

**Organization for Security and Co-operation in Europe
MISSION IN KOSOVO**

Department of Human Rights and Rule of Law

KOSOVO

**REVIEW OF THE CRIMINAL JUSTICE SYSTEM
September 2001 - February 2002**

THEMES:

INDEPENDENCE OF THE JUDICIARY

DETENTION

MENTAL HEALTH ISSUES

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GLOSSARY

ABA-CEELI	American Bar Association's Central and Eastern European Law Initiative
ADoJ	Administrative Department of Justice
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
COMKFOR	Commander of NATO-led Kosovo Force
CSW	Centres for Social Work
CRC	Convention of the Rights of the Child
DCPC	Draft Criminal Procedure Code
DHSW	Department of Health and Social Welfare
DOJ	Department of Justice
ECHR	European Convention on Human Rights
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
fYROM	Former Yugoslav Republic of Macedonia
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
JAC	Joint Advisory Council on Legislative Matters
JIU	Judicial Inspection Unit
KFOR	Kosovo Force
KJPC	Kosovo Judicial and Prosecutorial Council
KPC	Kosovo Penal Code
KPS	Kosovo Police Service
LMO	Law on Minor Offences
LSMS	Legal Systems Monitoring Section
MOC	Municipal Court for Minor Offences

NATO	North Atlantic Treaty Organisation
OHCHR	Office of High Commissioner for Human Rights
OLA	Office of Legal Adviser
OSCE	Organization for Security and Co-operation in Europe
UN SCR	United Nations Security Council Resolution
SRSR	Special Representative of the Secretary-General
TPIU	Trafficking and Prostitution Investigating Unit
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo

SCOPE OF THE REVIEW

With its first two reviews of the criminal justice system¹, OSCE presented a broad and comprehensive overview of the justice system from a human rights law perspective. The concerns expressed in these reports referred to specific cases where the activity of the judiciary, of its administrators, and of the law enforcement agencies failed to comply with standards and guarantees of fair trial and due process. The third OSCE review² shifted its scope to identify concerns within the judicial system at a structural level. Specific substantive areas of the criminal justice system, which were considered to raise the most pressing human rights issues, were exhaustively addressed. Practices of unlawful detention, defence issues, trafficking and sexually-related violence were reviewed to highlight the continuing barriers to conformity with international human rights standards.

The present review of the criminal justice system follows the same approach as the previous one. Issues such as independence of the judiciary, detention authority exercised by executive or military organs, and continuous arbitrary detention of the mentally ill in Kosovo represent the major areas of concern that this review will address. In line with the tradition established by previous public reports, OSCE will also put forward corresponding recommendations to assist Pillar I and other responsible authorities in effectively adjusting, where necessary, its policies and practices.

OSCE's new emphasis on thematic structural concerns within the justice system mandates a much broader overview of the system's evolution and background, which may, at times, touch upon issues, cases, or pieces of legislation that are outside the six-months timeframe of this review. Such cases or legislation will be analysed and commented upon, where relevant, even when mentioned in previous reviews.

METHODOLOGY

The analysis and arguments in this report are based on data and factual information collected during the reporting period by OSCE field monitors. OSCE monitors gathered information through direct observation of court proceedings, review of court files and records, and personal interviews with relevant actors (judges and justice officials, prosecutors, defence counsels, and law enforcement officers). During this reporting period, LSMS field officers performed in-court monitoring of one hundred fifty-six (156) cases, both pre-trial investigations and also trials. Fifty (50) of these cases involved charges of war crimes, ethnically or politically motivated crimes, and organised crime (19

¹ OSCE Review of the Criminal Justice System, 1 February 2000 – 31 July 2000 (hereafter First Review); OSCE Review of the Criminal Justice System, 1 September 2000 – 28 February 2001 (hereafter Second Review).

² OSCE Review of the Criminal Justice System, October 2001 (hereafter Third Review).

cases of war crimes and ethnically motivated crimes, 9 cases dealing with organised crime, and 22 cases of trafficking in human beings).

Issues raised and arguments made in the previous three reviews of the criminal justice system are not repeated in full here. Instead, when necessary, the present document references earlier reviews in footnotes.

Cases that support or illustrate this report's analysis and conclusions appear in separate paragraphs that have margins indented from the main text. This is to aid the reader in distinguishing case examples from the analytical paragraphs of the report. The material in these indented paragraphs represents factual data and case histories.

EXECUTIVE SUMMARY

This review is the fourth public report on the criminal justice system by the Legal Systems Monitoring Section (LSMS). LSMS is part of the Human Rights Division of UNMIK Pillar III (Organization for Security and Co-operation in Europe – OSCE). The present review covers the period from September 2001 through February 2002. Vested with all executive and legislative powers by United Nations Security Council Resolution 1244, the United Nations Interim Administration Mission in Kosovo (UNMIK) – through the Special Representative of the Secretary General (SRSG) – has the mandate to administer the justice system in Kosovo.

This mandate is currently fulfilled by UNMIK Pillar I for Police and Justice, which has brought together the departments of law enforcement and judicial affairs to facilitate co-ordination internally and co-operation with OSCE, KFOR and other international organisations deployed in Kosovo. Under UNMIK Regulation 2001/09 On A Constitutional Framework For Provisional Self-Government In Kosovo (the Constitutional Framework, promulgated on 15 May 2001), some of the administrative functions of the judicial system have been handed over to new Provisional Institutions of Self-Government, namely to the Ministry of Public Services.

According to its mandate, the OSCE shares, within UNMIK, the responsibility “*to ensure that human rights protection and promotion concerns are addressed through the overall activities of the mission*”.³ In line with the mandate of UNMIK to develop mechanisms to ensure the compliance of law enforcement agencies and the judicial system with international standards of criminal justice and human rights, OSCE has continued to focus its monitoring capacities on identifying human rights concerns at all levels of the justice system. Accordingly, this review is intended as an instrument to assist in comprehensively addressing the multi-faceted challenges facing the criminal justice system, in order to enhance the development of a culture of respect for human rights and the rule of law.

³ The Report of the UN Secretary-General to the UN Security Council, 12 July 1999, para. 87.

As expressed in previous reports⁴, OSCE understands the obstacles that UNMIK has confronted in establishing a justice system in a society lacking both a coherent legal framework and a core of experienced professionals within the local judiciary due to the disenfranchisement of a significant part of the local community prior to the establishment of UNMIK. However, now that a functioning judicial system has been established, and the emergency phase is over, compliance with international human rights standards should be assured. In terms of human rights protection and promotion, the enactment of the UNMIK Regulation 2001/09 is a recognition at highest level of the direct applicability of human rights instruments within the legal framework in Kosovo. Any breach of these basic standards by any authority should be thoroughly scrutinised and immediately addressed, as it may create adverse precedents for the future development of the judicial system and the society as a whole.

THEMED AREAS

Independence of the judiciary

The independence of the judiciary represents an integral part of any modern and democratic governmental framework, and it stands out as a prerequisite for safeguarding the judicial process from illegitimate state intervention. It also gives individuals the guarantee that the judicial system possesses the mechanisms to provide legal protection, when necessary, from actions or decisions of other state authorities. In other words, judicial independence guarantees governmental accountability.

This review will analyse the theoretical and practical extent of judicial independence existing within the UNMIK structure, and will consider this independence from the perspective of two of its basic concepts: institutional independence and functional independence.

Independence in an institutional sense requires that the judiciary be composed of officials whose appointments, performance, and disciplinary accountability enjoy an effective institutional autonomy. In this respect, OSCE will analyse the extent to which the procedure of appointing and extending the contracts of judges and prosecutors, both local and international, is consistent with guarantees and standards of judicial independence. Aspects of internal organisation of the courts, such as the mechanism of assigning cases to judges or panel of judges, will also be addressed from the perspective of the control that executive branches of UNMIK may exercise on such mechanism. Ultimately, disciplinary accountability, regarded as a guarantee of institutional independence and a guarantee against miscarriages of justice, will be scrutinised in respect of the manner in which the available disciplinary mechanisms function. OSCE will also focus on the compliance of these mechanisms with relevant international standards, and their applicability to international judges and prosecutors employed in the UNMIK framework.

⁴ See OSCE Review of the Criminal Justice System, 1 September 2000 – 28 February 2001, Executive Summary, page 1.

Independence in a functional sense implies non-interference of other non-judicial organs in the performance of judicial functions. It also covers the obligation of the state to safeguard the independent work of the courts and, implicitly, the personal independence of the judges. Within the conceptual frame of functional independence, OSCE will address the issue of executive interference of the SRSG and KFOR in the area of adjudication, and will also focus on legislative intervention that prejudices the principle of independence. Furthermore, OSCE will look into the collision between immunity, which protects UNMIK and KFOR from any form of legal process in Kosovo, and judicial independence.

Detention

The prohibition of arbitrary arrest and detention is a fundamental part of international human rights law. OSCE noted in a previous review that the supposed conflict between security and justice could not be used as a justification for interference by the executive in the judicial sphere, particularly by detaining persons outside judicial process.⁵ Instead, OSCE identified the need for a comprehensive and sustainable strategy to address the long-term challenges of the judicial system, so that it could successfully cover the areas of criminality where the SRSG and KFOR continued to exercise executive interference. Notwithstanding concrete recommendations from OSCE, and efforts made by DOJ to ensure availability of judges and court clerks whenever detention hearings needed to be held, KFOR has continued, albeit to a lesser extent in recent months, to detain persons without basis in the applicable law and without possibility of judicial review.

Another area of extra-judicial detentions, on which OSCE reported in the past, is the practice of Executive Orders issued by the SRSG.⁶ In this respect, OSCE welcomes the fact that the SRSG has not issued any Executive Orders within the past six months, and that, currently, there are no persons detained on extra-judicial orders. Notwithstanding these positive developments, there are still certain concerns that remain with regard to SRSG's powers in the area of deprivation of liberty.

Mental health issues

Another area in which progress has been disappointing is the detention of the mentally ill. OSCE has persistently pointed out in its reviews of the judicial system that the largest number of illegal detainees in Kosovo is within the mental health system.⁷ It is also the area of detention where there has been the least progress in addressing the issue of illegal deprivation of liberty. In this report, OSCE will develop the concerns regarding persons with mental disabilities and the justice system, which fall into three main areas: the use of detention; the treatment of lawful prisoners; and the use of mental health expertise within the criminal justice system.

⁵ See Second Review, Executive Summary, page 3.

⁶ See Third Review, Section 4, page 32-35.

⁷ See Third Review, Section 4, page 41-42.

SECTION 1: MONITORING

I. THE MANDATE OF THE LEGAL SYSTEMS MONITORING SECTION

In United Nations Security Council Resolution 1244 (UN SCR 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*”.⁸

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) should include human rights monitoring and capacity building. He also 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 Pillar III, the 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 UNMIK 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.

A Justice Circular (2001/15) issued on 6 June 2001 reaffirmed the OSCE human rights monitors’ access to court proceedings and court documents. The Circular was expected to enhance the understanding of the judiciary with regard to the OSCE mandate, and ensure the complete coverage of all stages of criminal proceedings by OSCE monitors. However, OSCE continued to experience denial of access to investigating hearings and to court files during the investigating stage, exclusively in cases dealt with by international judges or prosecutors. This position adopted by international judicial officials has had the effect of impeding OSCE from exercising its mandate. Monitoring the judicial system

⁸ United Nations Security Council Resolution 1244, 12 June 1999, para. 11/j.

implies having full and accurate knowledge of the content of court proceedings and documents. For OSCE to be able to issue credible reports and to properly analyse the compliance of the criminal justice system with internationally recognised human rights standards, it is crucial to have full insight into the facts and the proceedings of monitored cases. Attempts to clarify this issue with DOJ had no results within the reporting period, thus hampering OSCE's abilities to carry out the tasks foreseen in the setting up of the mission.⁹

Relationship to other Pillars

OSCE has foreseen in the previous review of the criminal justice system a close co-operation with UNMIK Pillar I on Police and Justice, as the objectives set out by the latter fall within the sustainable goals of institution and capacity building envisaged by the OSCE. At the level of the criminal justice system, Pillar I has been set to consolidate "*a law and order structure that is functionally logical, and in particular establish an unbiased judicial process through initial international participation and reform of the judicial system*".¹⁰ Along the same lines and according to OSCE's mandate, the Department of Human Rights and Rule of Law (HRRoL) promotes the development of a society based on the rule of law and guaranteeing full respect for human rights and the fundamental freedoms of every individual. These common goals set up by OSCE and Pillar I can only be effectively pursued through closer involvement of a human rights dimension in the decision-making process at the Pillar I level. Following the dissolution of the Office for Human Rights within the Office of the SRSG, OSCE has become the sole organ within UNMIK with a human rights mandate. Policy and decision-making structures within UNMIK currently lack a human rights component. Of further concern is the continued lack of human rights screening of UNMIK Regulations, despite the frequent and widespread complaints about this issue since 1999. Consequently, the active consultation and participation of OSCE in these structures and processes has become critical, if human rights protection and promotion within and by UNMIK is to be fully observed.¹¹

The OSCE Department of Human Rights and Rule of Law, as part of the institution-building Pillar, works in close co-operation with UN organisations such as OHCHR, UNHCR and UNICEF. 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), the International Organisation for Migration (IOM) and the American Bar Association's Central and Eastern European Law Initiative (ABA-CEELI).

⁹ An agreement between OSCE Department of Human Rights and Rule of Law and DOJ, on the access of OSCE monitors to court proceedings and documents during investigations, was signed on 22 April 2002.

¹⁰ See PDSRSG's presentation of Pillar I in article "New Police and Justice Pillar established" in *UNMIK News* no. 93, 21 May 2001.

¹¹ In the Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia, presented on 8 January 2002 in the 58th Session of the UN Commission on Human Rights, it was mentioned that "*the Special Representative remains concerned that human rights principles are not sufficiently integrated into the process by which legislation and administrative procedures are promulgated and implemented.*"

Since November 2001, OSCE has co-operated with the International Criminal Tribunal for the former Yugoslavia (ICTY) through the ICTY Outreach office in Prishtinë/Priština. OSCE provides regular updated information to the ICTY Outreach Co-ordinator for Kosovo in relation to on-going war crimes and politically/ethnically-motivated trials in domestic courts. Additionally, concerns, strengths or developments pertaining to the Kosovo criminal justice system, as identified by OSCE, are shared with ICTY Outreach to be included in Outreach reporting to the Tribunal in The Hague.

As 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 HRRoL Department, maintains consistent and co-operative relationships with other Pillars and international agencies. Systematic violations, observed trends, individual problems and issues identified by LSMS, within the broader mandate of OSCE, are communicated to DOJ in the weekly reports of the HRRoL Department. Moreover, LSMS has constantly expressed its willingness to work closely with DOJ to assist in implementing and addressing these systemic concerns. Accordingly, an efficient working relationship between the HRRoL Department and DOJ would benefit from increased dialogue and transparency. Consistent feedback and communication would serve to avoid instances where DOJ's actions taken on the basis of LSMS's monitoring and reporting capacities are not effectively followed up and shared with OSCE. On a positive note, LSMS has improved its relationship with the Judicial Inspection Unit of DOJ, as the latter established a policy of providing feedback on the complaints received from LSMS. LSMS and JIU have also agreed on a more consistent mechanism of using the information obtained by OSCE from court monitoring as a starting point for JIU's efforts to collect evidence for their investigations.

The right to a fair trial

International human rights standards are a part of the applicable law through, *inter alia*, UNMIK Regulation 1999/24, which obliges those holding or taking public office in Kosovo to uphold internationally recognised human rights standards and more recently through the Constitutional Framework.¹² 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 obliges any governing entity in the territory to ensure the people of Kosovo these rights.

OSCE analyses domestic law and practice for its conformity with international human rights standards for fairness in criminal proceedings. The international standards are

¹² UNMIK Regulation 2001/9 on the Constitutional Framework for Provisional Self-Government, adopted 15 May 2001, Chapter 3, Section 3.3, states that “*the provisions of rights and freedoms set forth in these instruments [international human rights instruments] shall be directly applicable in Kosovo*”.

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 OSCE. ‘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.

OSCE monitors cases that proceed through the criminal justice system, from the moment of arrest and/or detention, through trial and appeal until a final decision is reached. OSCE monitors cases involving serious crimes, the majority of which are designated as priority cases by OSCE, 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, LSMS monitors also have an insight into the investigative processes and materials of a case to ensure that they are able to address all the issues regarding pre-trial rights. This investigation forms the basis for the OSCE monitor’s analysis of the trial proceedings. OSCE monitors collect the information by attending the investigating and court proceedings and/or reviewing the file, when accessible, and by interviewing the suspect/detainee, police/KFOR, defence lawyer, public prosecutor, investigating judge and others. OSCE monitors attend trials and report on the practices in pre-trial and trial proceedings in the light of domestic and international standards.

