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

Department of Human Rights and Rule of Law

Legal Systems Monitoring Section

March 2002

Kosovo

Report 9 – On the Administration Of Justice

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GLOSSARY

ADoJ	Administrative Department of Justice
DOJ	Department of Justice
ECHR	European Convention on Human Rights
EJC	Emergency Justice System
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
JAC	Joint Advisory Council on Judicial Appointments
JIU	Judicial Inspection Unit
KFOR	Kosovo Force
KWECC	Kosovo War and Ethnic Crimes Court
LSMS	Legal Systems Monitoring Section
NATO	North Alliance Treaty Organisation
OSCE	Organization for Security and Co-operation in Europe
SCR	United Nations Security Council Resolution
SRSG	Special Representative of the Secretary-General
TAC	Technical Advisory Committee on Judiciary and Prosecution Service
UNMIK	United Nations Interim Administration Mission in Kosovo

Introduction

The Legal Systems Monitoring Section (LSMS), as part of the OSCE Department of Human Right and Rule of Law, is mandated to monitor the legal system from a human rights perspective and to issue recommendations aiming to create a legal system based on respect for international human rights standards.

This report will analyse the administrative dimension of the criminal justice system in Kosovo, and will identify the most symptomatic logistical and administrative obstacles to a proper administration of justice.

Scope

A well functioning judicial system, based on fundamental human rights principles of due process and fair trial is comprised not only of the basic framework of laws, the police, the public prosecutor and the judiciary, but of a whole structure of support to enable these bodies to function. This structure includes: the administrative staff such as the registrar, clerks, interpreters; logistics such as telephones, computers, typewriters, copying and fax machines, heating; and finally, the availability and accessibility to legal material, such as legislation, jurisprudence and commentaries.

Background and development of the justice system and the lack of minority members

When the United Nations Interim Administration Mission in Kosovo (UNMIK) arrived in Kosovo in June 1999 after the armed conflict and the NATO bombing campaign, there was no functioning justice system in place.

The *Joint Advisory Council on Provisional Judicial Appointments* (JAC) was established by the Special Representative to the Secretary-General (SRSG) on 28 June 1999 to recommend the provisional appointment of judges and prosecutors for an emergency justice system (EJS).

By decision of the SRSG, JAC was dissolved on 7 September 1999 and replaced by the Advisory Judicial Commission (AJC), which began its activity on 27 October 1999. On 11 and 12 December 1999, after receiving more than 700 applications and conducting some 560 interviews, the AJC delivered recommendations for over 300 judges and prosecutors and over 200 lay judges to the SRSG. The first swearing in ceremonies of judges to the regular justice system were held in January 2000. By June 2000, a regular and functional court system with regard to criminal cases had been put in place throughout Kosovo.

Despite the successful reestablishment of the justice system in less than one year and in spite of extensive efforts to further develop the justice system, a number of problems relating to the administration of justice have remained unresolved.

One of the most fundamental problems perceived within the justice system is the continuing lack of participation of minority communities. The low level of participation of minority community members - particularly Kosovo Serbs – in the justice system, in combination with the long and continuing climate of ethnic conflict, has given rise to much concern of actual or perceived bias among the Serb community. This has been of particular concern in cases involving minority community members implicated in crimes committed during the armed conflict, between autumn 1998 and spring 1999. These cases have mainly been investigated by Kosovo Albanian judges and then heard by majority Kosovo Albanian panels.

When the EJS was established during the summer of 1999, and following JAC's recommendations, the SRSG appointed a total of 55 judges and prosecutors, of which 42 were Kosovo Albanians, seven (7) Kosovo Serbs, four (4) Muslim Slavs, one (1) Turk and one (1) Roma. However, by the beginning of October 1999, all members of the Kosovo Serb minority had resigned from their appointments. With the establishment of the regular justice system, eight minority judges, including two (2) Kosovo Serbs, were sworn in. At the same time, only two (2) public prosecutors belonged to a minority Kosovo Community neither of whom was Kosovo Serb. Due to security concerns and pressure from Belgrade[1], as of September 2000 however, the Kosovo Serbs declined to work.

By 7 December 2000 the ethnical breakdown within the judiciary was as follows:

	Total number	Kosovo Albanian	Kosovo Serb	Muslim Slav	RAE[2]	Kosovo Turk
Judges	315	294 (93,34%)	2 (0,63%)	11 (3,5%)	3 (0,95%)	5 (1,58%)
Prosecutors	48	45 (93,4%)	0 (0%)	1 (2,2%)	1 (2,2%)	1 (2,2%)
Lay Judges	414	368 (88,98%)	11 (2,65%)	21 (5%)	4 (0,96%)	10 (2,41%)

At present there are 340 judges and prosecutors and 456 lay judges appointed to the 55 courts in Kosovo. Out of the 340 judges and prosecutors, there are 16 Kosovo Serbs (only 4 of them are working), seven (7) Kosovo Turks, 12 Kosovo Muslims (only 10 are working) and two (2) Kosovo Roma. According to the provisions in the Kosovo Consolidated Budget (KCB), the judiciary and prosecutorial services should include 420 judges and prosecutors; thus, there is a current lack of 80 judges and prosecutors.[3]

[1] See further the OSCE Report on Parallel Court Activities in Northern Kosovo.
[2] Roma/Egyptian/Ashkali
[3] Information per 26 November 2001 made available by the DOJ Professional Development Section.

