with a metal stick and that is why she drank the fluid. Neither this witness, the mother nor the father of the victim was ever asked to clarify these circumstances.

In another case which includes allegations of multiple rape and one murder involving two defendants, one of the alleged victims is a fifteen year old girl. While she was testifying the juvenile victim began to display signs of mental illness. As a result, the victim's testimony was highly confused and diverged considerably from her previous statements. At one point, the victim was smiling while testifying to an alleged rape by one of the defendants when she was in a car with a female friend laughing and another crying. She also accused the mother of the dead victim, her friend, of killing her daughter and then stated that she had informed the mother of the death. Despite this, the hearing of this witness went longer than necessary with one of the professional judges smiling while asking irrelevant questions to the witness apparently amused by her. This alleged victim was not accompanied in the court by either a family member or a legal representative.

In a case involving potentially serious protection issues, mentioned previously in this report, six girls (between the ages of fifteen and nineteen) were harassed by a group of men who were a part of the military police of the KLA (PU). Two of the girls alleged that some in the group attempted to rape them. They stated that if they reported the incident they would be killed. Although according to the police the girls were unwilling to provide statements at first based on concerns for their safety, they finally did. Despite the fact that the international prosecutor requested immediate detention of the suspects 16 November 2000, in part to protect the girls, the international judge has failed to act on the case. The

severe circumstances of the case and the girls' (victims and witnesses) fear regarding their safety appears not to have been considered by the judge.¹⁶

¹ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, General Assembly Resolution (29 November 1985).

² *Id.*

³ Art. 59 (1) (2) FRY CPC.

⁴ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, para. 5(d).

⁵ See *Dorson v. Netherlands*, (1996), 22 ECHR 330.

⁶ Art. 74 KPC, Art. 38, 39 KPC, Art. 46 KPC, Art. 251 FRY CC, Art. 155 FRY CC. Other trafficking-related offences include, "illicit crossing of the state border" of others (Art. 249 (2) FRY CC) and "enabling someone to enjoy intoxicating drugs" (Art. 246 FRY CC).

⁷ Art. 197 KPC, Art. 22 FRY CC, Art. 196 KPC, Art. 24 FRY CC.

⁸ *UNMIK Regulation 2001/4* may address this problem, in part, as it provides for a possible defence for victims against prosecution for prostitution, in that it states: "[a] person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking."

⁹ For example, UNMIK has yet to designate a victims assistance co-ordinator as required under the Regulation.

¹⁰ The police have established Trafficking and Prostitution Investigation Units in all five regions to investigate these cases.

¹¹ LSMS has monitored cases where there is no court interpreter available to translate from Russian to English (or even Russian to Albanian). This has caused difficulties in the court investigations in the cases in Pec/Peje and even resulted in an indication from the President of the district court that the statements from the victims may not be admissible in court for this reason.

¹² During an investigation hearing, another foreign woman testified that she was in love with the defendant and that he had not harmed her or forced her into prostitution. She also stated, however, that she had seen the defendant beat one of the other women. This testimony was not read into the trial nor was this witness summonsed to the trial.

¹³ LSMS observed that there was no defence counsel present during the investigation hearing of this victim. If the victim does not appear for trial to provide testimony in front of the court, then it would appear that the defendants' right to examine witnesses against them under Art. 6 of the ECHR and Art. 14 of the ICCPR may be violated. See section (a) for a discussion of this problem in these cases.

¹⁴ The case against *Canhasi* may also raise serious concerns regarding the defendants rights as at the time that the victims made statements before the investigating judge, he was under custody and was not represented by defence counsel.

¹⁵ Art. 59 (1) (2) FRY CPC.

¹⁶ Allegedly, some of the girls have been intimidated in the meantime.

SECTION 7: THE RIGHTS OF VICTIMS

II. INTRA-FAMILIAL VIOLENCE

Introduction

International standards on the rights of victims of crime require that states ensure that appropriate assistance is available to victims throughout the legal process. Such assistance should include the necessary material, medical, psychological and social assistance, including the provision of information to victims on the availability of health and social services and ensuring access to them.¹ To guarantee this, police, justice, health and social services should be provided the appropriate “training to sensitize them to the needs of victims, and guidelines to ensure prompt and proper aid.”² These standards further require that particular attention be afforded certain categories of victims, including those who may be the target of discrimination due to sex, family status, birth or age.

Moreover, there are more specific international human rights standards regarding discrimination against women and the rights of children that obligate UNMIK to take more expansive measures when persons within these categories are victims of criminal conduct. They further obligate authorities to take all appropriate measures to ensure that violence against women is addressed in a non-discriminatory manner and that the children are protected from violence.

As LSMS monitors primarily the district courts, where only some intra-familial cases are handled, the incidents of intra-familial violence in all the courts have not been observed comprehensively. The cases mentioned in this section, however, as well as others monitored but not discussed, have raised concerns that require attention.

The outcome in the cases monitored by LSMS is that victims of violence within the family, both women and children, are left without a remedy or protection, in that the criminal conduct against them remains either completely unpunished or inadequately punished. Consequently, victims are often placed in the position where it is necessary to return to homes in which criminal conduct is further perpetrated against them. A fair judicial response to these cases requires urgent development of social services and support mechanisms to ensure that the victims’ rights are protected and structures are in place to sustain women’s welfare in cases of family break-up. It appears that one of the most severe problems in the conduct of these cases presently is that the state-administered agency which is supposed to provide assistance in cases involving intra-familial violence and child protection, the Centres for Social Work under the Department of Health and Social Welfare, does not adequately function in this regard.

I. Violence Against Women in the Home

International standards regarding sex discrimination recognise that *de jure* equality is insufficient for the protection of women’s rights and that it is necessary to modify social

practices and societal prejudices in order to achieve women's equality with men. Consequently, CEDAW obligates authorities to take appropriate measures "[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." As with rape cases, cases of intra-familial violence present particular difficulties for the courts because they involve issues of culture, custom and traditional concepts of the roles of the sexes within the family.

In all communities, customary practices and cultural values play a significant role in the way in which courts, police and social services institutions view and treat cases of intra-familial violence. As a result, awareness raising and training initiatives are essential for addressing cultural and customary perceptions that influence professionals to conceptualise violence against women in the family and, in particular, child abuse as non-criminal.

(a) The law and prosecutions

Unlike the cases of sexual violence described in the last section, these cases involve criminal conduct within the family. Due to a complicated combination of many factors, including traditional bias against women, violence in the family is often not perceived as criminal, although the same acts between strangers would clearly constitute a criminal offence. There are three manifestations of this problem. First, the law may fail to criminalise acts between family members, for example the applicable law does not criminalise rape within the marital relationship. Second, the law may fail to criminalise such acts adequately. Third, the police, the prosecutors', and the courts' may fail to charge such acts under the law or may treat cases charged differently because they involve violence within families.

The inadequacies in the domestic law, such as the lack of legal mechanisms for the protection of victims from violence, have been identified and are being addressed by a working group on legislative review.³

Due to the fact that the applicable law inadequately addresses this issue, it is difficult to identify cases of intentional undercharging of such offences. However, in one case, in December 2000, a husband admitted to the police that he had, in a drunken state, taken his wife by the hair and threw her out of the house where he stabbed her in the waist with a "butterfly" knife. He admitted that he thought his wife might be dead and he returned to the house. The next day he voluntarily went to UNMIK police to report the incident. The file was handed from the district court to the municipal court, as the district court public prosecutor refused to charge the husband with attempted murder. The public prosecutor of the municipal court, at the end of February 2001, requested an investigation based on the charge of "endangering the security." It would appear that, at least, a charge of "second degree" light bodily injury where a weapon is used, which requires a public prosecution, or "grave bodily injury" would be more appropriate in such a case.

In the cases monitored by LSMS, the primary problem is not the classification of the offence but that the courts and police are unable to handle the multifaceted aspects of intra-familial violence. The lack of functioning social services severely impacts the ability of the courts and the police to effectively and appropriately investigate, prosecute and sentence perpetrators of intra-familial violence.

(b) Cases

In cases of domestic violence, women face the extremely difficult choice between dissolving the classically defined family unit or continuing to live with violence. Due to family or community pressure as well as insecurity, women may recant their statements or request that prosecutions be dropped. As there are no special employment programs for these women and a lack of social assistance and housing, women who desire to leave their husbands may understandably hesitate. There are very few shelters for women and children who are subject to domestic violence.

As a result of the lack of functioning social welfare institutions, the courts and the police have been playing inappropriate roles in these cases. KPS and international police officers as well as judges have been mediating cases involving domestic violence, either facilitating a reconciliation between the parties or admonishing the husband because the wife recants her statement. The roles of judge and police in dealing with these issues must be clearly defined. In none of the cases monitored have victims had a representative to protect their interests.

Minor Offences Court

The Pec/Peje municipal court of minor offences charged a husband with a minor offence for beating his wife. At the trial, the wife could barely walk into the courtroom and her face and hands were severely bruised as a result of the incident. The incident involved the husband coming home in the early morning drunk, beating his wife and threatening her with a knife which awoke their four children (two year old twins, and a six and nine year old). The husband slapped the nine-year old daughter in the mouth and sent her to the bathroom and she was so frightened that she wet her pants. After this, he threw the wife out of the house by her hair. The husband drove the wife around in his car at high speeds and then threw her out of the car and threatened to run her over. The wife stayed out all night with no clothes on until she returned home the next morning.

The husband admitted to beating the wife but denied beating her in the car. In his defence, he alleged that she had engaged in an extra-marital affair while they were living in Germany.⁴ The wife stated on a number of occasions that she could no longer live with her husband and that they had had "problems" over the past ten years. The wife requested custody of the children, but she stated she needed a place to live and some assistance to do this. At the time of the trial, the four children were living with the husband. The judge found the husband guilty and sentenced him to 30 days imprisonment although the judge expressed concerns about the welfare of the children as they were staying with the father. No further steps to resolve these issues ensued. LSMS observed that the KPS officer

involved in the case was attempting to facilitate a reconciliation between the wife and her husband.