The priority cases

The following is a guide to the priority cases over the past six months. Issues involving access to, and effectiveness of counsel, as well as prosecutorial and judicial misconduct are covered in the context of case monitoring.

War Crimes

Ethnically-motivated crime

Politically-motivated crime

Organised crime

Sexual Violence including victims of domestic violence and trafficked women

Treatment of Juveniles

Detention

Trials in Municipal and Minor Offence Courts

OSCE monitors detention centres only as they relate to “access to justice” issues. OSCE does not monitor the conditions of detention or ill-treatment. These areas fall within the mandate of the OSCE human rights officers and the ICRC.

As of December 2001, OSCE has also begun to monitor civil cases - primarily family-law cases – by observing possible human rights breaches relating to non-discrimination

and children's rights. The observations and findings resulting from this new monitoring dimension will be reported upon in a separate thematic report.

SECTION 2: THE APPLICABLE LAW

I. SIGNIFICANT DEVELOPMENTS IN THE APPLICABLE LAW

In the last six months that have passed since the last OSCE review of the criminal justice system there have been several significant developments in the applicable law, some of which are outlined below.

UNMIK Regulation 2001/20 On The Protection Of Injured Parties And Witnesses In Criminal Proceedings was enacted on 20 September 2001 to establish legal measures for providing protection to injured parties and witnesses, so that they may participate in criminal proceedings without fear or risk to their security.

UNMIK Regulation 2001/21 On Co-operative Witnesses, enacted on 20 September 2001, aimed at creating legislative measures to provide incentives for co-operative witnesses in court.

UNMIK Regulation 2001/22 On Measures Against Organised Crime, enacted on 20 September 2001, recognises the need to prevent and combat organised crime in Kosovo, and creates legislative mechanisms for the prosecution and punishment of perpetrators of organised crime.

UNMIK Regulation 2001/28 On The Rights Of Persons Arrested By Law Enforcement Authorities was enacted on 11 October 2001 to establish and protect the rights of persons arrested by law enforcement authorities, namely UNMIK Police and the Kosovo Police Service (KPS).

UNMIK Regulation 2002/1, Amending UNMIK Regulation 2001/20 On The Protection Of Injured Parties And Witnesses In Criminal Proceedings, signed on 24 January 2002, extended the applicability of UNMIK Regulation No.2001/20 to criminal proceedings initiated between June 1999 and the date of the present Regulation.

UNMIK Regulation 2002/2, Amending UNMIK Regulation No.2001/21 On Co-operative Witnesses, extended the applicability of UNMIK Regulation 2001/21 to criminal proceedings between 10 June 1999 and the date of the present Regulation.

Applicability of international human rights standards in Kosovo

Whereas the direct applicability of international human rights standards in Kosovo was, in theory, clarified by the Constitutional Framework¹³, attempts to find practical mechanisms for implementing these standards have so far been inconsistent and sporadic. OSCE has observed that very few defence counsels have yet tested the application of human rights guarantees in courts, while even fewer judges have tried to reason their decisions or actions in light of the principles of international human rights instruments

¹³ See *ante note* 11.

and its accompanying case law.¹⁴ It is yet to be seen whether human rights laws will become landmarks in the development of the justice system in Kosovo through sustainable promotion and awareness raising initiatives, or whether they will remain mere political intentions.

OSCE is also expecting the new legislation on criminal law and procedure, as this may have a positive impact on the clarity and coherence in the application of the relevant legal provisions in criminal matters.¹⁵ The preparation of these two laws started in September 1999, following a request of the SRSG, and the drafting process, as such, finished in the fall of 2001.¹⁶ The enactment of these two codes will be a major step towards a modern, democratic society in Kosovo, established on principles of rule of law and legal certainty.

II. RECURRING ISSUES FROM THE PREVIOUS REVIEWS

The drafting and implementation of new laws

Since the first OSCE review of the criminal justice system, a key concern has remained the manner in which new laws (regulations) are drafted and then implemented in the judicial system. Two key issues have been paramount. The first is the lack of consultation and use of available expertise and resources during the process of drafting new legislation. The result is that new laws are often difficult to implement, do not fit into the existing system (due to lack of consultation with practitioners and other experts), and most importantly, can breach human rights standards, as there is no systematic human rights audit of draft legislation. The second issue is even more straightforward – that laws that emerge are usually effective immediately on promulgation, but generally only appear in English and are then translated slowly into Albanian and Serbian, and not distributed. This means that judges and legal professionals are required to apply law that they do not understand.

Despite the lack of progress in this area, there is still no requirement for the SRSG to consult any organisation or institution before promulgating a regulation. Even in the cases where working groups, which often consist of experts, submit a draft law, such drafts are sent to the SRSG's Office of the Legal Adviser (OLA), often to remain there for long periods, until a version is implemented that may bear little resemblance to the original.¹⁷ The strongest and most persistent criticisms of the law-making process since

¹⁴ OSCE monitored, within the reporting period, only one instance when a judicial official, an international prosecutor from Gijlan/Gnjilane District Court, reasoned a Petition for Protection of Legality with the guarantees enshrined in Article 5 and 6 ECHR, and with relevant case law of the European Court.

¹⁵ The drafts of the Criminal Code and the Criminal Procedural Code are awaiting approval and promulgation by the SRSG.

¹⁶ The process of drafting the two codes was the result of common efforts of the Joint Advisory Council for Legislative Matters (JAC), together with the assistance of both international and Kosovar legal experts.

¹⁷ UNMIK Regulation 2001/28 On The Rights Of Persons Arrested By Law Enforcement Authorities was promulgated on 12 October 2001. The drafting process began in 2000, with a drafting group consisting of OSCE, UNMIK ADoJ, and UNMIK Police. The draft produced by this working group was, however, abandoned, and a new working group, excluding OSCE, was set up. OSCE was twice given the opportunity to provide comments on the draft regulation produced by the second working group, but, as it appears from

the creation of UNMIK in 1999 has been the lack of systematic human rights auditing of draft laws, with the result being that UNMIK has produced laws that violate international human rights standards. Moreover, UNMIK does not take any steps to remedy this when it is pointed out.¹⁸ Despite widespread criticisms of this procedure from both within the UN and without,¹⁹ no attempt has been made to have a systematic human rights audit of all draft laws, let alone open up the ways in which laws are drafted so that experts can have input on the final version.²⁰ This system is likely to grow even more complicated and confusing with the Assembly having the right under the Constitutional Framework to make laws, but without being clear exactly what laws will continue to be issued by the SRSG alone.

With regard to the second key issue related to the legislative mechanism, OSCE has expressed concerns in all of its previous reviews about the untimely translation and distribution of UNMIK Regulations. These are generally effective on the day they are signed by the SRSG, but they are made promptly available only in English, and there is no systematic and speedy distribution to all persons within the justice system. Again, little, if anything, has improved in the last two years. None of the UNMIK Regulations enacted in 2002 have been translated in Albanian or Serbian. For the regulations issued in 2001, the translation process stopped at the UNMIK Regulation 2001/19 (out of the 41 regulations passed in 2001). OSCE has documented numerous situations where judges, prosecutors, lawyers and the police were not aware of the changes in the applicable law brought by UNMIK Regulations because translated versions of this legislation were not available. This situation remains unacceptable: legislation that is applicable but not **known** by the judicial officials mandated to apply it can only compromise the efforts to build an environment of legal certainty in Kosovo. The lack of attention to this issue is particularly disappointing.

Trafficking-related criminality and the response of UNMIK authorities

UNMIK's response to trafficking in human beings

In the last review of the criminal justice system, OSCE highlighted structural concerns related to trafficking and sexually related criminality.²¹ In the same review, OSCE welcomed positive developments in this area, such as the establishment of the Trafficking and Prostitution Investigation Unit (TPIU) within UNMIK Police. The creation of the unit responded to growing concerns stemming from the escalation of trafficking in

the final version of the Regulation, many of these comments were not taken into account (see further *note 18*).

¹⁸ An issue, which was also reported on in the Third Review, was the drafting of what became Regulation No. 2001/28. Despite the clear violation of international human rights law in Article 3.7 of this Regulation (which allows for detainees to be denied access to lawyers for up to 48 hours), no attempt has been made to change it.

¹⁹ See Report of the Special Representative of the Commission on Human Rights, 8 January 2002, *op. cit.*, para. 92-94.

²⁰ In January 2002, the PDSRSG verbally informed the OSCE's HRRoL Department that such a human rights audit of draft laws would be put in place, with OSCE reviewing and commenting on all draft laws for compliance with human rights standards. This audit has not yet been implemented.

²¹ See Third Review, Section 5.

Kosovo²², which was perceived as a distinct branch of organised crime, thus requiring a distinct and independent approach on the part of the law enforcement officials. Moreover, TPIU has also developed, in close co-operation with OSCE and IOM, a coherent approach towards victims of trafficking. The assistance provided to such victims has turned into a reliable, structured procedure in which TPIU has been consistently referring certain victims to the repatriation programme established by IOM, while continuing to provide protection and assistance to those victims still involved in the judicial process. OSCE considers that the characteristics and scale of trafficking in Kosovo have not changed over the past year.²³ Therefore, the response of UNMIK Police towards this type of criminality should continue and even be strengthened.

Further concerns related to the response of the authorities to crimes of trafficking have emerged from monitoring the corresponding judicial proceedings. OSCE has continued to observe that local judges and prosecutors do not fully understand either the meaning and implication of trafficking offences, or the role and position of the trafficking victims. Despite focused training organised by the Kosovo Judicial Institute (KJI), judges and prosecutors still have failed to observe the guarantees and requirements provided by UNMIK Regulation 2001/4 in relation to how these crimes are investigated.²⁴ The interim measures of seizing the proceeds of such crimes, and of closing down the premises of the illicit business, have rarely been applied by the investigating judges. Even when they were applied, such premises have been re-opened soon after the closure, with a different owner and an allegedly different type of activity, following requests to the UNMIK business licensing authorities. As far as the court proceedings are concerned, OSCE has observed that investigating judges continue to disregard procedural guarantees intended to protect the victims/witnesses and to facilitate successful prosecution of the offenders. UNMIK Regulation 2001/4 states that the repatriation of the trafficking victims cannot be delayed due to judicial proceedings; therefore, investigating judges have been made aware that hearings of these victims/witnesses need to be held promptly and properly, so that the statements can be afterwards used by the prosecution during the trial. One of the main guarantees that these judges need to observe during these hearings is the presence of the defendant or his/her defence counsel, so that, when the witness statements are used in court at a later time, the defence cannot complain about the failure to respect the right to question the witness and to assess his or her credibility.²⁵ However, OSCE has monitored over the past six months repeated failures of the investigating

²² The creation of TPIU followed the enactment of new legislation combating trafficking, namely UNMIK Regulation 2001/4 On The Prohibition Of Trafficking In Persons In Kosovo.

²³ In the Situation Report, February 2000 to May 2001, of the IOM Counter-Trafficking Unit, IOM estimated that forced prostitution took place in at least 33 bars throughout Kosovo. In the up-dated Situation Report, February 2000 to December 2001, IOM mentioned that, according to UNMIK Police estimates, there were approximately 104 establishments in Kosovo where women and young girls were forced into prostitution.

²⁴ The Victim Assistance and Advocacy Unit (VAAU) within the DOJ announced, in a letter to OSCE dated 16 April 2002, that further training on the application of UNMIK Regulation 2001/4 will be designed for and provided to the local judiciary.

²⁵ See Article 333 FRY CPC.

judges involved in trafficking pre-trial proceedings to ensure the presence of the suspect or the defence counsel during the hearing of the victims/witnesses.²⁶

Another concern remains the lack of temporary or interim witness protection facilities for at-risk trafficking victims providing testimony in the justice process. Regulation 2001/4 mandates that “*appropriate measures shall be taken for witness protection during any investigation and/or court proceedings arising under the present regulation*”. OSCE has repeatedly raised this issue with UNMIK Police, but concrete steps have still not been taken.²⁷

Sexual Violence

OSCE welcomes any initiative to create a specialised police investigation response to sexual violence cases. Over the course of the previous LSMS reports, OSCE has highlighted the need for coherent policy regarding the treatment of rape victims. The need for a consistent police response and protocol is highlighted by the example of a memorandum attached to a regionally-based protocol written to investigators by the Gjilan/Gnjilane Regional “Criminal Investigations Division, (CID)” dated 31 October 2001. The memorandum states: “*It is been my observation that very few of the reported rapes are in fact actually that. Most of them, it seems, are afterthoughts of the women who had consensual sex and now must face her family. As you know, in this culture, pre-marital sex is forbidden, bringing shame to the women and fear of reprisal from her family. We, as Impartial Investigators, must investigate each case and come to a conclusion as to what, if any, crime has been committed and report the facts of the case. This may not satisfy the victim or her family but that is an issue we cannot be concerned with.*” The attached protocol goes on to instruct investigators to provide rape exams and collection of forensic evidence only “*if the investigator believes, that in fact a rape has occurred*” and states that “*if the investigators feels that this is not forcible, true rape case, he will advise the victim and the family of his beliefs and explain why he believes this.*”

These views, expressed by UNMIK police investigators, are alarming. Such a written policy implies that police investigators should start from the presumption that a rape allegation is false and that a forensic exam is not necessary to determine, in part, the truth of the allegation. The creation of a specialised police investigation unit and a coherent, centralised police policy on sexual violence may assist in ensuring that such prejudices do not influence the conduct of police towards possible victims of sexual violence. Although OSCE welcomes the creation of the Special Victims/ Domestic Violence Unit to assist in the provision of a sensitive response to such victims, the Unit has been hampered by a lack of resources and interference from regional command structures. Enhanced political support, resources and staffing of this Unit to work closely with

²⁶ Of the 12 trafficking cases directly monitored by LSMS in Prishtinë/Priština District Court, from September 2001 to February 2002, in 6 cases the investigating judges held pre-trial hearings of victims/witnesses without the defence counsel of the accused being present.

²⁷ DOJ informed OSCE, in a letter of 16 April 2002, that VAAU, TPIU, and Witness Protection Unit (WPU) are working on a joint project to establish an emergency, interim transit facility specially designed for victims of trafficking. There is, however, no precise time frame for the establishment of such a facility.

specialised sexual violence investigators is also needed to improve law enforcement's response to victims.

The lack of a standardised police policy concerning rape victims and specialised expertise within the police is one part of the broader issue of overall failure to respond to issues of sexual violence. In order to address holistically the needs of sexual violence victims, the OSCE Victim Advocacy and Support Section initiated a Working Group, which involves UNMIK Police Special Victims/ Domestic Violence Unit, KPSS, DOJ, the Forensic Institute, and the newly created Medical Examiners Office among others.

In addition, in prior LSMS reviews²⁸, OSCE has highlighted particular concerns regarding the treatment of child victims of sexual violence by the courts. This concern remains as there continue to be cases in which the courts treat child victim/witnesses as adults, without consideration for the impact of such treatment on the child's psychological and emotional wellbeing. This is despite the fact that the domestic criminal procedure law allows for the use of some special techniques concerning the questioning of children and that courts can use international human rights standards to fill any gaps. In addition, Regulation 2001/20 provides for the use of protective measures in courts that can be applied to protect children, such as *in camera* reviews. However, according to the Official Gazette, this Regulation has not been translated into Albanian and Serbian.²⁹

Translation/interpretation issues

Translation/interpretation services in courts throughout Kosovo has continued to be a cause of concern for OSCE, despite efforts undertaken by DOJ to find long-term solutions for this issue. In its last review of the criminal justice system, OSCE recommended the establishment of a pool of interpreters based in DOJ, which should be able to provide adequate translation in all court proceedings.³⁰ This recommendation has been followed up by DOJ, in the sense that a position has been created within DOJ for a Romanian/Russian/English interpreter to provide adequate interpretation in proceedings related to trafficking cases. OSCE welcomes this initiative, but concerns still arise from the fact that, three months after the vacancy notice was issued, the position has not yet been filled despite the existence of several applications. In the meantime, TPIU and the courts are still facing major difficulties in identifying, on an ad-hoc basis, translators for Russian or Romanian, whenever a trafficking investigation occurs.³¹ Apart from the issue of interpretation in trafficking cases, OSCE also expresses concern regarding the quality of translation that is provided during court proceedings involving international judges and prosecutors. Most of the assistants/interpreters assigned to international judges and prosecutors have been recruited from Albania. There are significant differences of vocabulary between the Albanian language spoken by Kosovo Albanians and that spoken

²⁸ See First Review, Section 7, and Second Review, Section 7, page 69-74.