Involvement of International Judges and Prosecutors

The first involvement of international judges and prosecutors in the judiciary was actually in response to public unrest and ethnic violence in Mitrovicë/Mitrovica in February 2000, when the SRSG passed UNMIK Regulation 2000/6 providing for the appointment of an international judge and an international prosecutor to Mitrovicë/Mitrovica.[4] On 29 May 2000, following pressure from hunger strikers in Mitrovicë/Mitrovica, the SRSG passed UNMIK Regulation 2000/34 that extended the power to appoint international judges and prosecutors to the whole territory of Kosovo.[5] Pursuant to section 1(2) of both Regulations, international judges and prosecutors may "select and take responsibility for new and pending cases within the jurisdiction of the court to which he or she is appointed." In January 2001, the power of the international prosecutors to take over cases was further strengthened by UNMIK Regulation 2001/2, which states that *an international prosecutor may undertake, resume or continue prosecution of a case, utilizing the procedures applicable to an injured party prosecution as set forth in Articles 60, 61 and related articles of the applicable Yugoslav Criminal Procedure Code. […]*[6] Under these new provisions, international prosecutors may undertake prosecution in cases where local public prosecutors find that there are no grounds for it, and they can also continue pursuing an indictment in court in cases where a local public prosecutor intends to withdraw the indictment.

The appointment of international personnel to the courts did help to alleviate some concerns with respect to impartiality, but given the limited number of international judges and the restricted scope of their powers, these appointments failed to completely address the impartiality concerns and resulted in differential treatment of similar cases. Defendants that had been charged with ethnically motivated crimes of a similar nature and seriousness were tried before panels of varying composition. Some were composed of all Kosovo Albanian judges, others included international judges and, in one case, Kosovo Serb lay judges.

Furthermore, district court trial panels composed under the domestic law consisted of two professional judges and three lay judges.[7] Verdicts were by majority and each judge carried an equal vote.[8] The equal distribution of voting powers to all judges severely reduced the impact that the international judge might have had upon a potential verdict motivated by ethnic bias. In this regard, the role played by the first international judges was inadequate to remedy the lack of an objective appearance of impartiality in trials involving allegations of serious ethnically motivated crimes.

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[4] UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors, 15 February 2000.

[5] UNMIK Regulation 2000/34 Amending UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors, 29 May 2000.

[6] UNMIK Regulation 2001/2, Section 1(3).

[7] Article 23 FRY CPC.

[8] Article 116 FRY CPC.

A further and significant step to address the problem was taken with the promulgation, on 15 December 2000, of UNMIK Regulation 2000/64.[9] The Regulation grants to competent prosecutors, the accused or defence counsels the right to petition the ADoJ for the assignment of international judges and prosecutors or a change of venue where this is "*necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice*." In the absence of a petition, ADoJ may also act by its own motion.[10] Following a petition, ADoJ is empowered to review a petition and make recommendations to the SRSG for final approval or rejection. Where a petition is approved, a panel may be convened consisting of an international prosecutor, an international investigating judge and/or a panel composed of three judges, including at least two international judges ("Regulation 64 panel"). Today, all major or high profile cases are as a rule tried by Regulation 64 panels and are frequently also investigated and prosecuted in accordance with the regulation.

The increased involvement of international judges and prosecutors does not, however, finally resolve the issue of lack of minority participation in the justice system. A further effort to recruit and involve members of the minority communities, particularly Kosovo Serbs, into the justice system remains crucial. It must also be borne in mind that, while the existence of international judges and prosecutors may be sufficient to remove suspicions of bias in high profile cases at the District Court level, there is no international participation in the administration of justice in Municipal and Minor Offences Courts. Thus, building of a multiethnic court system is a "sine qua non" for building up an institutional environment, which is governed by principles of human rights and rule of law and which is inspiring confidence to all members of the community. Finally, taking affirmative action towards this goal represents a viable solution for addressing the issue of returns. In this respect, UNMIK should focus return initiatives on professionals who are members of minority communities in Kosovo and who can serve as the basis for a sustainable confidence and capacity building effort within the minority communities.

Parallel Judicial Structure

Since 1999 a parallel structure of courts, answerable to Belgrade and not UNMIK has continued in the Kosovo Serb-dominated parts of northern Kosovo.[11] During 2001, UNMIK had continued to discuss with FRY officials, aiming to form a multi-ethnic Kosovo judicial system, and to eliminate the parallel systems. Previously, FRY officials had not acquiesced, since agreement to build a multi-ethnic judiciary might also imply, among other things, acceptance of the Constitutional Framework.[12]

In this respect the Joint UNMIK-Yugoslav Common Document of 5 November 2001, represents a step forward in that it confirms the commitment of UNMIK to create a multiethnic judiciary in Kosovo and the agreement to immediately consider the appointment of Kosovo Serb judges and prosecutors to the Kosovo judiciary.[13]

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[9] For a further discussion regarding regulation 2000/64, see the second OSCE Review of the Criminal Justice System, 1 September 2000 – 28 February 2001, p. 75 ff.

[10] UNMIK Regulation 2000/64, section 1(2).

[11] See further the OSCE Report on Parallel Court Activity in Northern Kosovo.

[12] OMiK Weekly Report No. 34/2001.

[13] Frequently referred to as the "Common Document".

However, despite the political commitments of reaching solutions to the parallel judicial structure in the northern part of Kosovo, the reality on the ground proves the contrary.