On appeal the High Court of Minor Offences modified the sentence to a fine of 400 DM (or thirteen days in prison in case of default) on the basis that the defendant, husband, lived with the victim, wife and they had four children and that the records reflected that the husband and wife had indeed reconciled. In the appeal, the defendant stated that he was back with his wife and that he would not repeat the offence. The trial testimony of the wife stating that she no longer wanted to live with her husband and that she was concerned about where she and her children would live appear not to have been known or taken into account by the appeal court. Within two months of this decision, the wife again reported to the police that her husband had beaten her while drunk and this had resulted in a fracture of her arm. A medical report confirmed the wife's serious injury. The husband was again charged under the minor offences law and was sentenced to forty days imprisonment. The wife has expressed her desire to the police to get a divorce.

Municipal court

A case in Prizren involves allegations by a wife that her husband has repeatedly mistreated her and beat their three children (aged three, six, and eight) with a belt. The first arrest of the husband was on 11 July 2000, four days after an incident when he punched his wife until she was unconscious and beat his children with a belt leaving injury marks all over their bodies. The husband was charged with "light bodily injury," but the charges were dropped as a result of the judge "admonishing" the husband. The wife apparently requested that her husband be released.

On 23 October 2000, the wife stated to UNMIK police that in the middle of the night, her husband had forced her to leave her home naked using a knife and had threatened to kill her. She also stated that this type of abuse had been occurring over the ten years of their marriage. The husband was re-arrested for the assault on his wife. On 31 October 2000, the wife went to the police and stated that she had forgiven her husband and requested that he be released from custody. On the same day, the husband was heard by an investigating judge. He confessed that he had beaten his wife and forced her to leave the apartment. He further explained that he was punishing his wife for speaking on the street with other men. There was no order of pre-trial detention.

According to the police, the wife withdrew her accusations because pressure from her family, including her brother who had told the victim that she should obey her husband and not leave the house or speak to men on the street. Allegedly, the father of the victim supported the position that the victim should withdraw the accusation and allegedly a cousin of her husband had threatened her.

On 1 December 2000, the husband was found guilty of "endangering the security" and was sentenced by the municipal court to eight months imprisonment with a conditional release. The verdict of the court does not mention the previous charges against the husband when he was admonished.

District court

A case in the Pec/Peje district court involved a brother charged with the attempted murder of his sister after shooting her in the neck/shoulder at close range. The motive of the attack, testified to by the brother, was the fact that she had not married her fiancé, but had married another young man. He claimed that the action taken against his sister was his right under custom.

The sister/victim was informed that she did not have to testify by law, but she agreed to testify. However, she could not speak so the judge read her testimony from the investigation hearing into the record. She had stated that she did not want her brother to be punished by the court. The medical report of the victim stated that the injuries to her shoulder are permanent and that she will be unable to use her arm.

The only other person to testify was the victim's husband, who had been the victim in a related case tried in the same court. In this separate incident, the alleged fiancée of the girl and his brothers were charged with grave bodily injury and weapons possession after they had severely beaten the young husband. As a result of the incident, the husband spent approximately one month in the hospital. During those proceedings, the presiding judge asked the husband to reconcile with the defendant in open court. As a result, the defendants were only convicted of light bodily injury and some for weapons possession but they were given suspended sentences.

The brother who shot his sister in the connected case was found guilty of grave bodily injury and sentenced to six months imprisonment (including time in pre-trial detention). He was released pending appeal. LSMS was informed that the President of the court had stated that the case was decided in this manner because it was a family issue and that the prosecutor and defence counsel had agreed on the sentence before the trial.

II. The Need to Protect Juvenile Victims of Family Violence

The majority of cases monitored involving intra-familial violence include violence against children. UNMIK has the obligation to take all appropriate measures to protect children from all forms of physical or mental violence, injury or abuse, neglect, maltreatment or exploitation, including sexual abuse.⁵ Authorities such as UNMIK have an obligation to give a high priority to family and child welfare.⁶ In cases where there is no family environment or the best interests of the child indicate that the child should not remain in the environment, authorities should ensure alternative care for children.

As with cases of sexual violence, the lack of victims' advocates and victim protection in cases of intra-familial violence monitored by LSMS is striking. Although the FRY CPC mandates the participation of the Guardianship Authority of the CSW (under the Department of Health and Social Welfare) in cases against juveniles, judges have argued to LSMS that in cases of intra-familial violence they are not required to involve the CSW. This is despite the fact that, under the *Law on Marriage and Family Relations*, the Guardianship Authority is the institution responsible for child protection ("supervising

the right to parenthood”) and cases involving child custody. There appears to be no regular process by which the courts or public prosecutors inform the CSW of these cases.

The UN-administered CSW offices lack the staff, the professional knowledge, the resources and sometimes the willingness to fulfil its legal obligations regarding children. The CSWs were tasked with administering the social assistance program, a role that these offices had not played in the prior system. Although this burdened some CWS in the initial stages, the administration of this task is now stabilising. It is in the area of these offices’ legal obligations to ensure the protection of children and provide professional social work services where substantial improvement and development is needed.⁷ In cases where the CSW have been involved, they have demonstrated a lack of professional knowledge and indicating a substantial need for training or even significant reform. The ineffectiveness of the CSW and the lack of victims’ support agencies further aggravates failures by the courts and the police to treat these cases appropriately and with the required urgency. It is clear that child abuse cases are rarely prosecuted. Currently, there are no administrated alternatives for children who are without family or who are subject to abuse by their family.

(a) Failure to involve CSW in cases

The Mitrovica/Mitrovice district court heard a case against a defendant, nineteen years old, for unlawful sexual relations with a minor and attempted murder. The case involved a girl, thirteen and one-half years old, who alleged that the defendant had forced her, through threats of killing her brothers, to marry him. Although the families of the two parties did not initially agree on the relationship, they were eventually reconciled and the relationship was recognised as a traditional marriage despite the fact that the girl was under the legal age of consent. The girl lived some time with the defendant, but returned to her family home multiple times.

The mother of the girl testified that she and other family members had been beating the girl to force her to return to the defendant as she was now "married." The defendant verified that he had seen the family of the girl beat her and had tried to intervene in her defence. The mother also testified that the girl had returned to the family because the defendant was beating her and sometimes locking her up in the house. The sister of the defendant testified, despite her right not to, that once she saw the defendant slap the girl when she went out of the house without his permission. The family of the girl finally decided not to force her back to the defendant. Eventually the fight between the families, resulted in the defendant stabbing the mother of the girl seven times. The defendant claimed that the act was in self-defence as the mother was attacking him with an axe.

The court was presented a report from a neuro-psychiatric clinic regarding the girl stating that she was in a depressive state. Throughout the court proceedings, the girl was not represented by a victim’s advocate. Despite the fact that there was evidence, testimony of her mother, that this thirteen year old girl was subject to abuse by her family (in part to force her to return her abusive “husband”), the court did not involve the CSW in the case. The fact that the girl appeared to be a victim of continued abuse and her home may not have been the appropriate place for her, was not considered by any party, including the

court. The defendant was found guilty of both offences and sentenced to two years and nine months imprisonment.

(b) The legal obligations of CSW and the need for training and reform

A case in Gjilan/Gnjilane involves multiple alleged acts of incest by the twenty-three year old brother of his three sisters, aged thirteen, fourteen and seventeen. All three sisters reported to the police that they had been victims of acts of incest including fondling, oral sex and sexual intercourse on 12 October 2000. The suspect brother was detained from 13 October 2000 for eight days, when he released from custody and allowed to return to the home where the alleged victims lived.

During the first investigation hearings, the two youngest sisters recanted the statements they had provided to the police. The two girls stated to the investigating judge that previously the brother had made efforts to fondle them, but no sexual intercourse. They further stated that they had made false allegations against him because he had beaten them and therefore they wanted him out of the house. The investigating judge did not clarify the reason for their prior inconsistent statements to the police. The eldest sister, who had allegedly stated to the police that she had been subject to acts of incest from her brother was not called to testify by the investigating judge in the first instance. She later gave similar testimony to the judge as her two sisters.

On 19 October 2000, the prosecutor sent the file back to the investigating judge for further investigation, in particular, to hear the KPS officers that had interviewed the girls and their brother. One KPS officer testified that the three girls had stated to her that they were sexually assaulted by their brother, including sexual intercourse. The investigating judge did not inquire into why the three girls may have changed their statements. The other KPS officer, who had questioned the defendant, testified that the brother had admitted that he had sexually abused all three sisters.

In his statement to the investigating judge, the brother denied that he had had sexual intercourse with any of his sisters and alleged that they had fabricated the story because he had beaten them, as they were out begging for money. According to the police, the father was under investigation at the time by the police for theft, coercion of the three daughters to perpetrate thefts and to beg for money (“breach of family obligations”).

Despite these circumstances, the investigating judge did not officially involve the Guardianship Authority of the CSW, nor did he order any medical or psychological assessments of either the suspect brother or the alleged victims.

The CSW in Gjilan/Gnjilane reported to LSMS that it was involved in the case since around 21 October 2000. They stated that they had been informally monitoring the situation in the home, but they argued that they required a formal request from the court or the prosecutor to take official action, despite their mandate under the family law.

On 21 February 2001, a trial was scheduled and the brother, the defendant, and the eldest daughter appeared at court. The case was adjourned as the youngest girls failed to appear. The hearing was called in the small office of the judge. Although the judge appeared to be taking steps to deal sensitively with the case, the setting seemed oppressive to the eldest daughter who was sitting just across from her brother, who has allegedly sexually abused her.

At this time, some off the record discussion took place. The father did appear as well as a representative from the CSW. The father stated that he did not know where the young girls were, as they had left the house the night before and asked the judge why he was summonsed to the trial. The father remains the official legal representative of these two girls.

After the father had left, the CSW representative discussed the case with the judge stating, in effect, that she did not think the girls would appear at court unless they were forced by their father, either through beating or threat of beating. The representative further indicated to the judge that she thought the two girls were unreliable and that they “were not behaving well.” A representative of the CSW office previously expressed to LSMS, that they were of the opinion that the girls “were no good.”⁸

The judge then asked the CSW representative her opinion of the girls’ father. She briefly stated that the father had insisted to her that the girls pay for their own living expenses. But she also stated that the father was acting appropriately towards her, the representative. It appeared that the representative had little understanding of her role or legal obligations. There was no indication that the representative had considered that the girls’ behavioural patterns may be the result of an inappropriate home environment.