²⁹ The Official Gazette, hosted by UNMIK web page, lists only the first 19 UNMIK Regulations passed in 2001 as being translated in Albanian and Serbian.

³⁰ See Third Review, Section 5, Recommendations, page 66.

³¹ In a letter of 16 April 2002, the DOJ informed OSCE that the reasons for the delay in hiring a Romanian/Russian/English interpreter were related to the slow UNMIK recruitment process and the problems in identifying a sufficient pool of qualified candidates for the position.

by Albanians, and results of court monitoring have shown that these differences are not mastered by the above-mentioned Albanian interpreters.³² By not understanding the meaning of some Kosovo Albanian dialect terms, the use of these interpreters in court proceedings resulted in prolonged trial sessions and, sometimes, disruptions of the proceedings where defence counsels or even members of the public strongly debated the quality of translation.³³ OSCE considers that the effects of this situation, which otherwise could not have been foreseen by DOJ when hiring these interpreters, can be corrected by providing them, after prior consultation with a Kosovo Albanian linguistic expert, with a list of frequently used expressions in Kosovar dialect. Another possible solution may be to avoid the use of these interpreters in open court proceedings where most of the complaints have so far occurred; instead, they can be used for written translation of trial records or court documents.

Court experts and quality of forensic expertise

The refusal of court experts to perform their legally required duties in criminal proceedings has continued throughout the courts in Kosovo. In the past, OSCE singled out cases where forensic experts failed either to finish reports ordered by the courts or to show up under summons to present the reports during trials. This practice has continued during the last six months, and OSCE has commented on the impact that it has on the rights of the parties involved in criminal proceedings³⁴ (such as the right to be tried within a reasonable amount of time³⁵) and its impact on the overall conduct and outcome of criminal trials. Unless it is adequately addressed by UNMIK authorities, the practice of court experts systematically disregarding orders coming from the criminal courts will result in serious violations of human rights guarantees to fair trial and due process.³⁶ Further, it will weaken the judiciary's authority to enforce its own rulings and to receive proper assistance from the officials and departments that are meant to enhance the administration of justice.

III. DEVELOPMENTS WITHIN THE JUSTICE SYSTEM AND STATUS OF IMPLEMENTATION OF OSCE RECOMMENDATIONS

Specialised sections within DOJ

Of these specialised sections, the Victim Advocacy and Assistance Unit (VAAU) has been created as a result of the OSCE's recommendation to the DOJ, coupled with the DOJ's internal policy decision highlighting the need to improve access to justice for all

³² Complaints of inadequate interpretation in trials involving international judges or prosecutors and their interpreters from Albania have been documented by OSCE in Prizren, Gijlan/Gnijlane, Prishtinë/Priština. Such complaints were raised by the international prosecutors and defence counsels.

³³ In an ethnically motivated murder case monitored by OSCE in Gijlan/Gnijlane District Court, the quality of the translation provided by the court interpreter was subject to debate over repeated court sessions in January and February 2002.

³⁴ See OSCE Special Report on Administration of Justice.

³⁵ See Article 6 ECHR and Article 14 ICCPR.

³⁶ See further Section V of this review.

victims of crime. The VAAU is envisioned to develop into a sustainable independent governmental authority on crime victims, assuming a policy and co-ordination role, including the training and establishment of a network of victim's advocates and an emergency response and referral system for assistance to victims of crime. As a part of this mandate, the VAAU will house the Victim Assistance Co-ordinator created by UNMIK Regulation 2001/4 and ensure implementation of the victim assistance aspects of the Regulation. VAAU has already established contacts with the other organisations and institutions involved in victim assistance, solicited funding and participated in many of the on-going activities regarding enhancing responses to high-risk crime victims. The Victim Advocacy and Support Section of the OSCE is supporting VAAU with resources including personnel, such as the Victim Assistance Co-ordinator.

Another specialised section within DOJ that OSCE expects will have a positive impact on the development of the justice system in Kosovo is the Judicial Integration Section (JIS). OSCE has recommended on previous occasions the need for a comprehensive and co-ordinated effort to create a multi-ethnic judiciary in Kosovo, and also to ensure equal and effective access to justice for members of minority communities.³⁷ Most of the concerns expressed by OSCE in connection with the above-mentioned issues fall within the mandate of JIS; OSCE, therefore, welcomes its establishment and envisages close co-operation with it.

Kosovo Judicial Institute

The Kosovo Judicial Institute (KJI) has continued its Legal Education Programme for magistrates currently practising in Kosovo courts and public prosecutors' offices. Seminars and information sessions have been held on different issues, such as the new legislation on the possession of weapons, the criminal procedure code, the Kosovo Judicial and Prosecutorial Council, the relationship between public prosecutors, investigating judges and law enforcement authorities, and anti-corruption policies. A seminar on extradition procedures, both from a theoretical and practical perspective, was held in December 2001 and was later repeated at the request of interested international judges and prosecutors, in January 2002. A new training session on the application of UNMIK Regulation 2001/4 was organised by the KJI in February 2002, and, unlike the initial training on these issues, it offered the participants a very focused analysis of all the practical aspects that can arise from the application of the Regulation.

In its last review, OSCE recommended the implementation, within KJI's framework, of training sessions for newly arrived international judges and prosecutors.³⁸ The aim of such sessions would be to provide these judicial officials with an overview of the legal system in Kosovo, and also with the potential practical problems that they may face while exercising their functions. KJI has already started drafting a curriculum for such an introduction course, and the initial programme will be held in June 2002, in conjunction with UNMIK DOJ.

³⁷ See OSCE special Report on Administration of Justice.

³⁸ See Third Review, Section 2, page 16.

The Judicial Inspection Unit and the Kosovo Judicial and Prosecutorial Council

The establishment of the Judicial Inspection Unit (JIU) within DOJ and, later on, of the Kosovo Judicial and Prosecutorial Council (KJPC), have been welcomed by OSCE as mechanisms designed to enhance judicial accountability while also observing the principle of judicial independence. JIU has so far managed to perform its tasks with a very limited number of judicial inspectors, both international and local. With a view toward making its processes more transparent and accountable, JIU has recently established an internal procedure that requires issuance of an official response to all complaints received by the unit, regardless of whether an investigation is commenced or not. As of the end of December 2001, JIU was conducting 73 investigations in cases of possible judicial misconduct; in 29 of these investigations the allegations of misconduct were found unsubstantiated and, consequently, dropped, while in the other 44 cases preliminary assessment warranted further and more in-depth investigations.

As far as KJPC is concerned, OSCE, in its previous review, issued a preliminary assessment of the benefits of such a body for Kosovo's judiciary.³⁹ In many respects, KJPC has started to fulfil its mission. By January 2002, KJPC had already looked into 16 of the cases submitted by JIU, of which 13 cases were subject to disciplinary proceedings. In total, 20 judges and prosecutors have undergone proceedings before the KJPC. The Council adjudicated 10 cases, of which 6 resulted in a decision of removal from office - a decision taken by the SRSG on the recommendation of the Council - and two cases ended with decisions of reprimand and warning. In two cases the Council found no misconduct and subsequently terminated the disciplinary proceedings.

Nevertheless, there are certain organisational aspects within KJPC's structure and functional framework that continue to raise concern; these concerns will be addressed later in this review in connection with the issue of judicial independence.

Forensic Institute

A Medical Examiner's Office has been created under the Forensic Operations Section of the Judicial Development Division in the DOJ. In light of this development, the status of the Forensic Institute and its doctors connected to the University and the hospital remains unclear. Although it appears that the Forensic Institute is solely responsible for providing rape examinations, such examinations are taking place in the field by untrained medical personnel. In order to meet the needs of both victims and the police, it appears that training of medical personnel throughout Kosovo to provide effective and sensitive examinations may be necessary. The lack of clarity on the future of forensic medical services in Kosovo presents a considerable obstacle for the development of coherent protocols for the examination and treatment of rape victims and for initiating training of medical personnel in the field to conduct such examinations.

³⁹ See Third Review, Section 2, page 17.

Implementation of OSCE Recommendations

As mentioned in the scope of this review, OSCE's approach towards the concerns that it identifies is to always put forward concrete recommendations aimed at assisting the other structures within UNMIK responsible for addressing those concerns in practice. Following the first review of the criminal justice system issued by OSCE, the former Administrative Department of Justice (ADOJ)⁴⁰ and OSCE established a working group, which had the mandate to analyse the recommendations made in the review and draft policy proposals to the relevant implementing authorities. The activity of this working group stopped after several meetings and it has never resumed again.

Following the second review of the criminal justice system, OSCE was asked by former ADoJ to draft a Strategy for Justice paper, summarising the recommendations made in the review and framing them into sustainable and achievable structures. Moreover, with the establishment of Pillar I on Police and Justice, OSCE was reassured that new mechanisms for implementing its recommendations in judicial and legislative matters would be set up. Nevertheless, the OSCE Strategy for Justice was not considered by Pillar I as a basis for reforming the justice system in Kosovo. Also, OSCE was not made a member of the main advisory and policy-making structure of Pillar I, the Steering Board. Instead, OSCE was given a seat on three of the six panels established by Pillar I to conduct work on the main areas of interest, such as law enforcement, judicial affairs, and legislative development.

Although not effectively designed to implement the recommendations that it made, OSCE welcomed, in its third review of the criminal justice system⁴¹, the set up of the Pillar I panels, which OSCE considered to be a working basis to address the most pressing issues related to the activity of the judiciary. Furthermore, OSCE expected that its presence on the panel of legislative development would make it possible to have OSCE's human rights expertise available during the legal drafting process. Regrettably, the panels within Pillar I have been abolished, and no other framework for consultation and co-operation has been set up since.

⁴⁰ The Department of Justice (DOJ) has been, within the new framework of UNMIK Pillar I, the successor of the Administrative Department of Justice (ADoJ).

⁴¹ See Third Review, Section 2, page 18.

SECTION 3: INDEPENDENCE OF THE JUDICIARY

I. INTRODUCTION

The principle of independence of the judiciary seems to enjoy universal recognition at the level of each national legal system. Furthermore, regional human rights instruments have enshrined the guarantee of an independent and impartial tribunal as an essential element of the right to a fair trial. In this respect, Article 6(1) ECHR states that “*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”, and Article 14 (1) ICCPR uses almost identical wording to define the right of an individual to be tried by a competent, independent and impartial tribunal established by law.

Despite being recognised and regulated almost universally, the principle of independence of the judiciary has been the subject of continuous litigation in national courts and in the various international bodies that apply regional human rights instruments, such as the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights.⁴² Moreover, the UN Commission on Human Rights has, since 1985, appointed three Special Rapporteurs on the independence of the judiciary; this demonstrates the international community’s interest in the development of member states’ policies and practices concerning judicial independence, and also its interest in the implementation of effective legislative and structural guarantees necessary for attaining the desired standard of independence and impartiality in all judicial bodies.

The debate on the independence of the judiciary did not stem from the definition of the principle, but rather from its practical implications. Within the broader framework of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms, basic and practical concepts had to be articulated in order to assist governments in their task of implementing, in their national legislation, common guidelines and rules that would secure the independence of the judiciary. In setting out these basic concepts, the principle of independence of the judiciary was broken down into “sub-principles” according to the various practical concerns and questions that had arisen in national or international litigation. The Seventh United Nations’ Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in August-September 1985, adopted the “Basic Principles on the Independence of the Judiciary” in an attempt to give judges appropriate guidance regarding their role in the justice system, and to set out specific rules concerning the exercise of judicial functions consistent with the guarantees of fair trial, the presumption of innocence, and equality before the law.⁴³ The document laid down a set of standards relating to the relationship of the judiciary to other state authorities, and, more specifically, to the selection, appointment and training of judicial officials, the conditions of their service and tenure, professional secrecy,

⁴² For a comprehensive overview of the case law and the legal debate on judicial independence issues in various countries, see the Reports of the UN Commission for Human Rights submitted by the Special Rapporteur on the Independence of Judges and Lawyers.

⁴³ See the Preamble of the *Basic Principles on the Independence of the Judiciary*.

immunity, and the suspension and removal from office. Executive interference in judicial matters, in the form of instructions given to judges or interpretation of the existing legislation, was particularly considered to have a detrimental effect on the independent work of the judiciary.

Departing from the theoretical recognition of the principle of independence and its specific sub-principles, this report focuses on the actual extent of judicial independence of the criminal justice system in Kosovo. The report will analyse the guarantees of independence of the judiciary existing within the UNMIK structure, and will consider judicial independence from the perspective of two of its basic concepts: institutional independence and functional independence. Independence in an institutional sense requires that the judiciary is composed of officials whose appointments, performance, and disciplinary accountability enjoy an effective institutional autonomy in comparison to other branches of the government. On the other hand, independence in a functional sense implies non-interference of non-judicial organs in the performance of judicial functions, and it also covers the obligation of the state to safeguard the independent work of the courts and, implicitly, the personal independence of the judges.

Both of these concepts will be observed in relation to the independence of the international judicial officials performing their functions under the temporary and extraordinary provisions of UNMIK Regulation 2000/64⁴⁴, and also in respect to the judicial structure existing and functioning under the regular court system.

II. INSTITUTIONAL/ORGANISATIONAL INDEPENDENCE

Independence of the judiciary in its institutional sense means that the exclusive functions of the judiciary are exercised by office-holders who enjoy extensive and well-defined guarantees concerning appointment to and removal from office, disciplinary accountability, and rules of case assignment.

Appointment of judges and prosecutors

With regard to judicial selection procedures, national legal systems provide different models, ranging from direct election by the people to parliamentary or governmental appointment. Regardless of the procedure used, it is critical that judicial officials be independent from the body or person selecting or nominating them.

In terms of the appointment procedures for judges and prosecutors in the justice system in Kosovo, the mechanism used for international officials is different from that used for local judicial officers. International judges and prosecutors are directly recruited and contracted by UNMIK within the regular UN employment framework, while the local judiciary has so far been nominated to the office for renewable periods of one year. Although not yet codified in an UNMIK Regulation, the DOJ has announced that starting

⁴⁴ UNMIK Regulation 2000/64 On Assignment Of International Judges/Prosecutors And/Or Change of Venue, enacted on 15 December 2000.

this year, local judges and prosecutors will be nominated for an indefinite term that will terminate upon the completion of UNMIK's mission in Kosovo. This new procedure changes the system of fixed-term renewable contracts by which the local judiciary has been appointed since 1999. OSCE sees this development as a positive step towards enhancing institutional independence of local judges and prosecutors.

As far as the international officials are concerned, OSCE has long had concerns that their status as civil employees within UNMIK affects the independent nature of their functions. The European Court has held that a nomination for judicial office made solely by a government entity does not itself affect the independence of the courts; what is decisive is the absence of any control or supervision by the executive authority after the nomination. In this respect, the very short contractual period for international judges and prosecutors⁴⁵, and the fact that each extension of these contracts is solely dependent on UNMIK's executive branches – DOJ and, ultimately, the SRSG – create an appearance of executive control over these officials. The very wording of the latest vacancy notice posted by UNMIK for positions of international judges and prosecutors in Kosovo is illustrative of the executive supervision over these officials: “*under the overall supervision of the Deputy Special Representative of the Secretary-General for Police and Justice and the Director of the Department of Judicial Affairs, the incumbent serves as an international judge[...]*”⁴⁶.

Again, it is noteworthy that independence of the judiciary in its institutional sense is mainly intended to secure the appearance of independence against any doubts of extraneous influence. The European Commission on Human Rights has stated that in order to establish whether a judicial body can be considered independent, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures, and to the question of whether the body presents an appearance of independence. The Commission went further in saying that it is irrelevant whether influence from outside sources or any actual bias has occurred; what is relevant in examining the independence and impartiality of a tribunal is that appearances must be taken into account.⁴⁷

In its Report of 13 January 1999,⁴⁸ the Special UN Rapporteur on the independence of judges and lawyers welcomed the decision of the Norwegian Supreme Court in a case where it held that temporarily appointed judges, who did not have the same protection of security of tenure as permanently appointed judges, were incompetent to adjudicate on disputes to which the State or any of its organs were parties – that is, cases in which the State was a party (which would include all criminal cases). It was further stated that the courts guarantee the rule of law for citizens in their relations with the legislative or executive powers and, since the State is a party in a considerable number of cases, it is especially important that the public can have full confidence in the individual judge

⁴⁵ The standard contract for international judges and prosecutors is for a 6 months renewable term.