> An on-going trial in Mitrovicë/Mitrovica District Court has raised new concerns of serious human rights violations and it clearly shows that the strong views on parallel structures are far from being left aside. A Kosovo Serb residing in a village within the Zubin Potok municipality, was indicted and tried for an alleged murder by the District Court of Kraljevo (Serbia proper), as the latter assumed the territorial competence of Mitrovicë/Mitrovica District Court.[14] After being tried and acquitted by the former court, the defendant has been indicted for the same offence by the Mitrovicë/Mitrovica District Court on 23 August 2001 and later detained by order of the same court on 30 August 2001. Although the decision of the District Court of Kraljevo is not final and an appeal is currently pending at the Supreme Court of Serbia, thus not bringing about the applicability of Article 14 (7) ICCPR,[15] LSMS raises concerns regarding the defendant's situation of possible double jeopardy. According to the workings of the initial session of the trial in Mitrovicë/Mitrovica District Court, the evidence put forward by the prosecution is virtually identical with the evidence produced during the first trial. The defendant gave the same statement as the one given in front of the District Court of Kraljevo, and the witnesses are expected to do the same.

Understaffing of Courts

Local Judges and Prosecutors

Apart from the lack of participation of minority group judges and prosecutors in the Kosovo justice system, the courts at all levels lack both judges and prosecutors. As stated above, the Kosovo Consolidated Budget (KCB) foresees the appointment of 420 judges and prosecutors appointed and working in the 55 courts in Kosovo, but at present there are 80 vacancies.[16] Since the enactment of UNMIK Regulation 2000/64, the workload of the international judges and prosecutors has also grown significantly and has resulted in a need to appoint more international members to the judiciary and the prosecution. There is also a lack of support staff both within the courts and within the International Judicial Support Division.

> In the Gjilan/Gnjilane region the President of the District Court reports a lack of two judges to hear civil cases. The President of the Municipal Court reports that there are three unfilled slots for judges and at least four slots for support staff. The Minor Offences Court President reports that there is a need for another four judges and a number (12) of support staff.[17]
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> In Mitrovicë/Mitrovica District Court there are four judicial vacancies. Of the four remaining judges (including the president of the court), there is only one trial judge while the other two judges act as both investigating judges in criminal cases and civil judges. According to information gathered by LSMS the remaining trial judge is to resign. On 15

[14] For more details, see OSCE Report on Parallel Court Activity in Northern Kosovo.

[15] Article 14 (7) ICCPR and Article 4 of Protocol 7 ECHR contain both a prohibition against double jeopardy (also known as the principle of *ne bis in idem*), stating that no one shall be liable to be tried or punished for an offence for which he has already been **finally** convicted or acquitted.

[16] Information based on statistics valid for January 2002.

[17] Information collected by the end of year 2001.

November 2001, the President of the District Court stated that as a matter of principle only urgent cases regarding detention were heard but no trials were scheduled due to a lack of judges. Of the four slots for prosecutors only three are filled.[18]

According to the President of the District Court in Pristinë/Priština, there are 24 posts for judges allocated for this court but only 14 are filled at the present (of which one is seconded for Kosovo Judicial Institute).[19]

Regarding the lack of local judges and prosecutors, the issue of salaries is a major obstacle in finding competent persons to fill these slots. While it is understandable that there is only a limited budget, it must be kept in mind that in order to secure an independent and well qualified judiciary and public prosecutors office, salaries have to be comparable with the income that those professionals could earn outside the judiciary. Where an increase in salaries might not be possible due to budget restraints, existing salaries must be adjusted according to a logical scale that gives professional a higher level of income than support staff. Discrepancies amongst categories of employees depending on whether they are paid by the KCB or by various international organisations or agencies have become a symptomatic issue in Kosovo's society and its perpetuation may lead to social conflict or alleviation.

Under the present staffing arrangements in the judiciary, the existing positions are funded from the KCB. However, there are situations where additional support staff for some courts, such as janitors, were hired under the UNMIK budget and, consequently, received a much higher level of payment. The result of these arrangements has been that significant discrepancies occur among the level of salaries of some of the support staff in the courts, which are paid by UNMIK, and the judges and prosecutors, which are paid from the KCB.

Apart from the problems it creates for the members of the judiciary themselves, such as significant workload and a large backlog of cases, the lack of a sufficient number of judges and prosecutors also impacts severely on the rights of the individuals whose cases are handled by the judiciary. The insufficiency in the number of judicial officials leads to significant delays in processing cases, even in instances where the subject matter of a particular case would only require a minimal allocation of time and resources. Furthermore, the human rights dimension of this administrative flaw is worsened where a defendant awaiting trial is held in custody. LSMS has documented numerous cases where defendants had spent one year or more in detention prior to being brought to trial. In many of these cases there were no significant investigative actions undertaken during these lengthy periods of time prior to the trial.

The most recent example of this issue is the case of two Kosovo Serb defendants, suspected of aggravated theft and robbery, detained in Mitrovicë/Mitrovica since 27 October 2000, on which date the investigation was also initiated against them. Between this date and 12 December some investigative actions were taken against the suspects, but after this no further procedural steps were undertaken. The reason provided for this was that all witnesses to the armed robbery were in Macedonia and despite several requests through the ADoJ to hear witnesses in Macedonia, there was no response. Notwithstanding the apparent lack of evidence in this case, the two detainees, together

[18] *Ibidem.*
[19] *Ibidem.*

with another three suspects (not detained) in the case, were indicted on 3 October 2001, based solely on the evidence that had been available to the court since 12 December 2000.