At the next court hearing, none of the three sisters attended. At the following hearing, after these girls essentially recanted their previous testimony, the prosecution of this case was abandoned.

(d) Habitual abuse and co-ordination between police, courts and the CSW

One case involves a father who is suspected of habitual abuse of his four children (aged, six, nine, eleven and thirteen years old). Recently, the six and nine year old daughters were picked up by KFOR at 4:00 am on the street. The girls were required to wander around the streets as their father had refused to let them in the house (earlier that evening). The police file indicates that the father has continually abused the children and possibly sexually abused the eldest daughter and has one report dating as far back as *26 December 1999*.

KPS officers were present when the father stated that he wanted to cut his daughters with an axe and that he did not want them.⁹ According to UNMIK police, the children have been picked up *11 times* on the street over the past year. Allegedly, relatives and neighbours of the father are afraid to provide information to the police or to keep the children. As a result, according to the police the children spend most of their time on the

streets and without any hygiene. Despite the various UNMIK police reports over a long period of time on abuse of these children, UNMIK police have just recently compiled a complete file on the case and handed over information to the court.

The President of the municipal court stated to LSMS that the court had contacted the CSW, but that the Centre had refused to handle the case because the employees had been threatened by the suspect father to not take action regarding the custody of the children. There is a note in the file which states that the director of the CSW refused to work on the case as he and his colleagues are “afraid, since the father disturbs our work and we’re not protected by the police.”

On 14 February 2001, the father signed a document in which he agreed to hand over the responsibility of the children to the CSW. Although the police claim that they have sent the file to the municipal court public prosecutors office for proceedings approximately one month ago, the public prosecutor contends that he has not received the file. No criminal proceedings have been initiated in this case. UNMIK police are currently investigating the father for killing the mother of the children two years ago during a pregnancy.

UNMIK police have recently reported that they are finding an alarming number of dead new-born babies. In Mitrovica/Mitrovice, the police stated to LSMS that they had found three such babies over a period of a couple of weeks. Although it is impossible to assume the reasons for this type of a phenomenon, it is clear that at present in Kosovo there is no functioning family welfare system, including professional psycho-social support as well as adequate employment/social assistance policy for women. In particular, there are no special programs for unwed mothers, including appropriate facilities such as a home. Furthermore, an option for mothers for the placement of children such as adoption exist, but are not yet fully regularised or embraced by the community, and other options, such as foster care, are not yet in existence.¹⁰ This lack of services is set in the context of the high rate of allegations of sexual and other sex based violence before the courts.

¹ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, at 14 and 15.

² *Id.* at para. 16.

³ In the majority of cases, however, the criminal code does criminalise the underlying acts of violence but inadequately. For example, a charge of “first degree” light bodily injury requires a private prosecution. In such cases where there is light bodily injury, some defendants are prosecuted for aggravated “endangering the security” of the KPC, which is an offence under the jurisdiction of the municipal court. However, many intra-familial cases are tried by the municipal court of minor offences which does not involve a public prosecutor, a role that further protects the interest of the victim, and provides for sentences only up to six months imprisonment. The positive aspect of the minor offences procedure, in light of the repetitive nature of intra-familial violence, is that a court investigation is not required, allowing for immediate prosecution.

⁴ There are indications in this case that the defendant husband may have psychological problems.

⁵ Art. 36 of the *Convention on the Rights of the Child*.

⁶ Art. 1 of the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*, General Assembly Resolution 41/85 (1986).

⁷ Significant efforts have gone into building the capacity in terms of staffing, equipment and training of the CSW professionals over the past year. The present approach of the Department of Health and Social Welfare is focused on improving training, supervision and the further development of internal policies, procedures and formulating protocols with other key agencies such as the police, schools etc.

⁸ OSCE was informed that an international consultant with the CSW and the police were visiting the family regularly. They were informed that apparently the brother had moved out of the house.

⁹ There are indications that the father may suffer from some mental illness.

¹⁰ Many children have been adopted inside Kosovo. UN Interim Administration Department of Health and Social Welfare issued an Administrative Instruction "*On National and International Adoption*," 22/2000 which in particular mandates the use of international adoption as a measure of last resort. UNICEF and the Department of Health and Social Welfare are in the process of drafting a new Administrative Direction regarding adoption, as well as developing a commission to review adoption procedures. The Department of Health and Social Welfare is considering a proposal for the introduction of a system for foster care.

SECTION 8: WAR AND ETHNICALLY MOTIVATED CRIMES **THE IMPARTIALITY OF THE COURTS**

Introduction

On 2 September 2000, fourteen detainees escaped from Mitrovica/Mitrovice detention facility.¹ All the detainees were Kosovo Serb and were indicted or under investigation for war crimes or ethnically motivated crimes. This followed the prior escape of seven detainees, all of whom were charged with war crimes or ethnically motivated crimes involving Kosovo Albanian victims. The September escape brought public condemnation, particularly from the President of the Prizren district court who threatened to call a strike. Five of the escapees had just been indicted by the Prizren district court for war crimes – only two remain in custody to stand trial. The President of the court stated to the media that, “we [the court] have a lot of witnesses and material evidence and the defendants should therefore accept things.” Authority over the Mitrovica/Mitrovice detention facility has now been transferred from UNMIK police to UN Penal Management and it is understood that new security measures have been imposed. On 26 February 2001, *Dejan Slavic*, a Kosovo Serb indicted for war crimes, also escaped from detention after having been transferred to the Pristina/Prishtine hospital.

Following *UNMIK Regulation 2001/1 On the Prohibition of Trials In Absentia for Serious Violations of International Humanitarian Law*, courts were no longer empowered to conduct *in absentia* trials for war crimes and other related offences. At the start of 2001, there were six defendants in custody awaiting war crimes trials, one of whom was already on trial. There were a further two defendants on trial for genocide. Despite this limited number, the problems of limited resources and security concerns have been exacerbated by a failure to appropriately stagger the sensitive trials. In January and February 2001 approximately nine war crimes and ethnically motivated crimes cases were due to go to trial. Many of these cases were being defended by the same Kosovo Serb counsel and international judges and prosecutors are already committed to sitting in other cases, as were some of the same Kosovo Serb counsel.

At present there are approximately 20 individuals indicted or under investigation for war crimes related offences (*see Annex 1 War Crimes and Ethnically Motivated Crimes Table*). According to available information, four of those individuals are currently in detention. In addition, there are approximately 10 individuals indicted for ethnically motivated murders/attempted murder. LSMS’ prior report highlighted the fact that the expedition of war and ethnically motivated crimes trials did not take place with proper regard to the existing capacities and competence of the courts.

I. UNMIK Regulation 2000/64

In the prior LSMS report, it was acknowledged that the important role played by the international judges and prosecutors in alleviating some of the concerns with respect to the impartiality of the courts. At the time of writing this report, the number of international prosecutors has increased from two to four - one for Mitrovica/Mitrovice,

one for Pristina/Prishtine, one for Prizren and one for Pec/Peje. The number of international judges has also increased from six to eleven - two for each of the five district courts and one to the Kosovo Supreme Court.²

Two critical concerns were raised in relation to the international judges and prosecutors:

First, that their limited number and sporadic allocation to cases has led to the unequal treatment of defendants. Cases of a similar nature and seriousness, involving defendants or victims from ethnic minority groups, had been tried before panels of varying composition – some with and others without an international presence.

Second, that the role played by, and impact of, the international judges was extremely limited. According to the FRY CPC verdicts are by a majority and each judge carries an equal vote.³ Bearing in mind that trial panels are generally composed of two professional judges and three lay-judges, the report highlighted that “the equal distribution of voting power to all judges severely reduces any real impact that the international judge may have upon a potential verdict motivated by ethnic bias.”⁴

UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, came into effect on 15 December 2000 and sought to address these concerns. The rationale behind the Regulation was to provide a system for a properly considered allocation of international personnel to cases and to ensure that the powers granted to international judges were sufficient to effectively exclude at least the *perception* of bias.

Section 1 of the Regulation grants to competent prosecutors, the accused or defence counsel the right to petition the ADoJ for the assignment of international judges and prosecutors where this is “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.” In the absence of a petition, ADoJ may also act by its own motion.⁵ Following a petition, ADoJ is empowered to review a petition and make recommendations to the SRSG for final approval or rejection.

Where a petition is approved, a panel may be convened consisting of an international prosecutor, an international investigating judge and/or a panel composed of three judges, including at least two international judges (“*Regulation 64 panel*”).

Although the promulgation of the Regulation was welcomed, there are two critical concerns; first, criteria have not been finalised and have not been disseminated to counsel, so as to ensure that cases of a similar nature and seriousness are treated equally, and second, the Regulation prohibits the transfer of cases after the trial or appeal has commenced.

Unequal treatment of defendants

In responding to LSMS’s prior report, the ADoJ stated that, “[t]he appointment of international judges and prosecutors has dramatically reduced any chance of bias in the

criminal justice system in Kosovo.” They went on to say that the international judges and prosecutors “*have been assigned to hear the most sensitive cases, with ethnic backgrounds*, which has already reduced dramatically any chance of bias as charged in the OSCE report...”⁶

LSMS has been provided by ADoJ with all Regulation 64 petitions. ADoJ has recently confirmed that whilst they do not have any finalised policy or criteria for the rejection or approval of *Regulation 2000/64* applications, such criteria is about to be finalised and distributed to defence counsel. The absence of any transparent criteria upon which petitions are accepted or rejected has meant that defence counsel and/or other applicants, are unable to properly prepare and present the grounds for their petitions. Some cases similar to those which have received Regulation 64 panels, have not been considered or rejected under the Regulation despite the fact that they involve Kosovo Serb defendants alleged to have committed serious criminal offences.