⁴⁶ The text of the vacancy notice is reproduced as found on the UNMIK web page.

⁴⁷ See the Report of the European Commission on Human Rights, *B Company v. the Netherlands*, 19 May 1994.

⁴⁸ Report of the Special Rapporteur on the Independence of Judges and Lawyers, United Nations Commission on Human Rights, 13 January 1999.

making his or her judgement without having to consider any negative consequences for his or her position.⁴⁹

It is also noteworthy that, as far as the international judges and prosecutors are concerned, recruitment to UNMIK, together with the appointment and extension of contracts, is also dependent on negotiations with the proper authorities in the judges' and prosecutors' home countries. This adds a further element of uncertainty to the issue of office tenure for these judicial officials in Kosovo, which makes it even more complicated to grant them longer term contracts or to predict, only on the basis of professional performance, their availability for office.

As a conclusion, neither the current procedure nor the terms of appointment, especially for international judges and prosecutors, comply with the standard principle of judicial independence. The security of tenure for local judiciary has been addressed by the latest re-appointments to indefinite term of office. As for the international judicial officials, their capacity as judges and prosecutors and the fact that they are, technically, regular UN employees are two concepts that can hardly be reconciled. The framework of the standard UN contracts does not allow the level of institutional independence that should be characteristic for any member of a judiciary.

Assignment of judges and prosecutors and allocation of cases

Assignment under UNMIK Regulation 2000/64

Apart from the issue of the nomination/appointment procedure of international judges and prosecutors and whether this procedure impairs judicial independence, the mechanism of assigning these officials to cases, as set up in UNMIK Regulation 2000/64, raises concerns about independence and structural impartiality.

On 15 December 2000, the SRSG passed UNMIK Regulation 2000/64, *On the Assignment of International Judges/Prosecutors and/or Change of Venue*. From the preamble of the Regulation, it is clear that its scope is closely related to issues of judicial independence and impartiality.⁵⁰ In its Section 1, the Regulation establishes that the competent prosecutor, the accused, or the defence counsel may, at any stage in a criminal proceeding, file a petition to the DOJ (former DJA) for the assignment of a panel of judges, an investigating judge or a public prosecutor, where this is considered necessary to ensure the independence and impartiality of the judiciary and the proper administration of justice. Pursuant to such a petition and also on its own motion, the DOJ shall submit a recommendation to the SRSG who, upon review, shall approve or reject the assignment.

Although intended to eliminate the appearance of or actual bias in sensitive ethnic or political cases, the Regulation actually established a parallel mechanism of judicial

⁴⁹ See *Jens Viktor Plabte v. the State*, Norwegian Supreme Court, December 1997, as reproduced in the Report of the Special Rapporteur on the Independence of Judges and Lawyers, 13 January 1999.

⁵⁰ The preamble reads that "recognising that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo[...]"

assignments, whose dependence on the DOJ and the SRSG is not consistent with the standards of institutional independence set forth in the relevant international instruments. The Regulation creates an ostensibly independent mechanism for initiating the application, by giving the parties the possibility of requesting, at any stage in the proceedings, the assignment of an international prosecutor, investigating judge, or panel of judges to a case. Nevertheless, this application process is overshadowed by the ultimate decision on assignment, and the particular officials assigned to a case, resting solely with the SRSG and, respectively, with DOJ. The mechanism of initiating the application procedure, as set up by the Regulation, also lacks clarity and accountability. The Regulation does not require a reasoned opinion on the DOJ's decision to recommend or not a case to the SRSG, while the SRSG's decision to apply the Regulation to a specific case is also not providing an accompanying legal justification.

When it comes to assigning cases to an individual judge or panel, different judicial systems use different mechanisms. However, a common feature in all systems, one which guarantees independence and impartiality, is that cases are assigned randomly, and that no party, body, or other organ belonging to the executive branches can interfere by assigning a specific case to a particular judge or to a particular panel. The relevant law in Kosovo states that a schedule for all the judges of a court is set up in advance, and that cases are assigned to the schedule upon registration and based on their serial number.⁵¹ A draft Law on the Work of the Courts that is awaiting promulgation in Serbia proper establishes in its Article 8 that *"everyone shall be entitled to a trial presided by a randomly selected judge, without relevance to the parties and nature of legal matter"*. The system of random case assignment is used by the local courts as a matter of routine, thus leaving no room for concern related to possible outside intervention in the independent work of the court.

Nevertheless, judges and panels of judges assigned to cases under the provisions of UNMIK Regulation 2000/64 do not enjoy the same guarantees when it comes to the way in which cases are assigned to them. Once DOJ recommends and the SRSG deems that a case warrants an international judge or panel of judges, that case is assigned neither randomly nor according to a pre-established and accountable system. Instead, DOJ is the sole entity deciding which cases go to which panel, thus giving DOJ the possibility of choosing the judges according to the executive's interests in a specific case. Principle 14 of the Basic Principles on the Independence of the Judiciary holds that the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Again, OSCE's concerns stressed above do not imply that DOJ follows extra-judicial interests when assigning cases to international officials. The concerns expressed by OSCE are related to the potentially detrimental effect that the mechanism of assigning cases under UNMIK Regulation 2000/64 may have on the appearance of independent adjudication, which is essential for a trust-worthy and well-functioning judicial system.

⁵¹ Articles 44-47 of the *Book of Rules on Internal Activity of the Courts*, Official Gazette no. 7/81.

Lack of criteria for applying UNMIK Regulation 2000/64

The system set up by UNMIK Regulation 2000/64 also lacks coherency and sustainability. More than one year after its enactment, no clear administrative instructions for the Regulation exist concerning the criteria on which to base a decision to appoint an international prosecutor, investigating judge or a majority international panel of judges.

The fact that the Regulation is applied at different stages of criminal proceedings and sometimes only for one stage, and not for the whole judicial process, raises concerns over the transparency of the mechanism and the criteria on which it is based. In some cases judicial official(s) were assigned under UNMIK Regulation 2000/64 to decide on detention and/or other issues during the investigation, but not for the main hearing. In other cases local judges handled the investigation, while a Regulation 64 panel conducted the trial. In some cases an international prosecutor, but not a trial panel, was assigned pursuant to the Regulation. Under such circumstances, the absence of clear criteria for applying UNMIK Regulation 2000/64 means that cases of a similar nature and seriousness risk being treated differently. It also permits political and other irrelevant considerations in assigning panels to cases.

In early 2001, former ADoJ informed OSCE that the written criteria for appointments were almost finished. On 23 November 2001 the International Judicial Support Division within DOJ confirmed that there was no administrative directive setting out the criteria for the application of the Regulation. Instead a reference was made to a template or form for filing a petition under UNMIK Regulation 2000/64, which was presented as a guideline for a “successful petition.”⁵² The petition form, which is not a legally binding document, sets out the purpose of the Regulation, as stated in the Preamble, and it goes on to say:

“The Department will evaluate a submitted petition under the following criteria:

- *The existence of, or potential for, intimidation or manipulation of the local judiciary and/or local prosecutors in relation to the proceeding;*
- *The actual or potential existence of significant public demand for a particular judicial and/or prosecutorial action at any stage of the proceeding;*
- *Diversity among the accused, victims, or witnesses with regard to characteristics such as religion, ethnicity, native language, citizenship, or political affiliation;*
- *The nature of the criminal offences referred to in the charge, indictment, or verdict;*
- *The stage of the proceeding; and*
- *Any other factors that could affect adversely judicial and/or prosecutorial impartiality or create the appearance of judicial and/or prosecutorial partiality.”*

This proposed form sets out a number of criteria for evaluating a petition but, as long as the form has never been formally adopted in an administrative instruction accompanying UNMIK Regulation 2000/64, it has no legal character. As the petition form is not legally binding, whether or not DOJ officials take the stated criteria into consideration cannot be ascertained. As stated above, the Regulation is not consistently applied; similar cases

⁵² *Petition for the Assignment of International Judges/Prosecutors and/or Change of Venue under UNMIK Regulation 2000/64*, available at DOJ.

receive different treatment, which, if the said criteria would indeed be the foundation for the assessment, should not be encountered. The next question is, then, to what extent the SRSG, who ultimately makes the decision, considers himself bound by these criteria. An accurate assessment on this issue cannot be made because the SRSG's decisions on applicability of UNMIK Regulation 2000/64 state no legal or factual reasons. Thus, OSCE has concerns that the proposed form provides an unrealistic appearance of transparency, while, in fact, there may well be another set of criteria deciding the matter, considering the broad language of the Regulation itself.⁵³

Disciplinary accountability and removal from office

The mechanism of disciplinary accountability

A further guarantee of institutional independence of the judiciary is the method of holding judges and prosecutors accountable for the exercise of their judicial functions. When judicial officials have reasons to fear disciplinary or other consequences due to the way they performed their duties, independence is impaired. This issue touches again upon the matter of security of tenure, but, as discussed above in this section, the circumstances in Kosovo preclude the establishment of a judiciary consisting of irremovable or long-term appointed judges. However, it is essential that judges enjoy, for a specific period of time, certain stability. The lack of such stability for the judges in Kosovo, be they local or international, raises concerns related to the possibility that the executive authority, which is responsible for the extension of their contracts, may have to use the extension procedure as a method of removing undesirable judicial officials without resorting to the regular disciplinary procedures.

Departing from the duration of the term of office, which should not itself bear on the judges' independence, the mechanism of judicial accountability and the dismissal or re-appointment procedures imply a considerable risk to judicial independence. As such, professional accountability for the members of the judiciary represents a necessary safeguard against miscarriages of justice, and OSCE has therefore welcomed, in its previous Review of the Criminal Justice System, the establishment of the Kosovo Judicial and Prosecutorial Council (KJPC) as a quasi-independent transitional body with a mandate for judicial discipline.⁵⁴

However, the KJPC itself, although perceived as a guarantor of judicial independence, is bound by organisational stipulations that are inconsistent with standards of independence, which, therefore, may impact on its overall performance. First, the fact that the KJPC, which is expected to ensure a transparent and independent review of the judges' performance, is nominated by the same executive power responsible also for nominating the judiciary, namely the SRSG, bears on the appearance of institutional independence of this body. The KJPC's dependence on the SRSG is further deepened by the fact that, when it comes to removals from office, the result of its disciplinary review is not a decision with binding authority, but a mere recommendation to the SRSG. According to

⁵³ Regulation 2000/64 makes reference only to the necessity of ensuring the independence and impartiality of the judiciary or the proper administration of justice.

⁵⁴ See Third Review, Section 2, page 17.

this mechanism, it is not the KJPC that makes the decision on a disciplinary case, but the SRSG, thus rendering KJPC merely an advisory organ for the executive authority. As to the basic guarantees of due process for the judges and prosecutors who are subject to disciplinary review by the KJPC, OSCE has concerns that these professionals have no possibility of appealing against the disciplinary decision taken against them. The Regulation establishing KJPC failed to provide a mechanism of review for these decisions and, technically, as long as the decisions themselves are taken by the SRSG, the possibility of review is complicated even further. Challenging a decision taken by the SRSG would only raise again the issue of immunity for UNMIK and its structures and representatives, thus leaving no room for the judges and prosecutors tried by the KJPC to even try to seek a review of the decisions taken against them.⁵⁵

The issue of judicial accountability becomes even more problematic when it refers to international judges and prosecutors. Despite numerous recommendations to develop a system of disciplinary accountability for these members of the judiciary, this issue has still not been addressed. First, the fact that disciplinary mechanisms are not equally available with regard to the local and the international judicial officials exercising their duties within the same court system and, sometimes, as members of the same court panel, creates a double standard that is inconsistent with a democratic judiciary. Second, the lack of a mechanism to hold international judges and prosecutors accountable for their performance also raises concerns over possible miscarriages of justice or judicial misconduct, which may go unchecked.

Furthermore, OSCE has concerns that, in the absence of such a disciplinary procedure for international judges and prosecutors, the only option for accountability comes at the moment of renewing their contracts. This option is, however, not consistent with the guarantees of judicial independence as long as the extension of contracts is an exclusively executive matter.

Legal remedies against impartiality

Although not directly connected to the issue of disciplinary accountability for judges, OSCE is also concerned with the lack of legal remedies against possible partiality shown by an international judge in the course of a trial. All legal systems, Kosovo included, provide clear criteria and procedures for abstention or disqualification of a judge. The applicable law strictly enumerates the situations in which a judge is disqualified from hearing a case, and it further provides for parties requesting the disqualification of a particular judge whose impartiality is suspect.⁵⁶

However, these legal remedies, provided by the law as a guarantee of judicial impartiality, do not apply to international judges assigned to cases under UNMIK Regulation 2000/64. The argument for not applying the disqualification procedures against these judges has been that, if given the authority to decide on a disqualification

⁵⁵ OSCE was informed, in a letter of 16 April 2002, that DOJ has finished working on a draft amendment of UNMIK Regulation 2001/8; the draft includes, among other issues, specific provisions as to the right of the judges and prosecutors to appeal the decisions taken by KJPC in the disciplinary cases.

⁵⁶ Article 39-44 FRY CPC.

motion against international judges or prosecutors appointed under UNMIK Regulation 2000/64, the presidents of the courts, who under the applicable law are competent to rule on disqualification procedures, would abuse the mechanism to the disadvantage of the international officials.⁵⁷ The alternative solution adopted by the DOJ to deal with motions to disqualify panels of international judges assigned under UNMIK Regulation 2000/64 illustrates further the control of the DOJ over purely judicial matters. This procedure, which does not even exist in codified form, stipulates that, whenever a disqualification motion for an international panel would arise, the Director of the DOJ would appoint another international judge to rule on the matter of disqualification. In other words, not only do judges assigned under UNMIK Regulation 2000/64 function outside the regular court system, with none of the domestic legal remedies or guarantees applying to their performance, but the DOJ is also given additional authority in the area of judicial process. This authority to appoint individual judges, that are expected to disqualify other international judges that DOJ itself had appointed, compromises the independence for the judiciary.

Removal from office and termination of contracts for judges and prosecutors

OSCE expressed concerns in the past about the procedure of removing judges and prosecutors from office, as it was done entirely within the executive authority. In this respect, the KJPC has now a mandate to decide matters of judicial discipline, including the mandate to make proposals to the SRSG on the nomination and removal from office of both judges and prosecutors. One matter of concern remains, however, regarding the method of renewing contracts for local judges and prosecutors, a process that can be used as an alternative to disciplinary removal.⁵⁸ The set of criteria for re-appointment to office, as listed in Section 6.1 of UNMIK Regulation 2001/8, allows for judicial officials not to be reappointed to office for reasons of moral integrity or discriminatory practices,⁵⁹ which should normally warrant a disciplinary procedure within JIU and KJPC, where the judges or prosecutors concerned could present evidence in their defence. Judges and prosecutors themselves have never been informed of the basis of the evaluation leading to an extension of their contracts. Curious situations have lately occurred when judges and prosecutors were expecting the renewal of their contracts for 2002. Interviews conducted by OSCE with judges and prosecutors in all regions in Kosovo showed that, by the end of January 2002, they still had no official information on whether or not their contracts were extended. Some of them reported hearing about their extension from the media but could not obtain an official confirmation from DOJ.⁶⁰ Such situations raise concerns first from the perspective of the legality of these judges' activity within the period when they were performing their duties without any legal basis. Furthermore, these shortcomings on the

⁵⁷ In a letter addressed to OSCE on 16 April 2002, the DOJ stated that “clearly, if this authority is given to the president of the court in panels comprised of a majority of international judges, it is possible that every panel would be defeated by the president.”

⁵⁸ As mentioned above in this section, the system of renewing these contracts every year has just been changed by DOJ and appointments are currently indefinite, with the possibility of being removed from office upon a decision of the KJPC.

⁵⁹ See Section 6.1 (c,d) of UNMIK Regulation 2001/8.

⁶⁰ DOJ's response to this matter was that the re-appointments to judicial office were advertised in the local media. Nevertheless, such publication prior to an official notice addressed to the judicial officials themselves does not satisfy the need for adequate information.

level of justice administration and the criteria for evaluating the extension of contracts raise concerns related to organisational judicial independence. A judge who goes through a re-appointment process every six months or every year, with no information on the processes and the criteria of that re-appointment, cannot be considered an independent member of the judiciary.