Besides the purely administrative aspect of the issue related to the lack of judges and prosecutors, LSMS also expresses concern with the manner in which it breaches basic rights of individuals facing the justice system. Where no objective alternatives are in place for supplementing the number of judges and prosecutors, LSMS considers that there are other alternatives and remedies that can and must be applied. The European Court of Human Rights has determined that the right to trial within a reasonable amount of time should be read in the light of the presumption of innocence. The Court made clear that it was for the domestic courts to determine whether the time that had elapsed before the judgement exceeded a reasonable limit, *i.e* whether it imposed a greater sacrifice that could, in the circumstances of the case, be reasonably expected of a person **presumed innocent**.[20]

The domestic law applicable in Kosovo provided for a maximum period of 6 months within which an indictment had to be filed, with an obligation to release the detainee when the time limit expired.[21] There was thus a definite time limit established by law after which the right to liberty and the presumption of innocence were considered to outweigh any other interests. Nevertheless, the above-mentioned time limit has been altered by UNMIK Regulation 1999/26, which increased the time limit of filing an indictment from 6 months to one year, in a time when the judicial system was at such an incipient stage that it could not, objectively, deal with cases within the time limits originally established by the law. It is widely acknowledged, however, that the emergency stage for the judiciary is over and consequently, higher standards and guarantees should be reactivated in order to provide an acceptable level of protection for the basic rights of persons who are subject of the criminal law.

LSMS has also raised concerns regarding other implications related to the understaffing of the courts. There have been instances where Municipal Court judges have been assigned to perform as District Court judges on a case-by-case basis, and there have also been instances where cases under the competence of the District Court were handled by Municipal Court judges even without a formal assignment or authorisation. These aspects are of concern for LSMS from the perspective of the defendants' right to be tried by a competent tribunal. This principle implies that the judicial officials sitting on a panel should have, besides formal derogation of competence assigning them to the respective panel, the expertise required to properly consider the subject matter of the respective case. Furthermore, LSMS has observed cases where decisions taken erroneously by a lower court judge affected the proceedings or the outcome of the case when dealt with afterwards by the competent higher court.

Due to serious understaffing of the Mitrovicë/Mitrovica District Court, a practice of using Municipal Court judges in District Court cases has been slowly establishing. While it was obvious that proper trial schedules could not be established in this District Court with only one full-time trial judge, the solution of using lower court judges to sit in important

[20] *Wemhoff v. Germany*, ECHR 27 June 1968.
[21] Article 192 FRY CPC.

and sensitive cases should have been only temporary. The Department of Justice (DOJ)[22] as a matter of urgency could have undertaken new assignments or temporary re-location of judges. The situation worsened as of 28 September 2001 when the President of the District Court decided not to schedule trials anymore, except for the ones with detained defendants, until a solution was found by DOJ to fill in the empty slots for judges. This form of protest adopted by the President lead to the creation of a serious backlog of cases in this court and, more importantly, raised serious concerns of denial of justice towards individuals who had the right to have their trials scheduled within a reasonable time.

A Kosovo Albanian suspect was arrested and charged in March 2000 for the alleged rape of a 13 year old girl and the theft of 50 DM. A District Court judge initiated a formal investigation, and subsequently ordered detention. However, a Municipal Court judge, who was also initiating an investigation into the theft charges, requested and obtained the District Court file. After summary investigating actions, he ordered the release of the suspect two months after the initial arrest and prior to sending the case back to the District Court for the proper investigations in the rape charges. The course of the proceedings has been seriously affected by the decision to release the suspect. An indictment was filed in February 2001 and the first trial date was set for 13 March 2001. However, the defendant has never shown up, neither in front of the investigating judge nor in front of the court, and, to date, the trial has been repeatedly postponed due to defendant's absence.

International Judges and Prosecutors

Similar concerns of delay in delivering justice in a reasonable time due to insufficient number of judicial officials occur also in cases handled by international judges and prosecutors. As all major cases are tried by panels established under UNMIK Regulation 2000/64, involving, as a rule, two international and one local judge, and prosecuted by an international prosecutor, the international judges and prosecutors are frequently heavily overloaded with work. The result is again detrimental mostly to the rights of the defendant, especially when pre-trial detention is ordered.

A Kosovo Serb, initially charged with war crimes in Mitrovicë/Mitrovica District Court was arrested on 20 December 1999. The indictment was filed on 8 September 2000 but the trial – which was held in front of a Regulation 64 panel consisting of two internationals and one local judge, and an international prosecutor – did not start until 10 April 2001.[23] There was an attempt to start the trial on 22 January 2001 in front of a regular trial panel including one international judge but the trial was postponed pending an ADoJ move for a Regulation 64 panel. After the first trial day on 10 April the main hearing was adjourned for more than 30 days. On 24 May the trial was restarted in front of a new panel as one of the international judges had left the mission and the applicable law required that, whenever the composition of the panel would change, the trial had to recommence from the beginning.[24] On 13 July, after the indictment had been amended and charges reduced to general endangerment, causing of damage and aggravated theft, the accused was released on bail after more than 18 months in detention. Overall the trial has proceeded very slowly with several lengthy adjournments and by 5 November, i.e.