On 12 January 2001 defence counsel for *Radovan Apostolovic*, a Kosovo Serb indicted for war crimes, submitted a *Regulation 2000/64* petition. *Apostolovic*, along with four other Kosovo Serbs, is alleged to have looted and burned property in the village of Suvi Do, resulting in the displacement of the Kosovo Albanian population of the village. The petition raised, amongst other things, concerns as to the impartiality of the courts, evidenced in part by the lengthy period of pre-trial custody.⁷ LSMS has been informed that the opinion of an international judge was canvassed. The judge felt that there was no need for a Regulation 64 panel because she felt that the local judges would not act in a bias manner. ADoJ rejected this petition on 23 January 2001. In due course, ADoJ submitted a petition on its own motion that has been approved.

Dejan Slavic is a Kosovo Serb indicted for war crimes in relation to his alleged involvement in the execution of 23 Kosovo Albanians in the spring of 1999. On 17 January 2000 defence counsel submitted a *Regulation 2000/64* petition requesting an international trial panel and international prosecutor. The grounds included the nature of the offence and the likelihood of a lack of impartiality. As in the *Apostolovic* case above, the international judge in the case was contacted and stated that he “could co-operate with the local judges” and there was no need for a Regulation 64 panel. On 1 February 2001, ADoJ recommended the assignment of an international prosecutor only. This was approved by the SRSJ on 6 February 2001. On 26 February 2001, *Dejan Slavic* escaped from custody and remains at large.

Defence counsel for *Stojan Jovanovic* and *Bogoljub Misic* petitioned pursuant to *Regulation 2000/64* on 10 January 2001. *Jovanovic* and *Misic* were initially under investigation for war crimes, although on 1 February 2001, *Jovanovic*, and on 5 February 2001, *Misic*, were indicted in relation to an alleged serious assault on a group of Kosovo Albanian males in 1999. As yet, there is no decision on the petition.

In January 2001 the trial of *Igor Simic* recommenced before a panel of the Mitrovica/Mitrovice district court. *Simic* is indicted for genocide, following, amongst other things, his alleged participation in the massacre of 26 Kosovo Albanian males in

Mitovica. The case is being prosecuted by an international prosecutor, before a panel consisting of one international judge and four Kosovo Albanian judges. In accordance with the FRY CPC, following a 30-day adjournment the trial restarted. The international prosecutor and international judge reminded defence counsel of the right to petition under *Regulation 2000/64* for the composition of the panel to be altered to include a majority of international judges. Despite the nature and content of the indictment, the defence declined to make the application and the case continued before the same panel. No petition was made by the international judge, the international prosecutor or by ADoJ.

Limited scope of the Regulation

Section 2(4) of the Regulation prevents *Regulation 2000/64 panels* being established at trial - once a trial session has already commenced; or on appeal – once an appellate panel session has already commenced. The rationale behind these provisions is that defective proceedings may be remedied on appeal or by extraordinary legal remedies.

This restriction on the scope of *Regulation 2000/64* may reduce its effectiveness and impact in certain cases. Evidence of bias or misconduct will frequently emerge during proceedings, following, for example, decisions on the admissibility of evidence, orders for continued detention or release, or inappropriate treatment. Moreover, delaying the intervention of international personnel, pending appeal or other extraordinary remedy, may result in the lengthy and unnecessary prolongation of pre-trial detention.

The case of *Momcilo Trajkovic* provides an example of this concern regarding *UNMIK Regulation 2000/64*. *Trajkovic* was arrested and detained on 7 September 1999 and has remained in detention from that date. On 21 September 2000 he was indicted for war crimes by the Gjilan/Gnjilane district court.

Trajkovic faced two indictments; one for attempted murder and illegal possession of weapons and the other for war crimes. The first indictment alleged that *Trajkovic* fired an AK 47 at a group of Kosovo Albanian males who were raising the Albanian flag, injuring one person. More than two months later, weapons and ammunition were recovered from *Trajkovic's* property following a search by KFOR.

The war crimes indictment alleged that, between 24 May 1999 and the entry of KFOR, *Trajkovic* abused his position as chief of police in Kamenica to order, plan and commit, on a systematic basis, murders, displacement, hostage taking, collective punishment and the looting and destruction of property. *Trajkovic* is alleged to have created a list of high profile persons and ordered their execution. The indictment goes on to specify a number of instances of murder, looting and arson as having taken place on the order of *Trajkovic*.

The *Trajkovic* trial started on 23 November 2000 before a panel composed of four Kosovo Albanian judges and one international judge. The case was prosecuted by a Kosovo Albanian public prosecutor. During the trial, the public prosecutor sought, at least in part, to develop his case regarding the war crimes charges on the opinion of the witnesses. Despite the objection of defence counsel, following the evidence of a number

of witnesses the presiding judge, an international, allowed the public prosecutor to ask the witness “[i]n your opinion (in one case he stated “and in the opinion of the people of Kosovo”) what is the relationship between the defendant and the victim and his death?” The witnesses generally replied, “[t]he defendant had given the order to kill the victim, because nothing could be done without his order and notice.” The presiding judge explained that the panel would consider all the evidence and statements, but that much less weight would be given to statements of opinion. During the examinations, little effort was apparently made to clarify the basis for the witnesses opinion. Despite the fact that this evidence has questionable value and could have prejudiced members of the panel, particularly lay judges, there was no ability to request a Regulation 64 panel during the trial.

On 6 March 2001, *Trajkovic* was acquitted of some of the counts and convicted of others on the war crimes indictment. He was also convicted of illegal weapons possession and attempted murder and was sentenced to 20 years imprisonment. In relation to the convictions for war crimes-related offences (which the verdict qualifies as crimes against humanity), the written verdict identifies the various offences on which he was convicted and, with one exception, concludes that they were committed by “policemen” or “police forces.” There is no evidence linking the defendant to any of these specific crimes. The only offence which purports to have “direct evidence” of *Trajkovic*’s involvement is the shooting of a male. In this instance, the victim initially testified that he was speculating that the defendant *ordered* the shooting. Later, he changed that testimony, stating that the gunman informed him that he was acting on the orders of the defendant.

II. Lulzim, Bajram and Agim Gashi Case

Kosovo Roma brothers *Lulzim, Bajram* and *Agim Gashi* (the “*Gashis*”) were arrested and detained by KFOR on 7 October 1999. On 20 October 1999, the first detention order was made extending their detention for a period of one month. According to Kosovo Supreme Court records, on 8 January 2000 the Supreme Court extended the *Gashis*’ detention until 8 March 2000 and 8 July 2000 respectively. On 8 July 2000, acting pursuant to *UNMIK Regulation 1999/26*, the Supreme Court extended detention until 8 October 2000 – marking the end of the *Gashis*’ period of twelve-month pre-indictment detention.

On 13 October 1999, KFOR sent the *Gashis*’ case file to the Prizren district court public prosecutor. On 18 October 1999, the public prosecutor requested the initiation of an investigation in relation to the *Gashis*’ for war crimes offences. *Agim Gashi* gave evidence before an investigating judge on 19 October 1999. *Lulzim* and *Bajram Gashi* gave evidence before another investigating judge on 20 October 1999.⁸ Further investigative hearings, involving the testimony of eight witnesses, were held on 8, 9 and 23 November 1999.

Undue Delay in the Conduct of the Investigation

According to the case file, the last investigative hearing in relation to the *Gashis*’ took place on 23 November 1999. After almost eleven months of inactivity, on 6 October

2000, the investigating judge delivered the case file to the Prizren public prosecutors office.⁹ The public prosecutor then applied, pursuant to article 174(2) FRY CPC for an extension of the time limit for bringing an indictment and the *Gashis*' detention. Article 174(2) FRY CPC relates to the extension of the time period for the preparation of an indictment and does not provide grounds for extending detention.

The public prosecutor cites "*the volume of the case-file and the short time for preparation of the indictment*" as the grounds for his application. The application for an extension of the time period for indictment and detention was granted, the same day, by a panel of the Prizren district court.

The investigating judge in the case stated that the delay stems, at least in part, from a failure of the ICTY to respond to a request for the disclosure of evidence. He also stated that UNMIK police had not responded to a request for information relating to the "deportation of Albanians and the looting of their homes."

The ICTY have established specific guidelines by which the Office of the Prosecutor may provide appropriate authorities in Kosovo, on a case-by-case basis, with material that is relevant to investigations and criminal cases being developed for prosecution. The guidelines clearly state that any request must be in writing and specify the nature of the material sought and the subject matter and geographic area to which it refers. The ICTY state that they have never received a request for evidence, either written or oral, in relation to the *Gashis*' case.

UNMIK police have informed LSMS that they do not get involved in war crimes-related cases and had no information on the case.

Domestic Law

The FRY CPC does not contain a specific time limit for the completion of an investigation. Despite the fact that no specific time limit is provided, it is clear from Article 190 (2) FRY CPC that in cases where the defendant is in custody, "custody must be kept to the shortest necessary time. It is the duty of all bodies and agencies participating in criminal proceedings and of agencies extending them legal aid to proceed with particular urgency if the accused is in custody."

International Human Rights Law

The right to trial within a reasonable time is guaranteed under article 5(3) ECHR. It overlaps with the more general right provided by article 6(1) ECHR. The European Court of Human Rights has found violations of Article 5(3) ECHR in cases where there are periods of prolonged inactivity on the part of the relevant authorities. In *Toth v Austria*, a case with an analogous timeframe to the *Gashis*' case, the Court found that a cumulative period of eleven months of inactivity amounted to a breach of the due expedition requirements of Article 5(3) ECHR.¹⁰

Bearing in mind the response of the ICTY and in the absence of further compelling and properly grounded reasons, the period of almost eleven months of inactivity leading, on 6 October 2000, to the presentation of the *Gashis'* case file to the Prizren public prosecutors office is unjustified. The claim raised by the public prosecutor as to the volume of the case file and the lack of time to prepare the indictment are wholly inadequate to obviate the entire lack of due expedition in the bringing of an indictment or dropping of the charges before 24 October 2000. These concerns are given stark confirmation and are further exacerbated by the fact that the case was finally dropped due to a lack of evidence.