III. FUNCTIONAL INDEPENDENCE

Being rooted in the basic concept of separation of powers, which governs every democratic society, the principle of functional independence of the judiciary is based on the idea that various state organs possess specific and exclusive competencies, and thus, that non-judicial bodies can neither exercise nor interfere with judicial functions. The first test in ascertaining the extent of judicial autonomy of a given legal system is to refer the independence requirement of the legislation under consideration. In this respect, the vast majority of national constitutions or statutory laws provide a guarantee of judicial independence by requiring that courts be established by law and that judges be solely directed by and answerable to the law.

Nevertheless, even where legislation provides sufficient guarantees for judicial independence in its functional sense, the real test of independence, beyond the legislative guarantees, is the practical interaction between executive or legislative organs and the judiciary. As far as the criminal justice system in Kosovo is concerned, this report will examine the functional relationship between the judiciary and the UNMIK executive and legislative branches.

As explained earlier in the scope of this review, OSCE's new emphasis on thematic structural concerns within the justice system mandates a much broader overview of the system's evolution and background, which may, at times, touch upon issues, cases, or pieces of legislation that are outside the six-months timeframe of this review. Nevertheless, as they are relevant for the theme at hand, such cases or legislation will be analysed and commented upon even when they were mentioned in previous reviews; old comments will not be reiterated, but a new perspective will be brought upon those same issues.

Executive interference with judicial independence

Freedom from interference in the performance of judicial proceedings represents a basic guarantee within the concept of functional judicial independence and it primarily entails that executive or legislative authorities cannot give binding instructions to the courts in the exercise of their functions.⁶¹

The issuance by the SRSG of Executive Orders to detain persons has raised concern and has been reported on by OSCE in previous reviews of the criminal justice system in

⁶¹ See *Beaumont v. France*, ECHR, 24 November 1994.

Kosovo.⁶² Such concerns have been expressed in relation to the lack of a legal basis in domestic or international law for issuing these orders, and also to the lack of a judicial review for those detentions. Besides these concerns, the SRSG's practice of issuing Executive Orders to detain raises further concerns from the perspective of executive interference with the performance of judicial functions. In all the cases where the SRSG exercised his authority to detain persons by an Executive Order, the individuals in question had already been the subjects of ongoing criminal proceedings, and had been released based on decisions of the courts. By re-assessing the detention issue, the SRSG stepped into the area of judicial adjudication; the executive powers of the SRSG interfered with the course of criminal proceedings and disregarded the authority reserved solely for the courts. In its case-law, the European Court has stated that "*the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a tribunal*" and represents the basic element of the concept of judicial independence.⁶³

The case of the four Kosovo Albanians suspected of participating in the bomb attack on the Nis Express on 18 February 2001 illustrates the way in which Executive Orders issued by the SRSG interfered with the authority of courts. Following an investigation conducted by an international investigating judge assigned to the case pursuant to UNMIK Regulation 2000/64, a panel of Prishtinë/Priština District Court, composed entirely of international judges, decided to release three of the suspects due to insufficient evidence connecting them to the charges. Nevertheless, the decision of the court has not been enforced due to the immediate executive intervention of the SRSG. The detention of the suspects continued under SRSG's Executive Order.⁶⁴

While acknowledging that the SRSG has not exercised his detention powers in the past six months, OSCE has concerns that the mere preservation of this authority to detain persons outside the judicial process affects the appearance of independence that should characterise any judicial system. In this respect, only the complete abandonment of this practice can eliminate the potential executive interference into specific judicial matters, such as ordering detention for persons involved in criminal activities.

Along the same line of reasoning, OSCE expresses concern for KFOR's practice of detaining persons. As part of the executive authority, KFOR represents in Kosovo a much more politicised body than a regular military force would represent within a democratic government. This status imposes an obligation on KFOR to act with greater responsibility when exercising or assuming executive authority, especially in the area of criminal justice. The power to detain persons outside the judicial process, as exercised by COMKFOR under the authority of UN SCR 1244, prejudices the functional independence of the judiciary. This detention practice turns into executive interference in the performance of judicial functions, especially in cases where a criminal proceeding is ongoing and the court has already made an assessment of the detention issue.

KFOR's interference with judicial matters is illustrated by the case of a Kosovo Albanian suspect, a member of the Kosovo Protection Corps (KPC), who was arrested on 25 April

⁶² See First Review, Section 4, page 24-26; Second Review, Section 3, page 16-19; Third Review, Section 4, page 32-37.

⁶³ Case *Van de Hurk v. Netherlands*, ECHR, 19 April 1994

⁶⁴ The three suspects were released on 18 December 2001 following a decision of the Supreme Court.

2001 on charges of attempted murder, illegal possession of weapons, and threatening behaviour. On 4 June 2001, following an appeal lodged by the defence against the extension of pre-trial detention ordered by a District Court panel, the Supreme Court of Kosovo decided that there were no grounds for holding the suspect in pre-trial custody and, consequently, ordered his release. More than one month after the release, on 14 July 2001, KFOR re-arrested the suspect in connection with the same case and placed him in detention under COMKFOR authority.

Principles 3 and 4 of the Basic Principles on the Independence of the Judiciary state that the judiciary shall have jurisdiction over all issues of a judicial nature, and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. They further declare that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. Assessing the SRSG's and KFOR's detention practices and authority in light of these principles, OSCE has concerns that any intervention in the detention status of an individual, in cases where a court established by law has already made its decision, constitutes a breach of the functional independence of that court. Furthermore, such practices weaken the confidence that the law-seeking public has in the judiciary. Judicial independence is an abstract concept that is very much dependent on the credibility and legal certainty that it should inspire in the public; as the European Court has many times emphasised, "*justice must not only be done, it must also be seen to be done*".⁶⁵

Legislative interference with judicial independence

Interference that is detrimental to the functional independence of the judiciary may also come from the legislative branches of the state authority. The European Court has held that a statute passed by the legislative authorities, aimed at changing the legal situation of a particular case pending before a court, infringes on judicial independence, especially in cases where the state is itself a party.⁶⁶ This interpretation and rationale, given by the European Court in relation to a civil case where the State was a party and had a direct interest in its outcome, has been extended to criminal cases. As a rule, the state is a party in criminal proceedings or, even where it is not, the state has a general interest in prosecuting criminal offences.

In this respect, OSCE expresses concern over UNMIK Regulation 2001/18⁶⁷, as its issuance represented a clear example of legislation that changed the legal status of a criminal case pending before a court, thus interfering with the latter's functions. UNMIK Regulation 2001/18, passed by the SRSG on 25 August 2001, seemed to create a judicial framework that could have brought executive detentions back into the sphere of judicial process. However, there were certain aspects of the Regulation's application that raised concerns regarding its collision with the independence of the courts.

⁶⁵ See *Delcourt v. Belgium*, ECHR, 17 January 1970.

⁶⁶ Case *Stran Greek Refineries and Straties Andreadis v. Greece*, ECHR, 9 December 1994.

⁶⁷ UNMIK Regulation 2001/18 On The Establishment Of A Detention Review Commission For Extra-Judicial Detentions Based On Executive Orders.

First, the commission set up under the Regulation was an ad-hoc judicial organ whose structure, functions, and composition fell nowhere within the regular court system in Kosovo; furthermore, the members of this commission were all selected and appointed under the authority of the SRSG, whose authority the commission was expected to review. In this respect, the commission established under UNMIK Regulation 2001/18 could not be considered a tribunal in the meaning of Article 6 ECHR and in the meaning of Principle 5 of the Basic Principles on the Independence of the Judiciary.⁶⁸ The latter states that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. It goes on to say that tribunals that do not use duly established procedures of legal process shall not be created to displace jurisdiction belonging to the ordinary courts or judicial tribunals. Consequently, the establishment, by legislative intervention, of an extraordinary judicial commission for reviewing detention issues in specific cases has the effect of usurping the jurisdiction that belongs to the regular court system.

Second, the Regulation's applicability was solely directed to a specific criminal case, namely to provide a review of the detention status of the three Kosovo Albanians suspected of involvement in bombing the Nis Express. When the Regulation was issued, those suspects had already spent three months in detention under Executive Orders issued by the SRSG and the investigation carried out by an international investigating judge was ongoing. It is noteworthy that the Regulation, and thus the commission, was valid for only three months. In light with principles of judicial independence, the only alternative consistent with the guarantee of a fair trial by a legally established independent tribunal would have been to reinstate and enforce the decision on detention reached by a panel of judges of the Prishtinë/Priština District Court (a decision that the SRSG had previously disregarded). As a last resort, the detention issue could have been submitted again to the regular court system for a re-hearing based on the evidence contained in the file and the findings of the investigating judge. Instead, by intervening in a specific legal ruling of a case that was pending before a court, and by altering the legal status of an issue already decided by that court, UNMIK Regulation 2001/18 prejudiced the functional independence of the judiciary.⁶⁹

⁶⁸ The European Court of Human Rights has frequently held that such apparent dependency on the executive disqualifies a body from being independent. See for example *Ringeisen v. Austria*, European Court of Human Rights, Judgement of 16 July 1971; *Langborger v. Sweden*, European Court of Human Rights, Judgement of 22 June 1989, especially para 32; *Belilos v. Switzerland*, European Court of Human Rights, Judgement of 29 April 1988; and *Findlay v. the United Kingdom*, European Court of Human Rights, Judgement of 25 February 1997, para 73. See also *Starrs and others v. Procurator Fiscal*, High Court of Justiciary, 11 November 1999 (a Scottish decision, one of many domestic cases applying the ECHR case law on independence).

⁶⁹ A detailed opinion on the compliance of UNMIK Regulation 2001/18 with recognised standards of independence of the judiciary was expressed by the Ombudsperson in his Special Report no. 4, of 12 September 2001. The Ombudsperson observed that UNMIK Regulation 2001/18 made it clear that the SRSG, acting in his capacity as the legislature of Kosovo, had promulgated a law guaranteeing the SRSG control over a judicial process of fundamental importance. The Regulation was thus meant to substitute a Commission under substantial control of the executive, whose act was being contested, for a regular court of law whose independence, impartiality, and full jurisdiction had never been questioned.

Immunity for UNMIK and KFOR

Another issue related to functional judicial independence in Kosovo arises from UNMIK Regulation 2000/47.⁷⁰ The Regulation provides that UNMIK, its property, funds, and assets, shall be immune from any legal process. The Regulation also states that the SRSG, the Principal Deputy, the other four Deputy SRSG, the Police Commissioner, and other high-ranking officials designated by the SRSG “*from time to time*” shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in Kosovo;⁷¹ furthermore, that its personnel shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in their official capacity within the territory of Kosovo.⁷²

Immunity of UNMIK in its administrative capacity

Immunity for the UN humanitarian or peacekeeping missions derives from the UN Charter and the Convention on Privileges and Immunities of the United Nations, and its functional purpose is to ensure independent exercise of the missions’ functions in relation to the local governments of their host countries. In Kosovo, however, UNMIK is not just an international presence mandated to monitor or assist the local government; rather, it is the government.⁷³ This unique position that UNMIK has in Kosovo leads to a collision between the issue of immunity and the independence of the judiciary, as this immunity does nothing else but to protect UNMIK from itself.⁷⁴ The immunity established under UNMIK Regulation 2000/47 ensures that, regardless of the character and consequences of the activities or decisions undertaken by UNMIK in its official capacity, courts cannot review the legality of these activities or decisions, nor can they receive and adjudicate private complaints against them.

An essential element of the functional independence of any democratic judicial system comes from the authority that the judiciary has to declare legislative and executive acts illegal and to offer protection and legal remedies to individuals whose rights are infringed by the actions of these executive or administrative authorities. As long as the judiciary in Kosovo does not have the authority to exercise such control over the actions of governmental bodies, the independence of the judicial system is prejudiced.

⁷⁰ UNMIK Regulation 2000/47 On The Status, Privileges, And Immunities Of KFOR And UNMIK And Their Personnel In Kosovo, enacted on 18 August 2000.

⁷¹ Section 3.2 of UNMIK Regulation 2000/47.

⁷² Section 3 of UNMIK Regulation 2000/47, promulgated by the SRSG on 18 August 2000.

⁷³ The fact that UNMIK has in Kosovo two distinctive functions, one as a peacekeeping mission and one as an interim administration, has no effect on the practical implications of the issues related to immunity. The distinction between the two functions of UNMIK has been made by the OLA in a letter addressed to OSCE. The OLA further argued that UNMIK privileges only cover its peacekeeping dimension and not UNMIK’s capacity as an Interim Administration. While, in theory, a distinction could be made between the two mentioned functions, and UNMIK should only assert immunity in connection to its peacekeeping actions or decisions, there is no practical possibility of distinguishing between actions undertaken in one capacity or the other. In many instances, such actions could involve UNMIK in its both capacities.

⁷⁴ In his Report 122/01, of 10 December 2001, The Ombudsperson in Kosovo stated that “*UNMIK acts as a surrogate state in Kosovo and not as a State requiring protection against the jurisdiction of a different state, in the sense of the doctrine of sovereign immunity.*”

A striking example of the effect of UNMIK's immunity on judicial independence and on the individual human rights of parties involved in the legal process, is the case of a Kosovo Albanian woman who contested in court an administrative act issued by Kacanik Municipality and by the former UNMIK Department of Education and Science. The applicant participated in a competitive examination for the position of school principal in Kacanik. The applicant considered the results of the examination as unfair and, accordingly, challenged the conditions and procedure of the examination process. The Municipal Court in Kacanik considered the case and decided in favour of the applicant. The response of UNMIK to the decision of the Municipal Court has been stunning. On one hand, UNMIK Legal Counsel sent a letter to the court saying the following: "*The Director of Kacanik MDE (Municipal Directorate of Education) is currently employed as the Director of Directorate of the Department of Education and Science in UNMIK's Interim Administration. He is, therefore, immune from legal process in what he says and does in his official capacity. The immunity of UNMIK personnel is established in section 3 of UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo.*" On the other hand, UNMIK held in another letter addressed to the court that UNMIK DES was the sole organ responsible for the selection and hiring process of the candidates for School Directors, and that the Municipal Directorate of Education had no authority on the matter. The consequence of this position adopted by UNMIK was that the court decision could not be legally enforced. The European Court of Human Rights has held that the execution of a final and binding judgement of a court constitutes part of the right to a court as guaranteed under Article 6 of the European Convention.⁷⁵ The Ombudsperson also looked into this case and issued a Report on 10 December 2001.

Human rights standards are directly applicable in Kosovo's legal system and, based on the wording of UNMIK Regulation 1999/24⁷⁶, they take precedence over non-compliant domestic provisions. OSCE is, therefore, concerned that the court system has so far failed to interpret the applicability of domestic legislation, including UNMIK Regulations, in the light of the above-mentioned principle. As the provisions on UNMIK and KFOR immunity strip individuals of basic rights, such as the right to an effective legal remedy,⁷⁷ OSCE has concerns with the courts' inaction in limiting the extent of immunity, by way of interpretation, only to actions or decisions of UNMIK or KFOR that do not compromise the rights of individuals to obtain full enjoyment of their rights and liberties.

Immunity from arrest and prosecution

From a different perspective but still related to the matter at hand, immunity of UNMIK and KFOR, as it extends to their personnel, potentially prejudices the independent functions of the judiciary in Kosovo in cases where international employees of UNMIK or KFOR are accused of committing criminal offences.

Under UNMIK Regulation 2000/47, UNMIK and KFOR personnel enjoy the right to immunity from any form of arrest or detention (Section 3.4), with respect to words and actions performed in an "official capacity" (Section 3.3). The Regulation essentially reflects the provisions of Article V of the Convention on the Privileges and Immunities of

⁷⁵ See *Hornsby v. Greece*, ECHR, 5 February 1997; *Immobiliare Saffi v. Italy*, ECHR, 28 July 1999.

⁷⁶ UNMIK Regulation 1999/24 On The Applicable Law In Kosovo, 12 December 1999.

⁷⁷ Article 6 ECHR; see further *Golder v. the United Kingdom*, ECHR, 21 February 1975, *Osman v. the United Kingdom*, ECHR, 28 October 1998, *Fayed v. the United Kingdom*, ECHR, 21 September 1994.

the United Nations (the “Convention”) adopted by the UN General Assembly in February 1946. In addition, Article 105 of the UN Charter generally provides for enjoyment of privileges and immunities by its members, as they are necessary for the independent exercise of their functions within the UN.