[22] The Department of Justice (DOJ) has been, within the new framework of UNMIK Pillar I, the successor of the Administrative Department of Justice (ADoJ).
[23] Article 280 (2) FRY CPC states that the main trial shall be set no later than two months from the date the indictment was received by the court.
[24] Article 305 (3) FRY CPC.

almost 7 months after the main hearing started, the trial had not proceeded further than the hearing of the second witness. Eventually, by January 2002, the trial in the first instance ended with the acquittal of the defendant.

Two Kosovo Serbs were arrested in Prizren region on 31 January 2000 under suspicion of having committed war crimes. The case was under investigation by a local investigating judge. On 19 January 2001, an international prosecutor was assigned to the case under UNMIK Regulation 2000/64. On 31 January 2001, the one-year maximum period of pre-trial detention expired.[25] The suspects were however not released. On 7 February 2001, the District Court in Prizren received an indictment which, in order to be given an appearance of conformity with the law, had been backdated to 1 February. The suspects were charged with participation in a gathering to commit violence, unlawful detention and grave bodily injury. On 12 February 2001, the charges for war crimes were dropped. Despite motions to release the defendants due to the unlawful detention, they continued to be detained. On 16 October 2001, the trial finally commenced, more than 20 months after the arrest and more than 7 months after the indictment had been filed. On 18 October 2001, both defendants were released on bail and on 2 November 2001, both were acquitted due to lack of evidence.

LSMS considers that this particular case, where the two defendants spent 20 months in detention before being brought to trial, is in breach of the reasonableness standard under international human rights law. The Human Rights Committee of the United Nations General Assembly[26] concluded, in a case of capital murder, that holding a person for 16 months before trial in the absence of satisfactory explanations from the state authorities or other justification discernible from the file, was a violation of the person's right to be tried within a reasonable time or to be released.[27]

One way ADoJ was (and DOJ is) addressing the insufficient number of international judges in each region is by establishing panels consisting of judges from different regions. The situation has been gradually aggravating and the result has been a steady movement of judges from one region to another and from one panel to another. There are instances where judges who sat on a panel in one case had not the chance to meet again and deliberate on the verdict.

In the case of three Kosovo Albanians convicted on 6 April 2001 for organising or participating in a criminal group, attempted extortion and kidnapping, causing general danger and endangering people's life, a Supreme Court panel consisting of three international judges heard the appeal on 29 August 2001. From that day to present, a verdict is still expected on the appeal and one reason for the delay has been, to LSMS's knowledge, the fact that the three judges in the panel have not for a long time been able to reconvene and deliberate on the verdict.

While these shortcomings in administering justice are mainly attributable to the lack of sufficient personnel to cover the large amount of cases that they are assigned to, LSMS has concerns with the effect of these administrative issues on the substantial rights of the

[25] UNMIK regulation 1999/26 extended the maximum pretrial detention for persons suspected of serious criminality to one year (Section 1). According to Section 2, if an indictment has not been filed within this period the suspect shall be released.
[26] Hereinafter Human Rights Committee.
[27] See *McLawrence v. Jamaica,* Inter-American Commission on Human Rights, 29 September 1997.

defendants. In all the above-mentioned cases defendant's right to be tried in a reasonable amount of time as enshrined in Article 6 (1) ECHR and Article 14 (3)(c) ICCPR has been affected if not all together disregarded. The European Court held that the purpose of the standards that require trials to be held within a reasonable time is meant to ensure that people awaiting trial on criminal charges do not suffer unduly prolonged uncertainty. When in detention, the standard imposed on state authorities is even higher, as it is based on the presumption of innocence and the right to personal liberty. This standard requires that anyone held in pre-trial detention is entitled to have their case given priority and to have the proceedings conducted with particular expedition.[28]

There has been a decision to double the number of international judges and prosecutors by May 2002[29] and the recruitment procedure is under way, but meanwhile the problem remains as a major obstacle to a proper administration of justice. Related to this, there is also a lack of sufficient support staff; there is a lack of international and national legal officers, interpreters, clerks and other staff necessary for the smooth functioning of the justice system.

Failure to pay lay judges and court experts
Although an internal matter between the courts and its administrators, the issue of paying due salaries or fees to lay judges and court experts has, on occasion, resulted in substantial problems with processing cases at the investigation or trial level.

> A strike took place in Gjilan/Gnijlane Municipal Court in October 2001, as lay judges refused to work due to the fact that ADoJ had not paid their salaries. The refusal of the lay judges on strike to sit in the trial panels resulted in a temporary paralysis of the court's activities.
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> Similar protests were organised in several occasions by forensic experts in various regions. Trials pending in Prishtinë/Pristina District Court were repeatedly postponed during the two month period from late January to March 2001 due to the refusal of the forensic experts to provide the reports requested by the court until their financial demands were met. Similar refusals have been documented in individual cases in the Prizren region. When asked to identify administrative flaws affecting their work, the majority of Presidents of District Courts and Municipal Courts told LSMS that there is a quasi-general refusal of forensic experts to show up in court and provide their expertise in criminal cases. This refusal has always been justified with low or delayed payments for their services.

These situations have raised concern because of the impact on a defendant's right to be tried within a reasonable time.