LSMS is informed by ADoJ that the *Commission on Compensation for Wrongfully Accused/Convicted and/or Detained Persons* has made a financial offer to the *Gashi's*.

III. Trials of War Crimes and Ethnically Motivated Crimes

Shaban Beqiri and Xhemajl Sejdiu

The trial of *Shaban Beqiri* and *Xhemajl Sejdiu* began on 25 July 2000. The defendants, both of whom are Kosovo Albanian, were indicted for the murder of two Kosovo Serbs in July 1999. The case was prosecuted by a Kosovo Albanian public prosecutor, before a panel of four Kosovo Albanian judges and one international judge.

The widow of one of the victims gave eyewitness testimony to the killing of her husband and the other victim. She positively identified the defendants as being involved in the killing, along with two other unidentified males. In statements to US KFOR, she had also stated that *Beqiri* was wearing a yellow t-shirt, whilst the others wore black t-shirts. She also provided US KFOR with a letter, signed by *Beqiri* (as a captain in the KLA), to the effect that they should deliver any weapons they may have in their possession, under the threat of force. The US KFOR report was part of the court file. The daughter of the second victim also provided trial court eyewitness testimony to the murders, consistent with the first witness. Although defence counsel asked questions about the letter, the trial panel did not. There was no forensic evidence presented in this case.

The defendants were acquitted on 24 October 2000. The public prosecutor and/or the panel failed to examine the circumstances surrounding the relevance of the yellow t-shirt that the eyewitnesses state *Beqiri* was wearing at the time of the murders. According to the US KFOR report, *Beqiri* was in fact wearing a yellow t-shirt at the time of his arrest some hours after the shooting. The public prosecutor and/or the panel also failed to examine the authenticity and origin of the letter allegedly written by *Beqiri* threatening the victims. This evidence may have provided significant corroboration to the eyewitness testimony and ought to have formed an important part of the court's deliberations.

Sava Matic

Sava Matic was arrested and detained on 27 December 1999 on suspicion of war crimes.

Eight witnesses were interviewed during the investigative proceedings. Three of the witnesses were unable to provide direct evidence of any criminal acts committed by *Matic*. One witness stated that he had seen *Matic* on 27 March 1999 in the village of Krusha e Madhe, along with three other police officers. This was the date when 42 persons were allegedly killed. The witness went on to state that four individuals survived the shooting. None of these persons was called to give evidence and no explanation was provided as to why. Another witness testified to having been assaulted by Serbian police in September 1998. He recognised *Matic* as having been present during the assault. This witness went on to provide testimony to the effect that he had heard from the population that *Matic* boasted about killing 60 persons.

A Kosovo Albanian witness provided evidence that he had heard *Matic* had assaulted two Kosovo Albanian males in May 1999. The witness was informed of the assault by a co-villager and the victims, neither of whom were called to give evidence.

A further witness against *Matic* stated that he would come with other police officers to his village to mistreat people and once stole 100 DEM from him. Another witness stated that, on an unspecified date in 1999, *Matic* had beaten him and two others. Evidence was not taken from these other individuals.

On 26 May 2000 the investigating judge in the case entrusted investigative acts to UNMIK police. On 24 July 2000, the chief of the UNMIK police Central Criminal Investigation Unit wrote to the investigating judge stating that only one witness was able to recognise *Matic* during a photo-identification and that this identification was unreliable.

Matic was indicted, on 11 September 2000, for war crimes. The trial began on 22 January 2001 before a panel composed of two international judges and one Kosovo Albanian judge. The case was prosecuted by a Kosovo Albanian public prosecutor. The indictment contains general allegations of large scale criminal activity including, amongst other things, that *Matic* “obeyed orders to attack unprotected civilians, committed acts of torture and inhuman behaviour, took hostages, illegally detained people and sent them into forced labour, illegally destroyed and stole property on a large scale without military justification...” The indictment goes on to state that *Matic*, as a subordinate, took part in the massacre of 42 civilians in the village of Krusha e Madhe on 26 March 1999, as well as the beating, physical and psychological ill-treatment of villagers of Potoqan I Ulet.

Central to the prosecution case were three survivors (“*X*, *Y* and *Z*”) of the alleged massacre at Krusha e Madhe. Witness *X* initially stated that he was not sure that *Matic* was involved in the massacre. On a number of occasions, however, *X* had been shown a photograph of *Matic* and consulted with a number of other survivors of the attack – all of whom agreed that *Matic* was in charge of the police team who carried out the killings. The international presiding judge pressured *X* to answer “yes or no” as to *Matic*’s involvement and, when *X* maintained that he was not sure, sought to put into the record that the witness refused to answer the question.¹¹

Witnesses *Y* and *Z* were called by the prosecution to corroborate the testimony of *X*. The evidence given by witness *Y* differed significantly from his statement during the investigation by the police and KFOR. During those interviews *Y* had identified another person as the officer in charge of the police who committed the massacre. At trial *Y* stated that he was now certain that the leader was *Matic*. The witness was not examined on this critical discrepancy. In fact, an international judge on the panel confronted the next witness, *Z*, with the inconsistency stating, “[w]hat would you say if I tell you that a witness in this case has said that [another person] was the leader of this police group? Response “I don’t know about that.” Witness *Z* also stated that *Matic* was the officer in charge of the massacre. During the police investigation, *Z* was uncertain that *Matic* had any involvement at all in the massacre. At trial, however, *Z* stated that he became certain when he saw *Matic* at court.

One witness stated that *Matic* had pointed a gun at him and that he had heard *Matic* was involved in the murder of three 17-year-old boys, but that he had never actually seen *Matic* shoot anybody. Another witness has no information in relation to *Matic* and appeared to have been called in relation to a different case altogether.

Three further witnesses gave evidence of an assault having been committed by *Matic* and another police officer in a vineyard in 1999. One witness gave eyewitness testimony, as an alleged victim of the assault. Neither of the remaining two witnesses had actually seen *Matic* commit the assault, but they provided testimony to the effect that they had been told about his involvement in the incident.

At the close of trial, the statements of two witnesses were read into the record. One stated that *Matic* had come to the village of Potoqani I Ulet on unspecified dates and maltreated people. On one occasion the witness claims to have been robbed by *Matic*. The other witness did not provide any evidence relating to *Matic*, but makes general comments as to the village of Potoqani I Ulet having been burned and looted by Serbs.

During closing speeches the public prosecutor handed a three-page typed speech to the panel and merely reiterated a few details. Defence counsel were not provided a copy of the speech and were therefore unable to ensure that the speech contained an accurate summary of admissible and relevant evidence.

Matic was found not guilty of war crimes by a majority decision, but found guilty of light bodily injury during the alleged assault that took place on 23 April 1999 in a vineyard. *Matic* was sentenced to two years imprisonment. In breach of the FRY CPC, the Kosovo Albanian judge on the panel was not present during the reading of the verdict.¹²

Following the verdict, an article in the Agence French Presse quoted the Kosovo Albanian judge on the panel as stating that the decision not to convict a Serb accused of participating in the execution of 42 ethnic Albanians in Kosovo was “an absurd judgement, a masquerade.” He went on to say that “Kosovan justice has failed...there was enough evidence to convict him of war crimes.” He was “disillusioned by the

decision of the two international judges sitting with him who decided not to push for a conviction on war crimes...”¹³

Afrim Xheladini

On 23 January 2001, the trial of *Afrim Xheladini* started in the Gjilan/Gnjilane district court. The investigation into the charges was conducted by an international judge, prior to the enactment of *Regulation 2000/64*. According to information provided to LSMS, an international judge informed ADoJ about this case but was told that it was “not serious enough” for a *Regulation 2000/64* panel. As a result, the judging panel was composed of a Kosovo Albanian presiding judge and two Kosovo Albanian lay-judges. The case is being prosecuted by a Kosovo Albanian public prosecutor.

Xheladini was indicted on 19 December 2000 pursuant to Article 157 of the Kosovo Criminal Code for the “Production of General Danger.” The indictment alleges that, on 20 October 2000, *Xheladini* threw two handgrenades into a shop in Vitina occupied by Kosovo Serbs. Three Kosovo Serbs were injured and property was damaged to the value of approximately 10,000DM. Soldiers from a near-by US KFOR patrol witnessed the act and apprehended *Xheladini* near the scene. *Xheladini*’s house was searched following the arrest and 9 grenades, a number of fuses and bullets were found, along with 400g of TNT explosives. *Xheladini* denied the offence stating he was innocently in the vicinity of the shop when the explosion occurred.

Xheladini, who was detained on 20 October 2000, remained in detention in Gjilan/Gnjilane until his release by order of the Presiding Judge on 24 January 2000.

Examination of the Defendant

During the examination of the defendant, the presiding judge questioned the defendant in a manner favourable to his defence. The judge did not examine him on inconsistencies between his testimony and his statement before the investigating judge.

Summoning of KS Witnesses

On 23 January 2000, the trial was adjourned following the non-attendance of Kosovo Serb witnesses. The court record includes a request for their attendance. One of these witnesses has been contacted in Vitina/Viti. He has informed the OSCE that he refused to attend the hearing because it was before a Kosovo Albanian panel. The other witnesses are in Serbia.

Failure to Notify US KFOR Witnesses

Nine US KFOR witnesses were due to attend trial on 24 January 2000. These witnesses are critical to the prosecution case as they were eyewitnesses to the grenade attack and arrested the defendant near the scene. There is a dispute as to whether the court actually requested their attendance.

Concerned as to the fulfilment of the required notification, US KFOR was contacted on 23 January 2000. US KFOR legal advisers indicated that they had not received any

notification as to the trial date. On 24 January 2001, eight US KFOR witnesses attended trial.

Treatment of KFOR Witnesses and the Trial Record

Despite having adjourned proceedings on 23 January 2001 to hear the KFOR witnesses on 24 January 2001, the presiding judge had made no preparations for the translation of their testimony. The district court President's assistant was asked to translate. The presiding judge conducted an aggressive questioning of the US KFOR witnesses and appeared upset by the statements.