There are, however, provisions in both UNMIK Regulation 2000/47 and in the Convention, which prescribe the limitations and conditions of such immunity. Section 3.5 of the Regulation obliges UNMIK personnel to respect the laws of Kosovo and to refrain from any action incompatible with that law. Immunity from legal process can be waived (Section 6) by the UN Secretary General, as immunity is considered to be for the benefit of UNMIK/KFOR and not for the individual. The wording of the Regulation is firmly supported by the Convention, which provides that privileges and immunities are granted “*in the interests of the UN and not for the personal benefit of the individuals themselves*” (Section 20). Furthermore, the Secretary General of the UN has “*the right and duty*” to waive immunity where it would impede the course of justice, and a waiver of immunity in such cases is without prejudice to the interests of the UN. Section 21 of the Convention is particularly relevant here, as it specifies that the UN has a duty to co-operate at all times with the appropriate authorities “*to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse*” in connection with any privileges and immunities. From the practical experience acquired with the UN missions, there seems to be unanimous recognition that immunity for international employees of UN is always limited to actions taken or words spoken in an official capacity rather than in an individual or private capacity.

An illustration of this is the Advisory Opinion of the ICJ (29 April 1999) concerning civil claims brought before Malaysian courts in four defamation cases that were based on statements of the UN Special Rapporteur on the Independence of Judges and Lawyers, published during an investigation carried out in that country. The ICJ, in a virtually unanimous decision, ruled that the UN Special Rapporteur had made the contested statements in the course of his mission performance and was, therefore, entitled to immunity.

It is, therefore, generally accepted that immunity does not necessarily amount to impunity, and that individual members of the organisations covered by such privileges should not assume that immunity authorises them to disregard the laws and regulations of the countries where they perform their duties. This argument is most compelling in cases where breaches of the domestic laws do not occur in official, mission-related, circumstances, and especially when they are criminal in nature.

The justice system in Kosovo, in terms of both its independence and its authority to enforce the rule of law, has not had a positive experience with regard to the exercise of the immunity privilege, especially when it has related to criminal cases. OSCE has so far monitored five criminal investigations conducted against international employees of UNMIK. In all five cases, none of the individuals involved has been held criminally responsible for the offences that they allegedly committed.

OSCE is particularly concerned with four of the five cases, because they involved UNMIK CIVPOL officers. In two cases that occurred in the summer of 2001, a Jordanian

and a Kenyan police officer were investigated, in unrelated events, for sexually abusing juvenile victims less than 15 years old. The course of the two investigations was different, although the net result was, in both cases, that the suspects were repatriated and the investigations were never concluded.

In the case involving the Jordanian officer, an international public prosecutor looked into the evidence collected by UNMIK police. After two weeks of consideration, the prosecutor considered the testimony of the 13 year old victim not to be strong and consistent enough, although the suspect himself gave four contradictory statements to police investigators. Material evidence, such as blood drops and cigarette butts, were also found in the empty house rented by the suspect for that particular night. The suspect admitted, in his final version of events, that he had rented the house for that night and that he did initiate sexual conduct with the victim, but he could not proceed with the sexual intercourse due to certain circumstances. Despite these indications and evidence, the international prosecutor did not file a request to an investigating judge to initiate an official investigation in the case, and he did not request a waiver of immunity according to Section 6 of UNMIK Regulation 2000/47. The investigation was closed and the police officer was repatriated.

Only one month after the case of the Jordanian officer, a similar case was brought to the attention of the same international public prosecutor. This time, the suspect was immediately detained and a waiver of immunity was requested the day after the arrest from the UN Secretary General. The Kenyan police officer was also accused of sexually abusing a 14 years old victim. The circumstances of the offence were different from the one mentioned above, as the victim had been, since she was 13 years old, exploited in working as a prostitute. Police reports and the victim's statements given to the police provided reasonable grounds to believe that the victim had been a victim of trafficking within the meaning of Section 1 of UNMIK Regulation 2001/4. She revealed that she had been recruited as a prostitute when she was only 13 years old by a woman who, through coercion and abuse of the victim's vulnerable position, sexually exploited her in exchange for material benefits. The same police reports and statements indicated the UNMIK police officer knew of the victim's position of sexual exploitation, but he continued to solicit sexual favours from her. These indications represented sufficient basis for a reasonable suspicion that the suspect had violated Section 4.2 of UNMIK Regulation 2001/4 (using or procuring sexual services of person in a situation of sexual exploitation). However, the international public prosecutor handling the case did not bring any charges based on the trafficking legislation. Based on the little evidence that was made available to them and based on charges of rape and unnatural sexual acts, a panel of international judges considered that the evidence was insufficient for the charges brought against the suspect and, consequently, released him after one month of detention. The suspect left for his home country; six months after his release, there have not been any developments in the investigation, and the international public prosecutor has still not brought charges under Section 4.2 of UNMIK Regulation 2001/4.

In January 2002, an investigation was opened on an Egyptian officer suspected of murdering his language assistant. He is also being investigated for allegedly concealing a

confiscated revolver that had come into his possession in his official capacity. This revolver appears to have been the murder weapon. The immunity from detention and prosecution was waived by the UN Secretary General and the police officer has been detained throughout the course of the investigation. A possible transfer outside Kosovo is, however, under consideration, as the suspect sustained severe injuries to the arm, which require surgical intervention.

In March 2002, an Austrian police officer was placed under investigation for allegedly mistreating a suspect during questioning. The officer, however, left an Austrian medical compound in circumstances that remain unclear. He later returned to Austria. The departure of the police officer, as well as the attempts of the Austrian government to solve the issue through diplomatic channels, were published in the international press, and have stirred unrest within UN and also among the public.

After monitoring these cases, OSCE has concerns that, with the exception of the Egyptian murder suspect who is still being detained and investigated, none of the serious criminal charges brought against these international employees were properly investigated to determine the truth of the allegations. The reasons for abandoning the investigations, as well as the circumstances under which the suspects were allowed to return to their home countries, varied in each case. The end result, however, was that victims were left with no compensation, either material or moral, and without an appropriate remedy or case resolution. Article 6 ECHR enshrines the right of any individual to a court and to effective remedies before that court, in cases of civil, administrative, or criminal nature. Furthermore, the European Court held that governmental authorities have an affirmative obligation to ensure that the rights guaranteed under the ECHR are practical and effective, and not theoretical and illusory.⁷⁸ In this respect, these examples of UNMIK international employees suspected of criminal activity escaping the jurisdiction of the Kosovo judicial system impairs the fulfilment of the victims' rights under ECHR and the authority of the court system to deal with cases under their jurisdiction. These cases add to a growing feeling among local judiciary that international members of UNMIK can act with impunity, regardless of the seriousness of the crimes they may commit. Alternatives undertaken by UNMIK, such as internal disciplinary measures against the employee in question or his/her repatriation to face, potentially, charges in the respective home country, are insufficient and inappropriate, and may allow, eventually, abuse without unaccountability.

Ultimately, the outcome of these cases brings disrepute to the UN itself, and also to the Secretary General. All requests for a waiver of immunity have been dealt with expeditiously, and they confirmed each time that there could be no immunity for criminal action committed by an individual on a peacekeeping mission. Nevertheless, this approach taken by the UN at its highest levels has not been adequately followed up by UNMIK.

⁷⁸ See *Artico v. Italy*, ECHR, 13 May 1980.

IV. RECOMMENDATIONS

- As a guarantee of judicial independence, the SRSG and KFOR should officially abandon any kind of executive or legislative interference in the area of the judicial authority, especially in the area of detention.
- One of the main functions of a court system is to independently review the legality of administrative actions and decisions taken by state authorities. This enhances judicial independence and guarantees the right of individual persons to challenge administrative decisions limiting or breaching their liberties and rights. OSCE recommends the amendment of UNMIK Regulation 2000/47, to allow local courts to review and decide on such administrative actions or decisions of the UNMIK authorities. The amendment of the Regulation should clearly define regular acts taken by UNMIK in its capacity as local administrator, which should then be officially subject to judicial review. The courts should also take the initiative of interpreting UNMIK Regulation 2000/47 in the spirit of international human rights law and, consequently, allow complaints to be filed against administrative acts issued by UNMIK, in order for the acts to be effectively reviewed.
- OSCE recommends that the independence of the KJPC should be further enhanced. Under the current framework, KJPC's findings in a disciplinary hearing are sent, in the form of an advisory opinion, to the SRSG who is ultimately the decision-making authority in this matter. OSCE recommends that the decision of the KJPC in a disciplinary proceeding should be vested with full and enforceable authority rather than be a recommendation to the SRSG. Moreover, OSCE recommends an amendment of the Regulation establishing KJPC, in the sense that judges and prosecutors heard in disciplinary proceedings by the KJPC should have the right to a review of such decisions. To accomplish this technically, OSCE recommends the appointment of two additional members of KJPC so that, from the total of 11 members, two chambers could be established – one acting in first instance and the second as an appellate chamber.
- International judges and prosecutors should be subjected to the same mechanism of disciplinary accountability as any other member of the judiciary. Provided that KJPC can allow for review of its decisions, and that its findings are vested with enforceable authority and do not require formal approval of the SRSG, then international judges and prosecutors should also be subjected to the disciplinary procedure of the KJPC.
- Taking into account the short term of office for international judges and prosecutors, due to the existing UN staffing system and the dependence of their availability on the approval of their home governments, decisions about extending these officials' contracts should be taken outside the authority of DOJ and SRSG, as a guarantee of effective institutional independence. The matter of extending contracts for international judges and prosecutors should be submitted regularly to the KJPC for consideration; such consideration should follow the same criteria as those applied in disciplinary assessments.
- UNMIK Regulation 2000/64 should be amended. First, precise criteria should be officially adopted to define the applicability of the Regulation to a particular case. Additionally, a mechanism should be established for randomly selecting the judges who are assigned to a specific case; either way, assignment of judicial officials to

cases should not be left to the discretion of DOJ and SRSG. Judges and prosecutors assigned under UNMIK Regulation 2000/64 should follow and abide by all the procedural guarantees provided by domestic law, including the provisions on disqualification on the grounds of partiality.

- The assessment on whether to apply UNMIK Regulation 2000/64 should be transparent and precise. Criteria that are considered when making such assessments should be officially adopted in an administrative instruction. These criteria should be followed strictly. To enhance accountability, the decisions of the SRSG to apply the Regulation should be legally and factually reasoned.

SECTION 4: DETENTION

I. INTRODUCTION

The practical and theoretical aspects of detention, both judicial and extra-judicial, have been thoroughly addressed by the previous three OSCE reviews of the criminal justice system.⁷⁹ The authority of the SRSG and KFOR to detain persons outside the judicial process has continuously been under OSCE's scrutiny in terms of its compliance with human rights standards and guarantees. Before addressing the evolution of these detention practices over the past six months, OSCE wishes first to welcome the changes that have occurred with regard to both SRSG's Executive Orders and to COMKFOR's special holds. There have been no Executive Orders issued by the SRSG within this reporting period, and the number of detainees held by KFOR extra-judicially has gradually, albeit with fluctuations, decreased from around 100 persons in early September 2001 to one person held by the end of February 2002.

Nevertheless, there are legal and practical aspects of these detention policies, which still raise concerns and mandate further analysis. This section will, therefore, address only the new developments and new arguments that have arisen in relation to the SRSG and KFOR detainment policy, without repeating the comments that had been already made in previous reviews.

II. DETENTION BY EXECUTIVE ORDERS OF THE SRSG

The SRSG's authority to detain persons outside judicial process still raises the same kind of concerns in respect of the lack of a clear legal basis and the non-compliance with human rights guarantees against arbitrary deprivation of liberty. Notwithstanding the fact that the executive powers of the SRSG have no longer been exercised in detention matters, OSCE retains concerns about the theoretical preservation of the concept. As mentioned earlier in this review when discussing judicial independence, the mere existence of this authority to detain compromises the appearance of judicial independence and the full trust of Kosovo's society in the rule of law.

From a practical perspective, OSCE expresses concern about the evolution and outcome of the last case in which the SRSG exercised his detention authority. The three detainees last held under Executive Orders had been part of a group of four main suspects arrested by law enforcement authorities in connection with the bombing of a bus carrying Kosovo Serbs on 18 February 2001 (also known as the Nis Express case). The net result of this case is that, after more than a year of investigations, a serious crime committed within a UN-administered territory and during a KFOR-led operation is still unresolved, and solid evidence seems to be all together lacking. The SRSG's intervention in this case ranged from issuance of Executive Orders to detain the suspects, to enactment of an UNMIK Regulation and the set up of an extraordinary Commission with judges, specially

⁷⁹ For an in-depth analysis of detention issues, see Third Review, Section 4.

recruited by the SRSG for this occasion, flown to Kosovo for a single day. All this executive interference was justified with the sensitiveness of the evidence incriminating the suspects. However, the current status of the case proves that there have never been enough evidence against the suspects and that the executive intervention was only meant to keep the suspects detained while investigators were expected to collect evidence against them.

III. DETENTION BY KFOR

Factual Overview

In its previous review of the criminal justice system in Kosovo, OSCE addressed in depth the compliance of KFOR detention practices with standards of international human rights law.⁸⁰ At that time, OSCE expressed concern regarding the large number of extra-judicial detainees held in Bondsteel Detention Facility (BDF), and noted that these persons held under KFOR authority were detained without any basis in law or court order, and without the possibility of having their detention reviewed by a judicial body.

OSCE's view on KFOR authority to detain people extra-judicially is unchanged in the past six months, although some external factors have had an influence over, on one hand, the number of detainees held in BDF, and, on the other hand, the procedures of detention. Accordingly, OSCE notes the substantial decrease in the number of persons held by KFOR. It must be remembered, however, that this decrease is related to the end of the two conflicts in the FYROM and in southern Serbia, which were the cause for the large number of detainees held by KFOR over the summer of 2001.

OSCE notes the clarifications that KFOR has made in their detention policy, especially the provision of some guarantees and rights for persons held in detention in accordance with international human rights law. Noteworthy is the issuance of KFOR Directive 42⁸¹ that aimed to establish policies and procedures for the exercise of COMKFOR's authority to detain persons outside judicial process. Moreover, KFOR announced its intentions to deliver written forms to each detainee when they are initially confined in BDF; these forms contain brief information about the reasons for detention, the period of detention, and the procedure of KFOR internal review. The form also describes the rights guaranteed during detention, such as, *inter alia*, the right to engage private legal counsel, the right to receive family visits at least once a week, and the right to file petitions to KFOR. From interviews conducted with people that had been held in BDF, OSCE notes that the form has not yet been introduced in practice.⁸²

⁸⁰ See Third Review, Section 4, Title III, page 37-39.

⁸¹ COMKFOR Detention Directive 42 (hereafter KFOR Directive 42), dated 9 October 2001, replaced a classified detention directive known as FRAGO 997.

⁸² As of October 2001, OSCE has held informative visits to BDF at least on a monthly basis, and also when specially requested by a detainee. OSCE has interviewed the majority of detainees that have been held in BDF since October 2001.

Notwithstanding these developments in KFOR's approach towards its detention practices, OSCE continues to have concerns over the most significant aspects of KFOR authority in this matter. The procedures set up by KFOR Directive 42 are a step forward in providing a framework for ordering, reviewing, and terminating detention; however those procedures do not make KFOR's authority to detain lawful.

Basis for Detention

The policy and the justification provided by KFOR Directive 42 refer to UN SCR 1244 as the basis for KFOR authority to detain persons outside judicial process. Supporting arguments are mostly the same as those forwarded to OSCE in September 2001, which have already been mentioned and commented upon in the previous review of the criminal justice system.⁸³ From the wording of the Directive, OSCE understands that KFOR has assumed its detention authority from the provision of the UN SCR 1244 authorising the international security presence in Kosovo (KFOR) to use "*all necessary means*" to fulfil its responsibilities. Moreover, KFOR feels that it is authorised to detain people in order to maintain a "*safe and secure environment*" in Kosovo for as long as "*civilian authorities are unable or unwilling to take responsibility for the matter*".⁸⁴

Taking these arguments into account, OSCE still has concerns that the authority exercised by KFOR in detention-related matters is not consistent with developments that have occurred within the justice system in Kosovo and the regional security situation. OSCE understands that, at the outset of UNMIK's mission, there was a need for a stabilising authority to preserve security, which, from an operational point of view, could have only been provided by KFOR. However, once a regular judicial system was in place, no matter how incipient, KFOR should have gradually adapted its policy regarding detention with a view to phasing it out altogether, and to encourage review of detention issues by regular judicial bodies.