Delivery of court documents

Delivery of court documents is another administrative activity of the judicial authorities, which, if done properly, should not affect the substantial rights of the persons who are subjects of the judicial process. The mass circulation of documents such as summonses,

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[28] See *Abdoella v. the Netherlands*, ECHR 25 November 1992, and *Tomasi v. France*, ECHR 27 August 1992.
[29] Joint UNMIK-Yugoslav Document 5 November 2001, Judiciary.

verdicts and detention orders, to and from the courts, and the methods of delivery, have been an issue of concern for LSMS. Inconsistency in practice has the potential effect to impede the courts' attempt to meet the standards of due process and fair trial.

Delivery of verdicts

The manner and the time frame of delivering verdicts to the parties in a criminal case is of significant importance, as the applicable law binds the exercise of the right to appeal a court decision to the moment when the written court decision/verdict reaches the parties. LSMS has expressed concerns with the issue of delivering verdicts in criminal cases, especially in those cases where defendants were detained and a delay in receiving the verdict directly affected their right to have the decision reviewed by a higher court and, possibly, their right to freedom. When delays were significant, LSMS regarded these administrative failures also from the perspective of the defendants' right to be tried within a reasonable amount of time. In a Report of the Human Rights Committee it was argued that the right to trial within a reasonable time includes the right to receive a reasoned judgement, at trial and appeal, within a reasonable time. The Committee further held that the failure of a court to render a reasoned written judgement within a reasonable time had the effect of preventing the defendant from enjoying the effective exercise of his right to have the conviction and sentence reviewed by a higher tribunal.[30]

The applicable law states that a written verdict should be prepared within 8 days from its announcement or, in complicated cases and as an exception, within 15 days. If the verdict is not written within the prescribed time frame, the presiding judge has the obligation to inform the president of the respective court about the reasons for the delay and ultimately, the president is required to take the necessary measures to ensure that the verdict is prepared as soon as possible.[31] As far as delivery of the written verdict is concerned, this also lies within the responsibility of the court. When the defendant is in custody, the delivery must be done within the same time frame as the one prescribed for writing the verdict.[32] Furthermore, the law states that the right to file an appeal against a verdict rendered by a court in first instance shall be exercised within 15 days from the day the verdict was delivered.[33]

Consequently, it is the obligation of the judge and the president of the court to ensure that the verdicts are prepared and delivered to the parties in a timely manner as governed by the law. Failure of either the responsible judge or the president of the respective court to comply with their professional obligations amounts in violations of the parties' right to file an appeal against the particular verdict. LSMS has documented serious delays in delivering written verdicts to defendants. In fact there appears to be a trend among some District Courts in delivering verdicts within months rather than within days, as is prescribed by the law.

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[30] See Report of the HRC in the case of *Currie v. Jamaica*, 29 March 1994.
[31] Article 356 (1) FRY CPC.
[32] Article 356 (3) FRY CPC.
[33] Article 359 (1) FRY CPC.

LSMS collected statistical data on the period of time passed between the conclusion of the main trial and the delivery of the written verdict. While in the Municipal Courts it appears that the delivery of verdicts is done, as a rule, within the legal time limit, District Courts verdicts are often issued with a significant delay.

> LSMS has analysed statistical data regarding delivery of written verdicts in two District Courts, *i.e* Mitrovicë/Mitrovica and Gjilan/Gnijlane. LSMS documented that in 25 out of the 36 cases monitored in Mitrovicë/Mitrovica in 2000, the verdicts had been delivered with delays varying from 1 to 8 months. Delays of up to 5 months have been noted in cases handled during 2001. In Gijlan/Gnijlane District Court, from the cases handled by the court in 2000, in 49 out of 72 cases the verdicts had been delivered with delays ranging from 1 up to 7 months. On a positive note, the same court improved its record in 2001 when only 6 verdicts out of 67 were delivered with a delay of 1 month.

There are also a limited number of cases where the delays in delivering the written verdict amounted to a clear violation of the defendants' rights under the international human rights law.

> In two cases from Prizren District Court, LSMS documented delays of more than 14 months in delivering the written verdict. In both cases defendants were in detention and their right to appeal was denied by the fact that they had not been served with the written verdict. Despite several complaints by the defence counsel and even the public prosecutor who was involved in one of the cases, no measures were taken by the president of the court, as is required by the applicable law, to speed up the delivery of the verdicts.

Delivery of court orders to release or to detain

The issue of preparing and delivering court orders to detain a person suspected of involvement in criminal activities or to release a person in custody has been of particular concern for LSMS in the past. There have been a number of cases where improper or untimely delivery of these documents resulted either in erroneous releases of suspects or in unlawful detention of persons who should had been released.

In this respect, LSMS has noted sustained efforts on the part of the judicial authorities to normalise these courts activities and, as a rule, orders to release or detain are currently being prepared and delivered properly to the detention facilities. According to internal information released within UNMIK, a DOJ circular is being prepared to remind judges, both local and international, of the necessity to follow the legal procedures and timeframes when issuing detention or release orders. Such initiatives are strongly supported and encouraged.

LSMS, however, has concerns with those cases where the courts still fail to perform their obligations in accordance with the legal requirements, as they occur in spite of the clear efforts of the judges and court administration to effectively address and find solutions to these shortcomings. Although limited in number, such cases raise concerns related to either the right of the suspect to liberty once released by the order of a competent court, or the interest of the authorities to hold a suspect in custody when considered necessary for a proper investigation.