On a number of occasions the presiding judge paraphrased sections of the testimony of the US KFOR witnesses in a manner favourable to the defendant. The presiding judge did not translate the testimony back into English to be verified by the witness. The paraphrasing was such as to render parts of the trial record inaccurate, the result of which may undermine any subsequent review of the case on appeal.

The Defendant's Release from Custody

The public prosecutor of 23 January 2001 had been appointed on the day of trial and did not have an advance copy of the case file. During the proceedings, he did not examine the defendant on discrepancies in his statement before the investigating judge (regarding the location of the weapons and the names of the victims). At the close of the proceedings the public prosecutor requested the continued detention of the defendant.

On 24 January 2001, the public prosecutor that had drafted the indictment took over the case. At the close of the proceedings, defence counsel requested that the defendant be released pending the completion of the trial. This request was accepted by the public prosecutor and an order for release was made by the presiding judge. The trial was adjourned to an unspecified date.

Zoran Stanojevic

Zoran Stanojevic was arrested and detained on 14 August 1999. On 9 September 1999, an investigation was initiated in relation to allegations of murder and attempted murder. Only two witnesses were called during the investigation. These witnesses stated that *Stanojevic* was one of a number of police officers who attacked the village of Racak on 15 January 1999. Both witnesses stated that *Stanojevic* fired his weapon at them and that they suffered injuries. They went on to state that *Stanojevic* shot and killed one Kosovo Albanian male.

The first trial date, 25 July 2000, was postponed due to the non-attendance of the witnesses.

The next trial date was 24 January 2001. Following a successful *Regulation 2000/64* petition, the case had been transferred to an international prosecutor and was being tried before a panel consisting of two international judges and one Kosovo Albanian judge.

On 24 January 2001, the panel requested forensic evidence, witness statements and other documents from the ICTY relating to the charge. The case was adjourned to await a response from the ICTY and due to the fact that there was a long power cut at the courthouse. Despite the fact that *Stanojevic* had spent more than seventeen months in pre-trial custody and that more than eight months had past from the date of indictment – no formal request for this evidence had previously been made to the ICTY by either the public prosecutor or the investigative judge.

On 6 February 2001, the legal representative of the two witnesses proposed to initiate a private prosecution of the defendant for attempted murder, to be joined with the main trial. At the time of indictment, the public prosecutor failed to issue the required declaration withdrawing the attempted murder charges in breach of the FRY CPC.

On 20 February 2001, the legal representative of the two witnesses presented a fresh indictment on behalf of the witnesses as injured parties. The indictment alleges that *Stanojevic*, acting as a police officer, killed a Kosovo Albanian male and attempted to kill the two witnesses. The trial continues.

Stojan Jovanovic and Bogoljub Misic

Stojan Jovanovic and *Bogoljub Misic* were arrested and detained on 31 January 2000, on suspicion of having committed war crimes.

Between 3 February 2000 and 12 December 2000 eleven witnesses were interviewed in relation to the charges. *Jovanovic* and *Misic* remained in custody throughout the investigation.

On 24 May 2000, UNMIK police were requested to carry out investigative actions. On 27 May 2000 an UNMIK police investigator wrote a memo stating that, of nine witnesses questioned only one was able to identify *Jovanovic* as having been involved in an assault on a group of Kosovo Albanian males in 1998. *Misic* was also allegedly present during this attack. By a memo to the investigating judge, dated 18 June 2000, the Deputy Commander of UNMIK police Central Criminal Investigation Unit, in charge of the investigation, concluded that “there is no evidence to indicate that *Jovanovic*, *Stojan* was involved in the crimes for which he has been accused and charged.” He goes on to state, “I would request that the court immediately orders *Jovanovic*, *Stojan* to be released from custody and these charges against him be dropped.” An international public prosecutor formally abandoned the war crimes charges on 12 February 2001.

In February 2001, however, *Jovanovic* and *Misic* were indicted for participation in a gathering that commits violence, unlawful detention and grave bodily injury. In spite of the fact that the investigation spanned a period of twelve months, the international prosecutor states in the indictment that, “[o]ther witnesses will be proposed, once we review the entire file of the case, including all police reports and the entire court file. We do not at this time have all reports, may not have all investigation testimony and do not have a copy of the full court file. This indictment is required immediately due to the one

year investigation span, and thus the indictment is made upon the limited information available to us.”

TMK Commander “X”

On 20 August 2000, a TMK Commander (“X”) and his bodyguard are alleged to have been involved in an assault that resulted in the victim suffering a fractured skull. According to information provided to LSMS, there are a number of eyewitnesses to the incident.

The bodyguard has been tried and convicted of the assault and sentenced to thirty days imprisonment. X’s case was initially transferred to the minor offences court and a summons was issued for X to appear on 4 September 2000. X in fact appeared on that date. Bearing in mind the severity of the injuries suffered, the case has been transferred to the municipal court public prosecutors office in Mitrovica/Mitrovice. The case is currently with an international prosecutor.

Despite the fact that the alleged accomplice in the assault has been convicted and that there were a number of eyewitnesses to the incident, no investigation has yet been initiated against X and there is no date for trial. A UN official has confirmed that UNMIK prevented law enforcement agencies from making an arrest despite requests having been made by an international prosecutor. In the light of the fact that X appeared at the last hearing date of 4 September 2000 it is, however, unclear as to why an arrest warrant is required. There is currently no apparent reason to suspect that he will fail to attend court if summonsed.

IV. Past Injustices: Status of Appeal/Review

Momcilovic Case

On 8 August 2000 the Gjilan/Gnjilane district court acquitted three Kosovo Serb males, *Miroslub, Boban* and *Jugoslav Momcilovic* of murder and attempted murder, the alleged victims were both Kosovo Albanian. They were convicted of illegal weapons possession and sentenced to twelve months imprisonment.

Central to the case was a video of the crime scene that showed armed men approaching the *Momcilovics’* property and thus supported the defence of self-defence. This was further bolstered by the testimony of KFOR soldiers who arrived at the scene and who admit to having killed the man the *Momcilovic’s* were alleged to have murdered. This evidence did not, however, come to light until the second trial in July 2000.

On 16 August 2000, LSMS produced a report “*Justice on trial: The Momcilovic Case,*” which outlined a catalogue of breaches of international human rights law, including the impartiality of the court. They included serious allegations of excessive periods of pre-trial detention and malicious prosecution. These concerns were also repeated in October 2000 in the LSMS Review of the Criminal Justice System.¹⁴

To date, no investigation has been initiated into the alleged criminal offences committed by the prosecution witnesses, including attempted murder, attempted kidnapping, illegal possession of weapons or perjury. Nor has UNMIK initiated any investigation into the allegations of misconduct by judicial officials.

Indeed, *Nebi Aslani*, who was shot by US-KFOR in relation to this incident, was indicted in **August 1999**, for the attempted murder of three US-KFOR soldiers. He was released from detention in December 1999. No trial date has been set in this case.

Questions as to why the evidence of the KFOR soldiers did not come to light until so late in the proceedings also remain unanswered, although LSMS is informed that the US Defence Department has completed an internal investigation into matter.

An appeal has been filed by the public prosecutor in the case. This appeal is presently before the Kosovo Supreme Court.

Besim Berisha

On 20 March 2000, *Besim Berisha* was acquitted, by an all Kosovo Albanian panel, of the murder of a Kosovo Serb male.

The defendant had been identified in an identification parade by the two family members of the victim. They were present at the time of the murder. *Berisha* had also confessed to the murder to his cellmate. At trial, *Berisha* raised the defence of alibi and called his cellmate as one of his alibi witnesses. He stated that, at the relevant time, he was in the custody of Italian KFOR in Pec/Peje. The public prosecutor and the court failed to effectively investigate the case and failed to discover that the alibi was in fact untrue. KFOR informed LSMS that the detention records were provided to the public prosecutor prior to trial and clearly indicated that *Berisha* was not in detention at the time of the murder.

The written verdict clearly bases the court's decision on the alibi, that *Berisha* was in custody at the relevant time, the failure of the two eyewitnesses to attend trial and the fact that fingerprints taken from the victim's house did not match *Berisha's* prints. In April 2000, LSMS presented a report on the case to ADoJ recommending that an investigation be initiated into the conduct of the trial. To date, no investigation has been undertaken.

Following questions by LSMS, on 26 April 2000, the public prosecutor filed an appeal against the verdict. The appeal relies upon the separation of the statements of the eyewitnesses and two other witnesses from the case file, the refusal to examine the records from the Pec/Peje detention facility and the failure to examine the eyewitnesses at trial. Due to the fact that the district court had not properly delivered the verdict and the appeal to *Berisha*, in accordance with Article 123 FRY CPC, the Supreme Court turned back the case file for delivery. Subsequent to the acquittal, however, *Berisha* cannot be located for the purposes of service. By 16 December 2000, following the eight days term of public notification, the verdict and appeal were considered to have been served.¹⁵ On 1

March 2001, LSMS was informed that the notification was inadequate and would have to be re-done. In March 2001, the appeal was formally lodged with the Supreme Court.

Zvezdan Simic

On 8 August 2000, *Zvezdan Simic* was convicted of the murder of two Kosovo Albanian males and sentenced to eight years and six months imprisonment. In the prior LSMS report concerns were raised as to the consistency of the evidence with the verdict. This stemmed particularly from the fact that the main witnesses in the case offered confusing and speculative testimony as to *Simic's* presence at the murder scene. Defence counsel filed an appeal against the verdict with the Kosovo Supreme Court. They have raised, amongst other things, allegations of bias on the part of the judging panel. ADoJ have recommended a Regulation 64 panel.

¹ One detainee was subsequently recaptured.

² One international judge has announced his departure, effective April 14, 2001.

³ Article 116 FRY CPC.

⁴ LSMS *Review of the Criminal Justice System*, at pg. 70.

⁵ Section 1(2) UNMIK Regulation 2000/64.

⁶ See UNMIK press release dated 20 October 2000, *International Judges have "dramatically reduced" chance of bias in Kosovo Courts: UNMIK*.

⁷ *Apostolovic* had spent almost 13 months in pre-trial custody.

