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1999-2005

REFORMS AND RESIDUAL CONCERNS

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GLOSSARY

ADOJ	Administrative Department of Justice
CDRC	Criminal Defence Resource Centre
DJA	Department of Judicial Administration
DOJ	Department of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EJS	Emergency Judicial System
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
ICCPR	International Covenant on Civil and Political Rights
IJP	International Judges and Prosecutors
JIU	Judicial Inspection Unit
JJC	Juvenile Justice Code of Kosovo
KFOR	Kosovo Force
KJC	Kosovo Judicial Council
KJPC	Kosovo Judicial Prosecutorial Council
KJI	Kosovo Judicial Institute

KFOS	Kosovo Foundation for Open Society
KPS	Kosovo Police Service
LSMS	Legal System Monitoring Section
NATO	North Atlantic Treaty Organisation
OMiK	OSCE Mission in Kosovo
OSCE	Organization for Security and Co-operation in Europe
PCC	Provisional Criminal Code of Kosovo
PCPC	Provisional Criminal Procedure Code of Kosovo
SRSG	Special Representative of the Secretary-General
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
WPU	Witness Protection Unit

EXECUTIVE SUMMARY

To date, the Legal System Monitoring Section (LSMS), in the Department of Human Rights and Rule of Law (the Department) of the Organization for Security and Cooperation in Europe (OSCE Mission in Kosovo) has issued nine public reports and eight semi-public reports, which have analysed the justice system from a human rights perspective and highlighted fair trial and due process concerns. These reports have included almost 200 recommendations addressed to the relevant authorities for specific action to help remedy the shortcomings and help ensure responsible compliance with international standards. The responsible authorities have included the Special Representative of the Secretary-General (SRSG) to the United Nations Mission in Kosovo, KFOR, the UNMIK Department of Justice (DOJ), legal or judicial institutions, the Court Presidents, prosecutors, and defence counsel. This report looks at the extent to which these authorities have addressed the concerns raised in the LSMS reports.

A considerable number of the OSCE recommendations have been fully or partially implemented by the addressed authorities. With respect to institutional developments, the authorities have established the Judicial Inspection Unit and the Kosovo Judicial and Prosecutorial Council to enhance the supervision of the criminal justice system; the Kosovo Judicial Institute (KJI) to train judges and prosecutors; the Criminal Defence Resource Centre (CDRC) to ensure a better equality of arms;[1] and Probation Service to foster a more rehabilitative penal system. Improvements have been made in the courts where the authorities have successfully encouraged greater participation by ethnic minorities. In terms of legislative developments, a number of the OSCE recommendations were fulfilled with the promulgation of the Constitutional Framework for Provisional Self-Government in Kosovo and the new procedural and substantive criminal codes, as well as through the issuance of justice circulars.

A number of the OSCE recommendations directed at the courts, prosecutors and defence counsel have also been addressed. There have been notable improvements in the way in which courts deal with crimes involving sexual assaults, as well as with the assignment of defence counsel. The Kosovo Chamber of Advocates (KCA), which represents the defence bar, has played an important role in raising the standard of defence representation by drafting a Code of Conduct and providing training for its members. In some areas, the standard of defence counsel has notably improved.

[1] The KJI and the CDRC are established by the OSCE Mission in Kosovo.

The OSCE recommendation that, in order to deal with judicial bias in ethnically sensitive cases international judges and prosecutors should participate, has been satisfied with a novel in which international judges and prosecutors sit alongside their local counterparts. Lastly, the former practice of extra-judicial detentions by the SRSG and KFOR has now ceased, seemingly for good, thus meeting the long-standing recommendations by the OSCE.

However, despite the above efforts, a number of the OSCE recommendations have not been addressed satisfactorily. For the most part, when the authorities have failed to act upon the recommendations, the relevant concern still remains a problem today. With respect to legal and judicial institutions, despite OSCE recommendation, the authorities have failed to provide courts with adequate office space to hold public hearings, and have resisted calls to increase judicial salaries to attract the brightest lawyers and to dampen corruption. There remains a serious lack of institutional support for dealing with non-custodial sentences, especially for juvenile offenders, so that a number of alternative punishments can not be used. Despite numerous recommendations calling for better facilities for dealing with mentally ill offenders, an adequate secure facility is still wanting. Whilst UNMIK has introduced a vast array of new laws, a number of areas that would have benefited from new or amended legislation, have been left untouched.