In a case investigated by Prizren District Court and assigned to an international judge and an international prosecutor, a Kosovo Albanian suspect was arrested for alleged involvement in a murder case. Following a *prima facie* consideration of the evidence in this case, the international investigating judge decided that there were not sufficient grounds for detaining the suspect. The international prosecutor lodged an appeal against the order for release and a panel of judges overruled the decision of the investigating judge and extended the suspect's detention. Nevertheless, the suspect was released on the basis of an order of the investigating judge, apparently because the court failed to communicate the panel's decision to the detention centre.

In a trafficking investigation carried out in Prizren, six Kosovo Albanian men were arrested for alleged involvement in criminal activities, under the provisions of UNMIK Regulation 2001/4 on Trafficking in Persons. Three of the suspects were arrested and, after 24 hours, police investigators handed the case over to a Public Prosecutor of the District Court for the proper filing of a request to start investigations. However, as the file was handed over on a Friday afternoon, the Public Prosecutor failed to file the request with the investigating judge, arguing that this was not possible since the clerks had already left. For the same reasons the investigating judge could neither set nor hold a detention hearing on Saturday or Sunday. Consequently, at the end of the 72 hours custody limit, all three suspects were released from custody.

In an investigation carried out in Pejë/Pec District Court against a Kosovo Albanian suspected of murder, armed robbery and illegal possession of weapons, a detention order was not issued by the local investigating judge due to the fact that the request to start an investigation had been filed by an international prosecutor in English and the court had no interpreter available to translate the request. As a result, the suspect was released from police custody.

Case-flow management

The issue of how each court in general, and each judge or panel of judges in particular, are organising and prioritising their work represents a constant challenge not only for the courts in Kosovo but also for the courts in any other judicial system. However, there are certain particularities in the manner of scheduling trials and organising court proceedings in Kosovo, specifically, which entail a closer insight and analysis.

LSMS has documented numerous cases where undue delays in setting trials, unlawful detention or unjustified prolonged custody were caused by shortcomings in the system of prioritising the work of the courts either by the judges themselves or by the authorities administering the judicial system as such.

One aspect of the case-flow management issue is scheduling trials in a manner that accommodates not only the interest of the judicial authorities to deal with a respective case but also the interests and rights of the parties involved to have access to a trial within a reasonable amount of time. Unjustified delays in scheduling trials have been noted by LSMS in cases handled by both international and national judges.

A Kosovo Albanian defendant waited 13 months in detention for his trial to be scheduled in front of a District Court panel in Mitrovicë/Mitrovica. After his arrest on 17 May 2000,

the suspect admitted to the attempted murder charges laid against him. However, despite the fact that the indictment was filed in August 2000, the court failed to schedule a trial until 19 June 2001, *i.e.,* within a reasonable amount of time.

Similar delays in scheduling trials have been documented by LSMS in cases involving juveniles. The applicable law prescribes a period of 8 days from the issuance of the indictment within which a trial has to be set in juvenile cases.[34] In a robbery case from Prizren, a juvenile held in detention awaited more than two months for the trial to be scheduled. Similar delays have been documented in other District Courts in Kosovo.

A relevant example in this respect is Mitrovicë/Mitrovica District Court where LSMS has documented, up to date, 8 cases where more than 2 years have passed from the date of the indictment and 29 cases where the delay in scheduling the trial after the issuance of the indictment is more than one year.

According to the applicable law, the presiding judge assigned to the case has the responsibility to set the trial no later than two months from the date the indictment was received in the court. When this time limit is not met, the president of the respective court has the duty to take the necessary steps to set the trial.[35] Consequently, it is solely the responsibility of the judge and the court to take necessary measures for scheduling the trials within a reasonable time.

As mentioned above, international judges have also experienced case-flow management problems. A Kosovo Serb suspect arrested on 27 March 2000 on charges of aggravated theft was indicted, after the suspect gave an almost full confession, one month later, on 28 April 2000. As his co-defendant escaped from detention soon after the arrest, the indicted defendant waited more than one year for his trial. Despite the appointment of an international judge to the case in October 2000, the trial was only set in April 2001 and was completed within one day. No objective reasons, such as assignment of that particular judge in other regions and for other cases, could be identified for the delay.

A similar scenario was observed in the case of two Kosovo Serbs indicted by Mitrovicë/Mitrovica District Court. Besides the already unreasonably long one-year pre-indictment detention, the two defendants spent an additional 8 months in custody waiting for the trial to be set. Notably, the two defendants have since been acquitted.

LSMS considers that such unjustified delays in setting a trial date after an indictment is properly filed and when a defendant is in pre-trial custody represent administrative failures of the courts and their officials, which amount to serious violations of the persons' right to be tried within a reasonable time or be released from detention. The interpretation of international human rights standards points to the conclusion that for individuals charged with a criminal offence and held in pre-trial custody, the obligation of the state authorities to expedite trials is even more pressing. The European Commission argued that even where the period of time before trial may be reasonable under Article 6(1) ECHR, holding a person in detention for that particular period may not be permissible under Article 5 of the European Convention "because the aim is to limit the length of a person's detention and not to promote a speedy trial".[36] In the words of the

[34] Article 484 FRY CPC.
[35] Article 279 FRY CPC.
[36] See *Haase v. Federal Republic of Germany*, ECHR 12 July 1977.