⁸ The additional judge apparently heard some of the witnesses in relation to the *Gashis'* case in order to "assist" the appointed investigating judge.

⁹ The international prosecutor in charge of the *Gashis'* case received the case file on or around 12 October 2000.

¹⁰ A 224 (1991) at para.76.

¹¹ According to information available to LSMS this was not actually translated by the interpreter into the record.

¹² See Article 291(1) and Article 352 FRY CPC.

¹³ *Decision to Acquit Serb for Kosovan War Crimes Absurd*, 30 January 2001 AFP.

¹⁴ Page 65 *et seq.*

¹⁵ See Article 123(4) FRY CPC.

ANNEX 1

War Crimes and Ethnically Motivated Crimes				
<ul style="list-style-type: none"> • Based on statistics available to LSMS on 28 February 2001. • Ks/Ka = ethnicity of defendant/victim. • Ka: Kosovo Albanian; Ks: Kosovo Serb; Kr: Kosovo Roma 				
Status	Genocide¹	War Crimes²	Murder³	Rape⁴
Indicted	7 Ks/Ka – 7	19 Ks/Ka – 19	10 Ka/Ks – 4 Ks/Ka – 6	0
Unindicted	0	1 Ks/Ka – 1	0	0
In-Custody	1 Ks/Ka – 1	5 Ks/Ka – 5	5 Ks/Ka – 2 Ka/Ks – 3	0
Escapee	5 Ks/Ka – 5	13 Ks/Ka – 13	1 Ks/Ka – 1	0
Fugitive	1 Ks/Ka – 1	3 Ks/Ka – 3	2 Ks/Ka – 2	0
Completed Trials	3	2 Ka/Ka – 1 Ks/Ka – 1	15 Ka/Ks – 4 Ks/Ka – 10 Kr/Ka – 1	2 Ka/Kr – 2
Guilty	1	1 Ka/Ka – 1	6 Ks/Ka – 5 Kr/Ka – 1	2 Ka/Kr – 2
Not Guilty	2**	1*** Ks/Ka – 1	9 Ka/Ks – 4 Ks/Ka – 5	0
Charges Dropped	0	4 Ks/Ka – 1 Kr/Ka – 3	2 Ka/Ks – 2	0
Total Remaining Defendants In Custody	1	4	9	0

1 Article 141 FRY CPC.

2 Article 142 FRY CPC.

3 Incl. Aggravated Murder, Murder and Attempted Murder.

4 Incl. Rape and Aggravated Rape.

** See analysis in the cases of *Milosh Jokic* and *Juvenile "X"* in Section 7: The Genocide Charges.

*** *Sava Matic* was found not guilty of war crimes, but convicted of assault.

SECTION 9: THE GENOCIDE CHARGES

Introduction

Genocide is generally regarded as the most serious international crime in existence. In line with its seriousness, the evidential burden for proving genocide is extremely high. In order to found a conviction for genocide the prosecution must prove that, with the required intention to destroy the group in whole or in part, the defendant committed a number of specifically enumerated acts, against targeted individuals, because of their membership of a specific group.

The extremely restrictive evidential threshold for genocide is reinforced in the case of *The Prosecutor v Goran Jelisic*.¹ *Jelisic* was found guilty of 16 counts of violations of the laws and customs of war and 15 counts of crimes against humanity – but was acquitted of the one count of genocide. Whilst the ICTY Trial Chamber was satisfied that the *actus reus* requirement for genocide had been sufficiently established – murder of members of a protected group – **the prosecution had failed to prove that the murders were committed with the specifically required genocidal intent.**

According to statistics available to LSMS, there are 7 individuals currently suspected of having committed or having been involved in the commission of genocide. Only one remains in custody. There have also been 3 completed trials involving genocide indictments. In two of those trials the charges were reduced and the defendants were convicted of war crimes and causing a general danger. *Miroslav Vuckovic* was, however, convicted of genocide on 18 January 2001, before a majority Kosovo-Albanian panel with one international judge, and sentenced to fourteen years imprisonment.

I. Genocide under domestic law

The former Yugoslavia became a party to the Genocide Convention on 11 December 1948 and ratified the Convention on 29 August 1950. Article 141 of the FRY CC, contains the domestic law definition of genocide. The domestic law definition includes the “forcible dislocation of the population” as an act that may constitute the *actus reus* for genocide. **It is essential to note, however, that it is unlikely that the forcible dislocation of persons from their home would *in itself* satisfy the required intention to *destroy* a group as such. The prosecution must show that forcible dislocation was one means of “inflicting conditions of life to bring about [the group’s] physical destruction in whole or in part,” an act that is enumerated in Article 141 FRY CPC.**

II. The Indictments/Trials

Milosh Jokic

Milos Jokic was indicted for genocide on 25 February 2000 in the Gjilan/Gnjilane district court. The indictment alleges that, with the “intent to destroy the Albanian nation,” on 8 May 1999 *Jokic*, along with nine paramilitaries, fired automatic weapons into the air, causing panic that ultimately led to the expulsion of 2000 inhabitants of the village of

Verban. The indictment goes on to state that, on separate dates in April and May 1999, *Jokic* was responsible for the murder of one Kosovo Albanian male and ordered the execution of one Roma male.

The trial of *Jokic* took place, before the Gjilan/Gnjilane district court, on various dates between 15 May 2000 and 20 September 2000. The trial took place before a majority Kosovo-Albanian panel, including one international judge, and was prosecuted by a Kosovo-Albanian public prosecutor. On the first day of trial a second indictment, containing one count of rape of a Kosovo Albanian female, was joined to the first indictment.

Despite the fact that the public prosecutor maintained the genocide charge throughout trial, as brought in the indictment, the court convicted *Jokic* of war crimes and sentenced him to 20 years imprisonment.

Igor Simic

Dragan Jovanovic, Igor Simic, Srdjan Aleksic, Vlastimir Aleksic, Branislav Popovic and Tomislav Vuckovic were indicted for genocide on 20 June 2000. The indictment alleges that the defendants, acting together, killed 26 Kosovo Albanians on 14 April 1999. The indictment goes on to state that, between March and May 1999, Dragan Jovanovic and Tomislav Vuckovic entered more than 100 houses and business premises belonging to Kosovo Albanians in Mitrovica/Mitrovice, ordered the inhabitants to leave and flee to Albania and then looted and burned the properties. Dragan Jovanovic is also alleged to have stolen money and jewellery from Kosovo Albanians in Mitrovica/Mitrovice and to have been complicit in the murder of two Kosovo Albanians in Mitrovica/Mitrovice.

The indictment continues, “[b]y the evidence stated during the investigation it has been undoubtedly established that the defendants committed the criminal act for which they have been charged by this indictment [genocide pursuant to Article 141 FRY CC] on the time, place, manner and motive as it is stated precisely in the statement.” Moreover, the defendants “were preparing themselves premeditatedly and performed with a plan *certain criminal actions against the Albanians in Mitrovica/Mitrovice.*” Their actions were committed, “*with a main goal; to destroy, that is, to expel the Albanians from Mitrovica/Mitrovice, that is, from Kosovo and to create an ethnically cleansed Serb state.*” (emphasis added)

The trial of *Igor Simic* began on 5 December 2000 before a panel of the Mitrovica/Mitrovice district court. The trial was held before a majority Kosovo Albanian panel, including a single international judge (presiding judge). The case was prosecuted by an international prosecutor. Proceedings against the remaining defendants were halted following their escape from Mitrovica/Mitrovice detention facility in August and September 2000 and the implementation of *Regulation 2001/1*, which prohibits trials *in absentia* for cases involving serious violations of international humanitarian law.

At trial, *Simic* denied the charges and raised the defence of alibi. Evidence, by way of forensics and/or direct witness testimony, was not produced to link *Simic* to the actual murders themselves. Moreover, no evidence was been presented to show that *Simic* acted as part of a wider plan to destroy the Kosovo Albanian ethnic group as such, nor that his acts took place as part of a widespread and systematic process of destruction of that group.

One Kosovo Albanian witness stated that *Simic* was one of a number of paramilitaries wearing masks at the relevant time. She recognised him by his build. Later, however, this witness stated that the paramilitaries *must* have been neighbours because they were wearing masks and *Simic* therefore *must* have been one of them.

A Kosovo Albanian witness for the prosecution testified at trial that *Simic* been her neighbour since 1993 and that she recognised his voice by the way in which he rolled his “R’s.” The defence went on to produce a document showing that the witness was receiving humanitarian assistance from the Red Cross in Novi Pazar at the relevant time and was therefore unable to have witnessed the events in which she alleged *Simic* was involved.

A Kosovo Albanian male testified that he saw 4-5 persons in black masks and black uniforms carrying machine guns. He was able to recognise *Simic* by his speech defect, although the witness was not able to imitate this defect. The witness went on to state that if *Simic* had not been involved in the massacre then he would have been declared an enemy of the Serbian people. According to the witness, *the fact that such a declaration was not made is proof of his involvement*. The witness frequently provided testimony that he had heard from other persons and even *acknowledged that he had given three false statements prior to his testimony* – each statement differing in critical respects to the evidence he gave at trial.

On 12 February 2001, a witness (“X”) for the prosecution, who allegedly escaped from the massacre, gave evidence. X testified, amongst other things, to *Simic* having been involved in the separation of men from women and children. Indeed, X concluded that *Simic* was in command of who was to be killed. Following questioning by defence counsel, X indicated that he had seen a videocassette of the French Gendarmerie interrogating *Simic*. The tape could be easily purchased and, apparently, other witnesses may have seen it. X went on to state that his statement may change if he obtained new information and that the video of the interrogation may have influenced his testimony. Pictures of the defendant indicating that he was a war criminal were also apparently on display shortly after the conflict. Following enquiries, it seems that a video does exist, but does not contain the details alleged by the witness. The video is a documentary about the French Gendarmerie, which does contain footage of *Simic* and other detainees, but does not refer to the interrogation.

On 14 February 2001, the international presiding judge indicated that the trial would have to be adjourned due to the bad translation of the record of the investigative hearings. Defence counsel objected to the continuation of the trial, arguing that the inaccuracy of

the critical records should have been noted prior to trial. In early March 2001, the translation equipment broke down. On 19 March 2001, the presiding judge and international prosecutor complained in open court that no attempts had been made to repair the equipment.

