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OBSERVATIONS AND RECOMMENDATIONS OF THE OSCE LEGAL SYSTEM MONITORING SECTION:

REPORT NO. 6
EXTENSION OF CUSTODY TIME LIMITS AND THE RIGHTS OF DETAINEES: THE UNLAWFULNESS OF REGULATION 1999/26

Issue

UNMIK Regulation 1999/26[1] ("the Regulation") is an instrument designed, at least in part, as a response to a climate of lawlessness fuelled by the material and institutional vacuum which has beset the Kosovo criminal justice system. The regulation fails, however, to strike a proper balance between the imperative duty to safeguard the right to liberty and the need to detain those charged with serious criminal offences, pending the establishment of a fair and adequately functioning criminal justice system.

Background

According to the FRY Code of Criminal Procedure, an individual may be held in pre-trial custody for a maximum of six months, at which point an indictment must be issued or the individual released. This six month period is staggered in the following manner:

i. An initial order for one-month detention may be made by the examining magistrate (FRY Code of Criminal Procedure, Article 197(1)). An appeal against an order for detention may be made to the panel of judges (FRY Code of Criminal Procedure, Article 192).

ii. After the expiry of this one-month period, a two-month extension may be ordered by a panel of judges (FRY Code of Criminal Procedure, Article 197(2)). A detainee has a right to appeal this decision – from a panel of the Municipal Court to a panel of the District Court or from a panel of the District Court to the Supreme Court.[2]

iii. Where the offence charged carries a minimum sentence of more than five years a panel of the Supreme Court of Kosovo may, for important reasons, extend pre-trial custody by a maximum of three months. This decision is to be reached on the representations of the examining magistrate or public prosecutor (FRY Code of Criminal Procedure, Article 197(2)). The decision of the Supreme Court is final.

UNMIK Regulation 1999/26 amends Article 197 of the FRY Code of Criminal Procedure and empowers a panel of the Supreme Court of Kosovo to extend pre-trial custody by two additional periods of three months.[3] This power to extend applies where: the offence charged carries a minimum sentence of more than five years and the "proper administration of justice" demands that an extension order be made.[4] This decision is to be reached, as in the FRY Code of Criminal Procedure, on the recommendation, with supporting reasons, of the investigating judge or the public prosecutor.[5]

Analysis

A. International Human Rights Law and the Extension of Custody Time Limits

The right to liberty and the presumption of innocence that attaches to pre-conviction criminal proceedings operate to create a presumption that a defendant will remain at liberty pending trial.

According to Article 5(3) and (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and the International Covenant for Civil and Political Rights ("ICCPR") Article 9(3) and (4), where an individual is detained he/she must be brought *promptly* before a judge and provided the opportunity to challenge the lawfulness of the arrest and/or detention. The obligation placed upon the authorities, to provide a forum by which to challenge the lawfulness of detention, continues throughout the entire period of pre-trial detention.

In order to effectively secure the right to challenge, the authorities may provide for periodic detention reviews and, further, may grant the detainee the right to initiate review by his/her own motion. The rationale behind such provisions is to ensure that detention is absolutely necessary for the progression of the criminal proceedings, that trial takes place within a reasonable time and that the investigation is conducted with expedition.[6] Moreover, where there has been a change in a detainees circumstances, there must be a process by which to challenge the basis for continued detention.

The forum by which detention is challenged must take the form of a court and must guarantee judicial process.[7] Following the decision of the European Court of Human Rights in *Toth v Austria* it is clear that this process must be *adversarial,* guaranteeing equality of arms and the various constituent elements of a fair trial.[8] Where an order for pre-trial detention is challenged, the detainee must therefore be provided with, amongst other things:

i. An oral hearing before an independent and impartial tribunal;

ii. The means by which to initiate such a hearing;

iii. Access to effective legal representation[9];

iv. The right to make representations in person or through a legal representative;

v. Adequate time to prepare a response to an application for continued detention[10];

vi. Disclosure of any evidence relied upon by the public prosecutor or the investigating judge as a basis for their recommendation for continued detention[11];

vii. Disclosure of any evidence which may undermine a recommendation for continued detention made by the investigating judge or the public prosecutor[12];

viii. The opportunity to call and examine or have examined witnesses; and,

ix. A fully reasoned decision as to the basis for an order for continued detention.