European Court, persons held in pre-trial detention are entitled to special diligence on the part of the authorities in the conduct of the proceedings.[37]

Other Logistical Problems

Lack of adequate interpretation/translation during court proceedings and improper distribution/translation of UNMIK Regulations
Ensuring adequate interpretation during court proceedings has been a continuous issue of concern for LSMS, as lack thereof amounts to non-compliance with international human rights standards, pertaining to the right of parties in criminal proceedings to be tried in a language that they understand. Despite the seriousness of this issue, this report will not focus on it, as the previous two LSMS Reviews of the Criminal Justice System addressed this particular concern in depth.[38] LSMS does acknowledge that positive developments have been observed related to this issue. For example, concrete steps have been taken by DOJ towards hiring and appointing qualified interpreters to assist with translation/interpretation in trafficking cases where victim/witnesses originate, as it usually happens, from Eastern Europe. This development follows corresponding recommendations forwarded by OSCE.

Concerns have also been expressed by LSMS regarding the manner and timeframe in which UNMIK Regulations are translated and distributed to the courts, other relevant authorities, and ultimately to the public. However, although it is an integral part of the scope of this report - administration of justice - this aspect will not be further addressed, as it was raised in previous LSMS reports.[39]

Lack of Adequate Translation Equipment
Following UNMIK Regulation 2000/46 making English a court language in proceedings involving international judges or prosecutors, trials are frequently conducted in the three languages - Albanian, English and Serbian. This requires adequate equipment for simultaneous translation in order not to burden the proceedings with consecutive translation in three languages. Despite the fact that the first international judges and prosecutors were appointed in February 2000, today, almost two years later, there is still a need for simultaneous translation equipment. The only set of equipment for simultaneous translation – which does not function - is allocated to Mitrovicë/Mitrovica District Court.

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Lack of Space
There is lack of space both in court offices and courtrooms, resulting in overcrowded offices or people taking turns using the office space and difficulties in scheduling trials.

> The Gjilan/Gnjilane Minor Offences Court is located in the building of the District Court, with 6 judges and 25 staff sharing 5 offices. The trials are held in a manner of "taking

[37] See *Tomasi v. France,* ECHR 27 August 1992.
[38] See *ante note* 1.
[39] *Ibidem.*

turns," with one judge holding trials in one office and the others waiting in the corridors for their turn.

With an increased number of judges and prosecutors, this problem will become even more pressing and will have to be solved. In Prishtinë/Priština there is not enough office space in the District Court for the international judges and prosecutors and they are at present located in a separate building in another part of the town. This, together with the fact that the international judges and prosecutors under UNMIK Regulation 2000/64 are hearing cases all throughout Kosovo, has the effect of distancing the two groups of judges and prosecutors from each other, thus minimising the capacity building function between the two groups. Although an increased number of international judges and prosecutors is desirable for the enhanced functioning of the justice system, without more courtroom space, the problem of long delays with scheduling and completing trials might not be solved.

Lack of security arrangements for local members of judiciary

LSMS is concerned with the continuing inequality of treatment between local and international members of the judiciary in terms of personal security. A significant number of local judges and prosecutors have complained over the past two years of the constant pressure that is put on them from the international community and of the constant public attention they receive, and yet, at the same time, of the lack of attention with which UNMIK authorities have so far dealt with their demands regarding personal safety.

LSMS considers that, if expected to meet standards of impartiality and independence, local members of the judiciary should be treated on an equal footing with their international counterparts when it comes to security. While it is true that international judges and prosecutors deal only with highly sensitive cases, which entitle them to be carefully protected from any kind of insurgency, LSMS has documented cases of equal importance and sensitivity, which were tried or prosecuted by local professionals. Denying the latter an adequate and appropriate consideration for their security can only deepen the gap between these two categories of professionals that are otherwise expected to collaborate. As they are required to perform their duties in a society confronted with serious organised crime, the local judges and prosecutors are not provided with the necessary support to develop into a respected and highly qualified core of professionals. Under the circumstances, any capacity-building effort is seriously diminished and cannot properly ascertain its goals.

LSMS considers that the issue of security for local members of the judiciary should be, on a case-by-case basis, taken into serious account by UNMIK and given the same consideration, where appropriate, as the security issues of international judges and prosecutors. Whether the safety of local judges and prosecutors cannot be, technically or procedurally, processed through the UNMIK Threat Assessment Committee, a similar structure should be put in place for assessing, when so requested, the level of threat or insecurity of particular judges or prosecutors involved in sensitive investigations or trials.

Recommendations

- LSMS recommends that UNMIK Regulation 1999/26 be abrogated; the time limit for holding a person in detention prior to the issuance of the indictment should be brought back to the original standard of 6 months, as laid down in Article 192 FRY CPC.
- The judicial administrative authorities should appoint more judges and prosecutors from minority groups (especially Serbs) within the court system.
- The Judicial Inspection Unit (JIU) should initiate disciplinary investigations in cases where judges are responsible for unreasonable delays in delivering written verdicts; priority should be given to cases where these delays prevent persons held in detention from having their decisions reviewed by a higher court.
- The Kosovo Judicial Institute (KJI) should organise training sessions for judges in the area of case-flow management. Modern and practical techniques of case management should be advocated and implemented, so judges could learn to cope with the significant workload while also satisfying requirements of expediency.
- LSMS recommends that lay judges and court experts be paid in due time.
- As a way of minimising delays in conducting trial, simultaneous translation equipment should be installed, as a matter of urgency, in every court where international judges or prosecutors are performing their duties.
- A structure similar to the UNMIK Threat Assessment Committee should be established within UNMIK Pillar I for addressing and deciding, on a case-by-case basis, upon security arrangements that can be made available to local judges and prosecutors.