The Investigation and Indictment

Simic was arrested and detained on **11 August 1999** and remained in detention until his release in April 2001. Despite this lengthy period of pre-trial detention, LSMS finds that the evidence presented before the investigative judge and in the indictment did not support the genocide charge. The provisions contained within the FRY CPC to prevent this prosecution were not followed.

According to the applicable law, an investigative judge shall terminate the preliminary examination when he finds that the “state of affairs has been sufficiently clarified” so that an indictment can be brought.² The file is then delivered to the public prosecutor who is required to do one of three things: motion the court for an additional inquiry, file a bill of indictment or abandon the case.³

The evidence presented before the investigative judge did not, according to LSMS, satisfy the required standard for an indictment, because there was not “sufficient evidence to warrant a reasonable suspicion” that the defendant committed the crime of genocide; it is of course for the investigative judge to assess whether the standard of “reasonable suspicion” is met. Although the public prosecutor is empowered to motion for an additional inquiry, the local public prosecutor did not. Nor did defence counsel traverse (challenge) the proposed indictment. An indictment becomes final when there is no challenge, or when a challenge has been rejected or when on receipt of the indictment, the presiding judge requests an appeal panel to review the indictment and they concur that it is correct.

The FRY CPC mandates that the indictment **shall** contain, among other requirements, “a recommendation as to evidence which should be presented at trial [and] a substantiation in which the state of affairs will be described according to the results of the examination, [and] evidence [to] be given to establish the decisive facts.”⁴

The indictment in this case alleges the *Simic*, with others, “took the lives of 26 Albanians...according to a previous [agreement].” The explanation in the indictment, states that “these witnesses have described in a very convincing way the actions and activities that the defendants undertook [and] confirm that the defendants have committed the criminal act of killing 26 persons...the defendants led the action of the young men (sic) execution.”

But the indictment does not contain any facts to “substantiate” the allegation with “decisive” facts. This is because the results of the examination did not implicate *Simic* in the 26 murders, either as the principal or on the theory of complicity to meet the standard required by the applicable law to indict, namely “reasonable suspicion” that the defendant

committed the crime.” Anything less than “reasonable suspicion” will not suffice. Commentaries on the FRY CPC state that “*judicial practice...is that simple suspicion is insufficient...the suspicion needs to be grounded, based on concrete information of a certain quality which is strong enough to justify the grounded suspicion.*”⁵

Notwithstanding defence counsel’s failure to traverse the indictment, the FRY CPC permits the presiding judge to motion for an appeal panel to review the indictment for sufficiency under the “traverse” provisions.⁶ This includes the power to reject an indictment where there is insufficient evidence to warrant a reasonable suspicion that the defendant committed the crime.⁷ No such motion occurred in this case.

The FRY CPC obligates the public prosecutor to defend the indictment before the court.⁸ It further provides for the option of the abandonment of an indictment by the public prosecutor prior to trial.⁹ Once an indictment has been dropped, there is nothing in the FRY CPC to prevent the public prosecutor, or a private prosecutor, from issuing a fresh indictment based on new charges. This option was not invoked in the *Simic* case. On 9 April 2001, after the testimonies of the witnesses had been heard and the trial had spanned five months, the international prosecutor, who had replaced the local prosecutor during the pre-trial proceedings, abandoned the indictment, and *Simic* was released.

Miroslav Vuckovic

Miroslav Vuckovic and *Bozur Bisevac* were indicted for genocide by the Mitrovica/Mitrovice district court on 29 November 1999. The indictment states that, between 22 March 1999 and May 1999, the defendants, along with other unnamed individuals, entered two villages in Mitrovica/Mitrovice. The defendants are alleged to have fired weapons and threatened to commit murder so as to force the inhabitants of the village to flee to the woods and near-by villages. A number of houses were then looted and burned, resulting in the death of one elderly Kosovo Albanian female.

The indictment alleges that these acts were committed “*with the intention to displace the Albanian population with coercion and the intention to completely or partly destroy the Albanian community.*” In the accompanying explanation to the indictment the prosecutor alleges that the acts were also committed with the intention to “*forcibly displace the Albanian population.*” It is further stated that the actions of the defendants were committed with the goal of making the “*inhabitants of the Albanian community*” flee their homes and preventing their return.

The trial of *Miroslav Vuckovic* began in the Mitrovica/Mitrovice district court on 19 October 2000. The panel was composed of one international judge and four Kosovo Albanian judges, including the presiding judge. The case was prosecuted by a Kosovo Albanian public prosecutor. At the commencement of the trial, *Vuckovic* had spent approximately 14 months in pre-trial detention, whereas *Bisevac* remained a fugitive (the trial of *Bisevac* was discontinued pursuant to *Regulation 2001/1*).

Many of the witnesses called by the public prosecutor provided testimony that was inconsistent with their prior statements before the investigating judge. Witnesses frequently gave testimony that was speculative and no forensic evidence was produced to corroborate the allegations made in the indictment. With regard to the two allegations of murder, no bodies were recovered and no medical or forensic evidence was produced.

A number of witnesses gave uncorroborated evidence as to acts of murder and attempted murder that did not form part of the indictment against *Vuckovic*. In referring to the murder of two Kosovo Albanian males, one witness stated that he did not see the murders take place, but is sure that they were killed by *Vuckovic*. Another witness stated that *Vuckovic* was well known prior to the conflict and had beaten Kosovo Albanians in the past. This evidence was irrelevant and highly prejudicial.

The evidence presented for the prosecution did not show that *Vuckovic* was engaged in a plan to destroy the Kosovo Albanian group or to displace them into conditions in which their destruction would take place. One witness described how *Vuckovic* had evicted a Kosovo Albanian male from his neighbouring property stating that it was "Serbian soil" and that the neighbour could leave for wherever he wanted. Another witness, on questioning by the public prosecutor, described how those persons who had taken refuge in Vinarce were the subject of further attacks and forced to move on to join a convoy of people moving in the direction of Albania. This witness went on to state that, between 1 March 1999 and 15 April 1999, attacks were designed to scare people to leave the village, but no one was killed.

At its highest, the evidence indicated that *Vuckovic* may have been involved as a principal, or as an aider and abettor, in the displacement of an unspecified number of Kosovo Albanians from their homes in villages of Gusavc and Vinarc, the burning of a number of houses and the theft of cattle and other property. During these acts *Vuckovic* was variously seen wearing civilian clothing, paramilitary and/or police uniforms.

The evidence was, however, **insufficient to prove the required genocidal intent to destroy the Kosovo Albanian group as such in whole or in part**. The domestic law definition of genocide requires proof of an "intention to destroy a national, ethnic, racial or religious group in whole or in part..." The prosecution must show that *Vuckovic* intended to destroy the Kosovo Albanian ethnic group as such - not merely that his actions were designed to destroy *communities* in the villages indicted.

In essence, the public prosecutor conflated evidence of dislocation as being sufficient to show the intent to destroy the Kosovo Albanian group. In order to fulfil this approach, he would have had to show that by displacing people from their homes he intended that the ethnic group would be destroyed, at least in part. There was no evidence to support this assertion.

In fact, following *Vuckovic's* acquittal of the two counts of murder in the indictment, there was no evidence to indicate that *Vuckovic's* actions led to, or were intended to lead to, the *destruction* of any Kosovo Albanians. The acts appear to have been limited in

scope to specific villages of Gusave and Gornji Suvi Do, Mitrovica/Mitrovice municipality. The public prosecutor did not produce evidence to show that *Vuckovic* acted as a part of a wider systematic plan of destruction of the Kosovo Albanian population. Nor was evidence produced to show that *Vuckovic* displaced the Kosovo Albanian inhabitants of these villages into conditions such as to bring about their destruction.

Despite these critical failings in the case against *Vuckovic*, he was convicted of genocide and sentenced to 14 years imprisonment. One member of the judging panel dissented.¹⁰ To-date the written verdict has still not been provided in violation of the applicable law.¹¹

It is against this background that the OSCE issued a press release, dated 18 January 2001, expressing its concerns that the verdict was “inconsistent” with the evidence and calling for an appeal before a “Regulation 64” panel with a majority of international judges. It is currently unclear as to whether such a panel will be provided. The presiding judge in the case responded in the media stating that the verdict was well founded in the light of, “the victimisation of a population from their homeland and their deportation in terrible living conditions, robbing of their valuables, burning of homes and other dwellings...”

III. International Humanitarian Law Training

In September 2000, the Kosovo Judicial Institute (KJI), in conjunction with UN JAD and the ICTY, organised a seminar on international humanitarian law for national and international judges, public prosecutors and a core group of defence counsel.¹² It was originally intended to form a part of the preparations for the Kosovo War and Ethnic Crimes Court (the “KWECC”), a project that has been abandoned. Whilst welcoming these initiatives, the present conduct of the genocide trials and the prosecution of other serious violations of international humanitarian law have reinforced the need to ensure that all such cases are prosecuted by an international prosecutor, with appropriate international criminal law and humanitarian law experience, before a majority international panel.

¹ The *Prosecutor v Goran Jelusic* 14 December 1999 at <http://www.icty.org>.

² Art. 174 (1) FRY CPC

³ Art. 174 (2) FRY CPC

⁴ Art. 262 (1) 5 & 6 FRY CPC

⁵ Authors Vasiljevic, Grubac in the *Commentary on Law on Criminal Procedure*.

⁶ Art. 277 (1) FRY CPC

⁷ Art. 270 (4) FRY CPC

⁸ Art. 45 (2) 3 FRY CPC

⁹ Art. 51 and 286 FRY CPC

¹⁰ UN, OSCE, UNHCR and EU joint press conference, 19 January 2001.

¹¹ Article 356 (1) FRY CPC.

¹² The seminar group included approximately 34 judges and prosecutors and 6 defence counsel. Of the 40 participants, only 3 are from ethnic minority groups. A representative of the KJI indicated that this is due, amongst other things, to security concerns expressed, for example, by minority judges.