A striking example that cuts against KFOR's assertion that its detention authority is justified by the need to preserve a safe and secure climate in a post-conflict territory is the United Nations Transitional Administration in East Timor (UNTAET). The UN mission in East Timor has been confronted with a similar security post-conflict environment to the one in Kosovo. Furthermore, the mandate that UNTAET and its accompanying military force have had in East Timor is for the most part similar to UNMIK's and KFOR's mandate in Kosovo. However, the solution adopted by UN Security Council for the military presence in East Timor differs from the solution adopted for Kosovo, as the international military force in East Timor was put under SRSG's civilian authority and has never claimed nor exercised any detention authority of its own. From the public reports issued by the UNTAET and by other independent international organisations and NGOs in East Timor, OSCE understands that the solution applied in East Timor has not affected in any way the mandate of maintaining a secure environment, which has been successfully fulfilled by a military presence which does not have the authority to detain persons extra-judicially. The same reports state that the judiciary in East Timor is in a similar development phase as the one in Kosovo; however, the judicial system of East

⁸³ The letter of 6 September 2001, sent by the then COMKFOR to the OSCE Head of Mission. See Third Review, Section 4, page 37.

⁸⁴ See KFOR Directive 42, Section 4/a.

Timor has not been deemed so incapable of taking responsibility for enforcing the law that additional authorities to complement its powers are considered necessary.⁸⁵

Another argument put forward by KFOR to justify its continuing extra-judicial detention practice was that the judicial system in Kosovo is still not ready to handle the type of cases that mandates KFOR detention. Following OSCE's recommendations for establishing a system in which international judges and prosecutors are assigned to handle sensitive cases, KFOR expressed reluctance to hand over such cases to the local judiciary, and expressed the view that military intelligence and information cannot even be shared with international judicial officials. The position adopted by KFOR leads to the conclusion that KFOR excludes *a priori* any civilian review of their detention practice as an alternative to terminating its extra-judicial detention practice. KFOR argues that the intelligence information that usually serves as the basis for detention can only be handled by officials with "NATO clearance". It further seems that such clearance cannot be granted, for military reasons, to international judges or prosecutors. Even if it were granted, concerns would still exist in relation to the rights of the defence to have access to such information or evidence. The right to fair trial and due process cannot be fully observed if only the panel or the prosecutor has access and knowledge of the evidence against the defendant. The latter, either directly or through his/her defence counsel, must be able to challenge, in an adversarial manner, the relevancy and accuracy of such evidence or information. KFOR indicated that, to address the issue of NATO classified information, special advisers with the required NATO clearance have been appointed directly to the Director of DOJ, and that they could review the evidence and information that cannot be shared with judicial officials. OSCE is concerned that this solution, rather than representing a resolution of the detention issue, will further enhance the control of the executive authorities over what should be the purely judicial matter of ordering and reviewing the basis for any deprivation of individual liberty.

KFOR has also argued that not only is the judicial system in Kosovo unprepared to take over the detainees held under its authority, but that the existing legislative framework is immature and insufficient.⁸⁶ KFOR gave as an example that most of its detainees held since the summer of 2001 had been involved either in illegal border crossings to and from FYROM and southern Serbia, or in illegal possession of weapons, or both. KFOR explained that, if handed over to the judicial authorities, alleged perpetrators would not receive sentences sufficient to deter the offender, and that KFOR is thus "forced" to take responsibility in these cases. OSCE considers that this justification is inconsistent with recent developments in Kosovo's criminal justice system, specifically with legislative reform.

The recent UNMIK Regulations on border crossing, terrorism, on the authorisation of possession of weapons and on measures against organised crime provide legal tools to investigate and prosecute persons who are suspected of involvement in illegal activities in

⁸⁵ See the reports of the East Timor based NGO, Judicial System Monitoring Programme (JSMP) <http://www.jsmp.minihub.org/Resources.htm>

⁸⁶ These views were expressed by KFOR LEGAD during a round table discussion with representatives of OSCE, Council of Europe, UNHCHR, and the SRSG, held in February 2002.

the border and boundary areas of Kosovo.⁸⁷ Furthermore, the level of punishment for persons found guilty of such criminal actions, as provided for in these Regulations, represents a strong and sufficient guarantee that the sentences passed against these persons would meet both the preventive and the re-socialisation scope that is normally foreseen for a punishment. Offences related to the illegal use or possession of weapons are punishable to imprisonment of up to 10 years, involvement in organised crime is punishable up to 20 years, terrorism provisions provide sentences of up to 40 years, while the new illegal border crossing legislation allows for sentences of up to one year imprisonment, a court procedure that is handled by judicial officials appointed under UNMIK Regulation 2000/64 and further requirements of expediency.⁸⁸ Taking all these arguments into account, OSCE considers that the current legislative framework provides sufficient guarantees that persons for whom KFOR assumes responsibility to detain and hold can be effectively prosecuted and tried by the judicial system.

Returning to the major human rights concerns expressed on previous occasions, OSCE continues to view KFOR's detention authority and practices as a violation of two basic guarantees against arbitrary detention enshrined in Article 5 ECHR: the right to be informed of the reasons for detention upon apprehension, and the right to be brought promptly before a judicial official. The disregard of these two basic guarantees are of particular concern for OSCE, as they apply to any type of detention, regardless of circumstances that may permit temporary derogation from the observation of human rights. Both the ECHR and the Inter-American Commission on Human Rights have held that the right to be brought in front of a judicial authority for review of detention applies, with reasonable derogation, in any emergency situation and even during armed conflicts.⁸⁹ In a background comment regarding the rights and status of the prisoners held by US Forces in Guantanamo Bay, Cuba, following the armed conflict in Afghanistan, the Inter- American Commission on Human Rights stated that "*while some human rights standards can be derogated or limited during times of war or national emergency, other human rights standards continue to apply in full force at all times. Instruments relevant to the treatment of persons deprived of their liberty include [...] the UN Standard Minimum Rules on the Treatment of Prisoners, to which the United States became a party in 1994*".⁹⁰ Accordingly, the UN Standard Minimum Rules on the Treatment of Prisoners

⁸⁷ UNMIK Regulations 2001/10, 12, 7 & 22.

⁸⁸ See UNMIK Regulation 2001/10, Section 5.2.

⁸⁹ This was made clear in the case of *Coard et al. v. United States*, decided on 29 September 1999 by the Inter-American Commission on Human Rights. In this case, which concerned the detention of civilians by the US Army during its invasion of Grenada, the United States argued that it had complied with its obligations to present its detainees to a court, by handing them over to the courts after two weeks' detention. The Commission disagreed, stating that two weeks was too long for the army to detain persons, even though the US Army was engaged in an armed conflict during part of the period. Case 10.951, Report No. 109/99. See also *Brannigan and McBride vs. the UK*, ECHR, 26 May 1993, where the ECHR stated that a period of seven days' detention before the detainee was brought before a judge fell within the powers a government could legitimately take on during in an emergency, given that in Northern Ireland all detainees had a general habeas right from the moment of detention. In *Aksoy v. Turkey*, ECHR, 18 December 1996, the European Court considered that 14 days' detention without being brought before a judge was too long, particularly as there was no habeas remedy, even in a region suffering armed conflict.

⁹⁰ *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, Human Rights Watch Press Backgrounder, 29 January 2002.

contains a separate Section E referring to persons arrested or detained without charge, which is the status of the persons held under KFOR authority. Section E begins by stating that “*without prejudice to the provisions of Article 9 of the International Covenant on Civil and Political Rights [...]*”, thus placing this special category of detainees under the protection of Article 9’s legal guarantees and remedies. These guarantees include the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power. Article 9 also states that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order for the court to rule without delay on the lawfulness of the detention, and to order release if the detention is not lawful.

The arguments and examples mentioned above suggest that security situations more serious than in Kosovo do not necessarily exclude observance of human rights guarantees. Therefore, KFOR’s assertion that its authority to detain persons without any judicial review rests and is justified by the security environment in Kosovo is difficult to accept.

OSCE also considers that the special form that Directive 42 envisages being given to detainees upon apprehension provides insufficient information about the grounds for detention within the meaning of Article 5 ECHR.⁹¹ The form simply says that the detainee is held because he or she represents a threat to the safe and secure environment in Kosovo, without stating the precise charges or factual circumstances which led KFOR to detain the individual.

KFOR 72-hours detention practice

KFOR Directive 42 does not refer solely to COMKFOR’s authority to detain persons extra-judicially. It also gives the KFOR regional (MNB) commanders the authority to detain persons for up to 72 hours without having to inform COMKFOR, unless detention is foreseen to exceed the 72 hours threshold. The grounds and justification for this authority are the same as for the COMKFOR detentions and, OSCE will not reiterate the comments regarding these issues. There are, however, specific aspects related to this practice that warrant further analysis.

First, OSCE has concerns that the existence of this authority indicates that KFOR, rather than trying to gradually restrain its detention practice with the aim of abandoning it altogether, is actually developing it. KFOR’s authority to detain people outside judicial process has always been presented as an extraordinary solution and as a last resort, and, consequently, it has been perceived as being an authority resting solely with COMKFOR. The fact that COMKFOR was the sole level of command having the authority to ordering such detention did provide certain guarantees that such measures were undertaken only after due consideration in extreme cases. Extending this authority to the regional commanders, even if only for 72 hours detentions, and allowing this authority to be unchecked and unreported to COMKFOR, raises concerns about KFOR’s attempt to acquire even more law enforcement functions. The KFOR LEGAD has admitted that this

⁹¹ See *Jecius v. Lithuania*, ECHR, 31 July 2000, paragraph 51.

practice is viewed as corresponding to the 72 hours police custody.⁹² Several concerns arise from this policy. Under the domestic law, and under international human rights law, brief detentions ordered by law enforcement agencies are governed by strict guarantees regarding the rights of detainees. There are limited circumstances under which a person can be held by law enforcement agencies: they include, for example, detention for the purpose of establishing a person's identity, and detention to prevent the risk of flight or the risk of destroying relevant evidence. Furthermore, persons held in police custody have a well-defined set of rights, both under the domestic law in Kosovo and under international human rights law. OSCE has concerns that these rights, especially the right to defence counsel and the right to remain silent, are not effectively observed during these 72 hours KFOR detentions. These detainees are interrogated by KFOR without any of the above-mentioned guarantees. Another concern is that some individuals are detained under the 72 hours provisions only for the purpose of intelligence gathering.⁹³

Second, while the exercise of COMKFOR authority has recently become more transparent, and interested international organisations have been able to receive information on and access to these detainees, the 72-hour detention practice escapes detection by both COMKFOR and the international community. The usual procedures for access of international organisations, such as OSCE and ICRC, to the KFOR detention facilities require regular consultation of the detention lists, prior notice to KFOR of the visits, and an approval and notification process that generally takes in excess of 72 hours, thus rendering any accountability for the detentions impossible.

Consequently, OSCE expresses concern that the 72-hour detention practice draws KFOR, in the exercise of its authority to detain as assumed under SCR 1244, perilously close to arbitrariness and disregard of basic principles and guarantees of international human rights law.

IV. RECOMMENDATIONS

OSCE has consistently provided practical recommendations for ensuring a sustainable hand over of KFOR's practice of law enforcement and detention to UNMIK law enforcement agencies and to the judicial system. Solutions have been identified to ensure that investigations and specific information can be handled by UNMIK law enforcers. None of these recommendations have been effectively taken into account by KFOR.

- OSCE recommends that KFOR should stop its detention practice and officially renounce its authority in this area.

⁹² According to information provided by KFOR LEGAD, there is an average of 10 persons per month held under MNB Commander's authority.

⁹³ Section 4 (b) of KFOR Directive 42 states that *the fact that a person may have information of intelligence value by itself is not a basis for detention*. Interviews conducted by OSCE with individuals who had been held by KFOR for 72 hours indicated that detainees were only asked questions relevant for gathering of information purposes.

SECTION 5: MENTAL HEALTH ISSUES

OSCE has persistently pointed out in its reports on the judicial system that the largest number of illegal detainees in Kosovo is within the mental health system. It is also the area of detention where there has been the least progress in addressing the issue of illegal deprivation of liberty. In this report, OSCE will develop these concerns regarding persons with mental disabilities and the justice system, which fall into three main areas: the use of detention; the treatment of lawful prisoners; and the use of mental health expertise within the criminal justice system.

I. DETENTION

The mentally ill are the forgotten detainees in many justice systems. Indeed, detention of the mentally ill is often labelled under different names – e.g. commitment, sectioning, involuntary admission – that actually disguise that persons are deprived of their liberty. In Kosovo the detention problem is made particularly acute by the existence of a “social institution” in Shtimë/Stimlje, where persons have been detained without treatment or court intervention for years. Furthermore, a large number of persons are also effectively detained - for treatment purposes, but still without legal intervention - in Prishtinë/Priština Hospital Psychiatric Ward.

Shtime/Stimlje Special Institution

The largest number of illegal detainees in Kosovo remains in the Shtimë/Stimlje Special Institute for the Mentally Retarded.⁹⁴ According to the Ministry of Labour and Social Welfare, which is responsible for the Institute, as of 11 March 2002 there were 230 residents in the Institute, of which 135 were Serbs (the majority from Serbia proper), six were Croats, five were Macedonian, and 10 were ethnic Hungarians. The 20 children in Shtimë/Stimlje have now been physically removed from the institution and placed in new “halfway homes” in Lapa Selo and Shtimë/Stimlje town (for the Serbian and Albanian children respectively), although their legal status remains uncertain.

As previously stated, the detainees in Shtimë/Stimlje are a particularly egregious case. Persons detained for mental health reasons should, under international law, only be detained as a last resort and when treatment is available.⁹⁵ The detainees in Shtimë/Stimlje are not mental health cases, but in fact “social cases”, placed in a social institution by guardians and left, locked up, for years without any treatment or legal review of their cases.

In the last review of the criminal justice system,⁹⁶ OSCE mentioned positive developments with regard to arranging the judicial review of these detentions. The then

⁹⁴ See OSCE Review of the Criminal Justice System, October 2001 for further details.

⁹⁵ See UN Principles For The Protection Of Persons With Mental Illness And The Improvement Of Mental Health Care, Principle 16; *Winterwerp v Netherlands*, ECHR, 24 October 1979.

⁹⁶ See Third Review, Section 4, Title IV, page 41-42.

Administrative Department of Health and Social Welfare issued in 2001 an Administrative Instruction confirming that no person can be detained in the Institution without a court order. This should have meant that the Institution then reviewed all the cases, decided who needed to be detained, informed the other inmates that they were free to leave and sent the “detained” cases to the court, which could then issue orders for detention when it considered to be necessary. However, this has not happened. The Institution has begun to review cases, with the help of a “De-institutionalisation Team” that assesses their needs, but the process is extremely lengthy and slow. So far, this Team has reviewed 65 of the 230 inmates, and the majority⁹⁷ were judged “*not needed to be detained*”. These inmates have been informed that they are free to leave, but none have done so, largely because most are Serbs who wish to return to Serbia proper. However, the Ministry estimates that at least 60 persons in the Institute will need to be detained in order to receive treatment and to protect themselves or others.

The Institution has submitted cases to the appropriate court (Ferizaj/Urosevac Municipal Court) requesting an order for detention under the Law on Non-Contested Procedure of 1986 (LNCP). However, although the first cases were sent to the judicial system in January 2001, the courts have still not heard or issued any judgement on any of the cases.⁹⁸ This reluctance of the courts to deal with these cases appears to stem from the fact the persons have always been detained in Shtimë/Stimlje without court involvement (i.e. illegally), so the courts are unclear as to how to hear and judge the cases. Indeed, it appears that Shtimë/Stimlje, as a social institution, has no power to detain under the existing law, which only allows detention for mental health reasons in a “neuro-psychiatric institution”. The courts may be reluctant to declare this. They also appear to be reluctant to apply directly the basic provision of human rights law that every person detained has the right to have his/her case reviewed by a court with power to order his/her release.⁹⁹ Judges, who have little experience of dealing with mental health issues, may also be overwhelmed by dealing with what can be complex cases. There are no specialist mental health judges, or lawyers, in Kosovo, despite the large number of persons with mental health problems, as it appears that the laws were rarely, if ever used. Despite these problems, by failing to issue any judgement as to whether individual persons can be detained by the Institution, the courts are failing in their duty to prevent arbitrary detention. In addition, as long as there are no court orders, the Institution is still detaining these persons illegally.

The reluctance of the courts to address the issue is also assisted by problems in the LNCP itself. This law does not set out the grounds for the court to order detention, allows 15 days for the court to hear the case, and also sets out procedural requirements, with which it is difficult to comply (e.g. that three medical opinions are needed, when there are only 31 psychiatrists in the whole of Kosovo).