B. Regulation 1999/26 and International Human Rights Law

Regulation 1999/26, and the practice of pre-trial detention pursuant to that regulation, is in clear violation of Article 5(3) and (4) of the ECHR and Article 9(3) and (4) of the ICCPR in that:

i. The Regulation fails to make adequate provision for the periodic review of the extension of custody time limits throughout the period of detention covered by the Regulation;

ii. The Regulation fails to provide the detainee the right to initiate a review of an order for detention throughout the period of detention covered by the Regulation;

iii. The period of three months, which the Regulation allows before an application for renewal of extension is required, is excessive;

iv. The Regulation fails to ensure access to an *adversarial* forum by which a detainee can challenge the lawfulness of an order for continued detention, during the period covered by the Regulation.

RECOMMENDATIONS

1. Regulation 1999/26 must be amended. The following recommendations provide guidance as to the necessary elements of an amended Regulation.

2. In order to effectively challenge an order or recommendation for the extension of custody time limits LSMS recommends that the authorities ensure that the detainee is provided with:

   i. The means by which to initiate a review of an order for continued pre-trial detention;

   ii. Access to effective legal representation;

   iii. Adequate time to prepare a response to an application for continued detention and, in any event, notice of an application to extend custody time limits no later than seven days before the hearing;

   iv. The right to make representations in person or through a legal representative;

   v. Advance disclosure of any evidence relied upon by the public prosecutor or the investigating judge as a basis for recommending continued detention;

   vi. Advance disclosure of any evidence which may undermine a recommendation for continued detention made by the investigating judge or the public prosecutor;

   vii. The opportunity to call and examine or have examined relevant witnesses; and,

   viii. A fully reasoned written decision as to the basis for an order for continued detention.

3. LSMS recommends that where detention is extended beyond the maximum six months under the FRY Code of Criminal Procedure, Regulation 1999/26 must be amended to provide for (a) the review of an order for continued pre-trial detention at one month intervals[13]; and, (b) the right of the detainee to initiate a review of the lawfulness of detention at any stage before conviction or release. The decision whether or not to allow an application for initiated review before the full panel of the Supreme Court of Kosovo (under (b) above) may be made by a judge of the Supreme Court of Kosovo. Such review *must* take place where the detainee can show a *sufficient change in circumstances* such as to challenge the grounds for continued detention.

4. Where a hearing takes place, under (a) and/or (b) above, it must take the form of a court and the proceedings must be *adversarial* in nature. Both parties must be granted

the opportunity to make oral representations. The current wording of Section 1(3) of the Regulation must be amended accordingly.

5. LSMS recommends that in determining whether the "proper administration of justice" requires continued pre-trial detention, under Section 1(1) of the Regulation, the panel of judges of the Supreme Court of Kosovo must have *reasonable grounds to suspect* that, if released, the detainee will: abscond; interfere with the course of the investigation or trial; commit further offences or cause a threat to public order.[14] The continuation of an investigation, where such investigation has not been carried out with due expedition, the lack of available court premises, the lack of available judges, prosecutors and/or defence counsel shall not be sufficient grounds upon which to extend pre-trial custody. Regulation 1999/26 must be amended, or a direction on the application of the regulation issued, accordingly.

6. LSMS recommends that a specific provision should be incorporated into the Regulation to the effect that trial must take place within a reasonable time.

7. LSMS recommends that a specific provision should be incorporated into the Regulation whereby, on expiry of the 12-month maximum custody time limit, the detainee must be released or an indictment issued.

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[1] UNMIK Regulation 1999/26 (22nd December 1999).
[2] The FRY Code of Criminal Procedure fails to detail the appropriate venue for hearing appeals against orders for the extension of custody time limits. LSMS has received conflicting information on this issue from members of the judiciary.
[3] *ibid* at Section 1(1).
[4] *ibid* at Section 1(2) and Section 1(1) respectively.
[5] *ibid* at Section 1(3).
[6] See, for example, *Neumeister v Austria* (No.1) (1979-80) 1 EHRR 91.
[7] ECHR Article 5(3) and (4) and ICCPR Article 9(3) and (4).
[8] (1992) 14 EHRR 551, *Neumeister v Austria* (No.1) (1979-80) 1 EHRR 91 has now been overruled.
[9] See, for example, *Woukam Moudefou v France* (1991) 13 EHRR 549.
[10] See, for example, *K v Austria* (1993) a 255-B Unreported.
[11] See *Lamy v Belgium* (1989) 11 EHRR 529.
[12] *Ibid*.
[13] *Bozicheri v Italy* (1990) 12 EHRR 210.
[14] *Letellier v France* (1992) 14 EHRR 83.