⁹⁷ The Ministry of Labour and Social Welfare was not able to give the exact figure.

⁹⁸ A case was finally scheduled for a hearing on 14 March 2002, but this hearing was postponed by the court.

⁹⁹ Article 5(4) ECHR, Article 9 ICCPR.

The draft Regulation on the deprivation of liberty and forced treatment of the mentally ill drawn up by a working group and mentioned in the last report would address the above problems, by providing for clear grounds and procedure for the review of detention, as well as specialist Mental Health Panels in the courts. It would also give a temporary power to detain persons in the Shtimë/Stimlje Institution who needed to be held there, if they received treatment, whilst a long-term solution is found. The draft Regulation was sent to the Office of the Legal Adviser in October 2001, the last step before its promulgation, and OSCE has been recently informed that it will be dealt with as a priority.¹⁰⁰ The enactment of the Regulation will be a major development, as the lack of a clear and workable law has so far been the main reason for the continued illegal detentions in Shtimë/Stimlje. Without this, the judges are being forced to apply a law they have never used and which is almost unworkable.

In addition, a second “social institution” exists in Kosovo, the Elderly Home in Prishtinë/Priština, with approximately 100 inmates. This, however, is legally and practically an open institution with no detainees. The Director of this institution has said that although there are residents with mental health problems, anyone who attempted to leave would be free to do so. However he did inform OSCE that some inmates needed forced treatment at Prishtinë/Priština hospital, without legal intervention (see below).

Prishtinë/Priština Hospital

A different type of detention takes place at Prishtinë/Priština hospital. Previously, persons in Kosovo clearly needing to be detained and treated were sent to hospitals in other parts of former Yugoslavia (such as Skopje and Nis). However, with the severing of the Kosovo health system from these hospitals in 1999, the most acute cases are now sent to Prishtinë/Priština hospital, which was not designed to take them. Persons who need to be detained for forced treatment are therefore kept in the hospital, again without any legal intervention.

The hospital has informed OSCE that it has 75 beds in its psychiatric department, but generally has over 100 patients there. Of these, it estimated that over 50% (normally over 50 at any one time) were severely ill and therefore need to be detained, in order to forcibly treat them. The hospital informed OSCE that although the psychiatric ward was “open”¹⁰¹, persons who needed to be forcibly treated were “chemically restrained”, i.e. forcibly injected with drugs. This therefore remains detention in the same way as the use of locked doors or guards.

As in Shtimë/Stimlje Institution, no law is used to govern the use of detention/forced treatment in the hospital. The hospital informed the OSCE that the LNCP, although existing on paper governing this deprivation of liberty, was rarely used before 1999, with persons detained on the order of psychiatrists, not the court. The situation has remained

¹⁰⁰ In March 2002 (outside the timeframe of this report) DOJ and OSCE were informed by OLA that this Regulation would now be a priority.

¹⁰¹ When OSCE visited the ward, the door leading into the ward was locked. The hospital management said this was to control the entry of visitors, not restrict the movement of patients.

the same. The hospital management stated that there was an urgent need for proper training of the staff in the law governing detention and forced treatment. Today the situation is even worse than before 1999, because persons are detained in a hospital that is not designed to deal with detention, and therefore lacks any secure areas, any staff trained in security, and any court order stating who is detained/ or can be forcibly treated. One outcome has been the imposition of the two closed rooms by UNMIK Police (see below).

Four other hospitals in Kosovo (Pejë/Pec, Prizren, Gjakovë/Djakovica and Mitrovicë/Mitrovica) have psychiatric wards, but the first three have informed OSCE that they do not detain any patients, but send such patients to Prishtinë/Priština.

Use of “security measures” within the criminal justice system

OSCE’s previous review pointed out the problems caused by the use in the criminal justice system of “security measures” to order the detention of persons for treatment. This remains a problem because, although such persons are subsequently detained by order of a court, it remains the fact the criminal courts have, in effect, ordered treatment, an area in which they are not expert. Furthermore, it appears that in most cases, such orders are made when the prosecution has been dropped or a person found not criminally responsible – i.e. they are not convicted of any crime and are no longer within the criminal justice system. Such persons need treatment in a hospital.

OSCE understands that, by the end of February 2002, there were eight persons in the prison system on the basis of such “security measures”.¹⁰² This shows that such orders fail to ensure that the persons receive the treatment they need in the health system, but instead end up in the prison system with convicted criminals. The reason for the use of such orders appears to be the lack of knowledge within the criminal justice system of the civil law on detention and treatment, as well as any secure space within the hospitals. Indeed, the detention of such persons in a prison may be illegal, as the current domestic law provides for the ordering of mandatory psychiatric treatment and custody in a medical institution.¹⁰³

The implementation of the draft Regulation on Deprivation of Liberty and Forced Treatment, and the draft Criminal Code and Procedure Codes would resolve the problem by abolishing the power of criminal courts to order detention for treatment purposes (not criminal purposes) and transferring this power to the civil courts where it belongs. As stated above, there has been minimal progress with the implementation of these laws.

¹⁰² These are all in the Lipjan/Lipljan Detention Centre, which informed OSCE that five were sent there for mental health reasons, and two were drug addicts sent there by a criminal court for compulsory treatment, which, however, cannot be given in the prison.

¹⁰³ Article 63 FRY CPC. Although UNMIK has designated Lipjan/Lipljan Detention Centre as a medical institution for the purposes of this Article, it is only able to provide very limited medical care. However, no lawyers have attempted to challenge this detention in courts.

II. TREATMENT OF PRISONERS WITH MENTAL HEALTH NEEDS

A separate concern from detention is the treatment of prisoners lawfully detained under the criminal justice system who need mental health treatment. The prison and health authorities are under a duty to ensure that such prisoners receive the highest level of health care.¹⁰⁴ For severely ill persons, this should be in the therapeutic environment of a hospital, with adequate security provisions.¹⁰⁵

Therefore, what is needed is an agreement between Pillar I and the health authorities on the systematic provision of health services in prisons¹⁰⁶ and the setting up of low-key but adequate security measures in the hospitals for prisoners who need to be treated there. The outcome has been that first, some prisoners only receive sporadic visits from psychiatrists. A further problem is the lack of any law in Kosovo on the imposition of forced treatment rather than detention, which leaves detention centres unclear as to whether they can impose forced treatment on persons who appear to require it.¹⁰⁷ This is another issue that is addressed by the draft Regulation.

Of deep concern is the effective seizure by UNMIK Police of two rooms at Prishtinë/Priština Hospital Psychiatric Department for use by “prisoners”. The hospital informed OSCE that UNMIK Police informed them in late 2001 that they had to have two rooms for prisoners. Since that time police have guarded these rooms, not allowing access without permission for hospital personnel. The hospital management are deeply concerned by the seizure of these rooms, and by the disturbing effect that the presence of the armed and uniformed police has on other patients in the ward, many of whom are suffering from traumas caused by persons in uniform from 1999 and earlier. It appears that the two rooms are used for prisoners who need any sort of medical treatment, from physical treatment (e.g. cardiology or cancer treatment) to persons with serious mental health problems. When OSCE visited in March 2002, there were five persons in these two rooms. The hospital staff understood that three were there under “security measures” by order of the Pejë/Pec court. The hospital stated that these were persons who they believed no longer need be detained for medical reasons, but the court order (given by a criminal court) meant they had to remain. A fourth person was in the hospital for physical treatment, but was being forced to share a room with a fifth, who had been detained by the police for apparently violent behaviour and suspected mental illness. It therefore appeared that this fifth person had been illegally detained, because without the implementation of the draft Regulation, no such power of detention lies with the police. Moreover the treatment of these persons, and the other patients, by the police risks being inhuman and degrading treatment contrary to Article 3 ECHR, particularly the refusal to allow hospital staff into the ward, the presence of uniformed and armed officers, and the

¹⁰⁴ See Principle 24, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

¹⁰⁵ See UN Standard Minimum Rules for the Treatment of Prisoners, Article 22(2).

¹⁰⁶ DOJ say they now have agreements in all regions for visits by psychiatrists to the prisons/detention centres, but visits are still sporadic. For example, in Lipjan/Lipljan Detention Centre, only one psychiatrist visits, usually once a week.

¹⁰⁷ Lipjan/Lipljan Detention Centre informed OSCE that they had at least one prisoner who needed forced treatment, but in the absence of any clear legal power authorising this, they were unable to do so.

mixing of mental health patients with those with physical ailments. Despite this, the hospital said it had been impossible to discuss any of these matters with the UNMIK Police. DOJ has informed OSCE that the Head of Pillar I recently issued an instruction that all hospitals should have a dedicated and secure room for the use of prisoners who need to be in the hospital, but, in Prishtinë/Priština at least, this has led to what appears to have been the taking over of two rooms by the police, and the mixing of prisoners with physical needs and mental health needs. The root of the problem is twofold. First that the hospital lacks an acute ward able to provide the necessary security for mental health cases needing detention and forced treatment. The second cause is that the prison authorities, police and medical authorities have been unable to agree on a way of providing low-key security for prisoners who need treatment in hospital, that will respect both security needs and the hospital's position as a therapeutic environment.

III. MENTAL HEALTH EXPERTISE WITHIN THE CRIMINAL JUSTICE SYSTEM

The final major area of concern is the use of psychiatric expertise in criminal cases. There are three main areas where the criminal justice system needs such expertise. The first is in determining a person's degree of mental responsibility at the time of an alleged offence; the second is determining a person's capacity to receive a fair trial (there is no clear law in Kosovo on this, although the draft criminal procedure code provides for it) and finally, given the criminal court's continued powers and use of security measures, whether a person needs detention for forced treatment.

OSCE's monitoring of the criminal cases shows that the limited availability of forensic psychiatric expertise is a major problem. The vast majority of cases concern requests by the court for assessment of a person's state of mind at the time of the offence. However, expert reports take weeks to submit, if submitted at all, (during which time the accused is often held in hospital, solely for the purpose of assessment, not treatment). Often, the expertise cannot be assessed by a judge, because it consists, like much forensic evidence in Kosovo, of simple lines stating "*the person had full responsibility*". Such assertions cannot be challenged by the defence or by the court.

During an investigation carried out by the District Court in Prizren, the Kosovo Albanian suspect showed signs of mental illness from the moment of apprehension and throughout the course of the investigation. The suspect was first placed in Prizren Detention Centre on 13 November 2001, and on 4 December 2001 the investigating judge ordered that the suspect be transferred to Prishtinë/Priština Psychiatric Ward for an evaluation of his mental state. After being held in the hospital for 7 days, the suspect was discharged on 27 December 2001 and sent back to Prizren Detention Centre. However, the psychiatric experts did not provide any kind of evaluation of the suspect; they justified their refusal by indicating, in a document sent to court, that the suspect had a "bad behaviour" and that some other institution should do the examination.

One problem is that there is only one forensic psychiatrist in Kosovo who only works to a limited degree on providing forensic expertise. Again another cause of the delay in providing assessments is that the hospital does not have an acute ward with a secure

environment where assessments of difficult cases can be made relatively quickly. The major problem appears to be that the judicial system and medical system have never fully discussed what expertise and in what form, should be provided.

IV. RECOMMENDATIONS

Laws

- The Draft Regulation on Deprivation of Liberty and Forced Treatment should be promulgated as a matter of priority. This will set clear legal grounds for detention and forced treatment by all authorities, a workable procedure for judicial review and limited periods of detention between reviews.
- The new Criminal Code and Criminal Procedure Code should also be promulgated immediately. These provide for the removal of “security measures”; clear procedure for assessing someone’s capacity to stand trial or degree of mental responsibility; and remedies when evidence is late or inadequate.

Detention

- Shtimë/Stimlje Special Institute must complete its review of cases within one month. Special psychiatric experts must be provided to allow this process to be complete.
- All persons not detained must be given a clear explanation that they are free to leave.
- The courts shall review the legality of the detention of patients immediately. Failure to do so should result in a complaint to the JIU.
- Any hospital wishing to hold persons against their will or forcibly treat them should submit the case to Prishtinë/Priština Municipal Court for judgement.
- Medical staff and legal professionals should receive a series of combined training sessions (from KJI and others) on law and mental health issues.
- A secure acute psychiatric ward, with staff with specialist training, should be created immediately in Prishtinë/Priština hospital, and elsewhere if needed.
- The use of “security measures” by the criminal courts should cease.

Treatment of Prisoners

- All prisoners should be informed of their right to go to court to order adequate treatment. No one should be denied necessary treatment on the grounds of security.
- The Ministry of Health and the Penal Management Division of the DOJ should agree on a comprehensive document on the need for health care in prisons and appropriate security for prisoners in hospitals (recognising that hospitals are therapeutic environments, and need to have ultimate control over their buildings and care).
- The two secure rooms in the hospital should be immediately opened and the armed, uniformed police removed. Furthermore, this measure should be immediately followed by a clearly regulated framework, legislative and operational, allowing for

these cases of mentally ill persons to be properly handled within the penal and correctional system.

Expert evidence

- Urgent training of more psychiatrists in forensic evidence is needed.
- A Forensic Psychiatric Unit should be created, able to provide medical expertise and treatment to prisoners lawfully within the criminal justice system. These two roles should be clearly separated. Persons not within the criminal justice system (including those found not responsible) should not be held inside a prison.

CONSOLIDATED RECOMMENDATIONS

INDEPENDENCE OF THE JUDICIARY

- As a guarantee of judicial independence, the SRSG and KFOR should officially abandon any kind of executive or legislative interference in the area of the judicial authority, especially in the area of detention.
- One of the main functions of a court system is to independently review the legality of administrative actions and decisions taken by state authorities. This enhances judicial independence and guarantees the right of individual persons to challenge administrative decisions limiting or breaching their liberties and rights. OSCE recommends the amendment of UNMIK Regulation 2000/47, to allow local courts to review and decide over such administrative actions or decisions of the UNMIK authorities. The amendment of the Regulation should clearly define regular acts taken by UNMIK in its capacity of local administrator, which should be then officially open to judicial review. The courts should also take up the initiative of interpreting UNMIK Regulation 2000/47 in the spirit of international human rights law and, consequently, allow complaints to be filed against administrative acts issued by UNMIK and effectively review such acts.
- OSCE recommends that the independence of the KJPC should be further enhanced. Under the current framework, KJPC's findings in a disciplinary hearing are sent, in the form of an advisory opinion, to the SRSG who is ultimately the decision-making authority in this matter. OSCE recommends that the decision of the KJPC in a disciplinary proceeding should be vested with full and enforceable authority rather than be a recommendation to the SRSG. Moreover, OSCE recommends an amendment of the Regulation establishing KJPC, in the sense that judges and prosecutors heard in disciplinary proceedings by the KJPC should have the right to a review of such decisions. Technically, OSCE recommends the appointment of two additional members of KJPC so that, from the total of 11 members, two chambers could be established – one acting in first instance and the second as an appellate chamber.
- International judges and prosecutors should be subjected to the same mechanism of disciplinary accountability as any other member of the judiciary. Provided that KJPC is equipped with a review of its decisions and that its findings are vested with enforceable authority and do not require formal approval of the SRSG, then international judges and prosecutors should be also subjected to the disciplinary procedure of the KJPC.
- Taking into account the short term of office for international judges and prosecutors, due to the existing UN staffing system and to the dependence of their availability on the approval of their home governments, decisions about extension of these officials' contracts should be taken outside the authority of DOJ and SRSG, as a guarantee of effective institutional independence. The matter of extending contracts for international judges and prosecutors should be submitted regularly to the KJPC for consideration; such consideration should follow the same criteria as those applied in disciplinary assessments.

- UNMIK Regulation 2000/64 should be amended. First, precise criteria should be officially adopted to define the applicability of the Regulation to a particular case. Additionally, a mechanism should be established for randomly selecting the judges who are assigned to a specific case; either way, assignment of judicial officials to cases should not be left to the discretion of DOJ and SRSG. Judges and prosecutors assigned under UNMIK Regulation 2000/64 should follow and abide by all the procedural guarantees provided by domestic law, including the provisions on disqualification for reasons of impartiality.
- The assessment on applicability of UNMIK Regulation 2000/64 should be transparent and precise. Criteria that are considered when making such assessments should be officially adopted in an administrative instruction. These criteria should be followed strictly. To enhance accountability, the decisions of the SRSG to apply the Regulation should be legally and factually reasoned.

DETENTION

- OSCE recommends that KFOR should stop its detention practice and officially renounce its authority in this area.

MENTAL HEALTH ISSUES

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