The OSCE has directed many of its recommendations to the judges. However, notwithstanding the assistance of detailed OSCE reports and training by the KJI, in many areas the judges have yet to lift the standard of their practice to satisfy international standards. Breaches of due process and fair trial norms occur regularly throughout Kosovo, despite specific recommendations indicating which practices need to change. In particular, the judges at all levels consistently fail to properly and fully reason their decisions on detention and punishment. The courts have failed to introduce recommended practices and procedures designed to ensure that trials are heard without undue delay: there remain problems in ensuring the attendance of witnesses at trial, organising the municipal court prosecutors, and obtaining expert evidence. And, despite consistent reminders, a number of court presidents do not ensure that complete trial schedules are posted in public view.

In addition, many recommendations to defence counsel have fallen on deaf ears. The OSCE has continued to observe cases in which defence counsel have failed to represent their clients effectively and/or have breached the domestic code of conduct. In many cases this has led to a violation of the accused's right to an effective defence.

Lastly, the international judge and prosecutor programme, although a necessary component and an overall success in fighting inter-ethnic and organised crime in the post conflict period, has a number of shortcomings. Whilst some of the OSCE recommendations were addressed, others were ignored. Inadequate contractual arrangements for the international judges and prosecutors hampers the system; the procedure for case assignments may breach international standards; and the lack of engagement in terms of mentoring has diminished the long term benefits of the program. These remaining problems, which could have been remedied without a large effort, have left the program open to criticism.

As the remaining legal and judicial responsibilities begin to pass from UNMIK to the PISG, this report can serve as a reminder of what has been achieved and, perhaps more importantly, of what remains to be done.

CHAPTER 1
INTRODUCTION

I. BACKGROUND

This Review was prepared by the Legal System Monitoring Section (LSMS), which is part of the Department of Human Rights and Rule of Law (the Department) of the OSCE Mission in Kosovo (OSCE). The OSCE functions under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK) as the Institution-building Pillar.

LSMS has monitored Kosovo's United Nations (UN) administered criminal justice system since 1999. Throughout this period, LSMS has issued reports, which have analysed the justice system from a human rights perspective and highlighted concerns in terms of fair trial and due process. LSMS has issued over 190 recommendations over the last six years, ranging from the release of illegally held detainees to the provision of translation equipment for courts. These recommendations have been addressed to relevant authorities, including local and international institutions or actors, such as the SRSG, KFOR, the UNMIK DOJ, legal or judicial institutions, the Court Presidents, prosecutors, and defence counsel. Following the publication of its reports, LSMS has held meetings with the Presidents of the Supreme, District and/or Municipal Courts, the Prosecutors, representatives of the Kosovo Chamber of Advocates (KCA), and actors within the DOJ, to discuss ways to remedy the highlighted human rights concerns. Since January 2005, LSMS has distributed its semi-public monthly reports directly to the courts, public prosecutors and Kosovo Chamber of Advocates, to provide notification of the monitored concerns, as they arise, and discussions have taken place upon request by the above mentioned actors.

This report assesses the developments and the remaining concerns in a select range of areas to give a broad overview of the criminal justice system. This is not a comprehensive assessment of every past recommendation. Chapter 2 of the report deals with recommendations that have been (at least partially) addressed by the authorities. Chapter 3 looks at recommendations that have never been properly addressed, and the resulting shortcomings that persist within the justice system.

II. THE MANDATE OF THE LEGAL SYSTEM MONITORING SECTION

UN Security Council Resolution 1244 authorised the UN Secretary-General to establish an international civilian presence in Kosovo that would provide an interim administration. One of the

main responsibilities of the international presence is "*protecting and promoting human rights.*"[2] 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 should include human rights monitoring and capacity building. He also instructed UNMIK to develop co-ordinated mechanisms to facilitate human rights monitoring and the due functioning of the judicial system.[3]

A Letter of Agreement, dated 19 July 1999, between the Under-Secretary-General for Peacekeeping Operations of the UN and the Representative of the Chairman-in-Office of the OSCE, stated that 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.[4] Within the OSCE, the Department has the responsibility to monitor and report upon the judicial system in terms of human rights and the rule of law. As a section of the Department, LSMS is tasked with the role of monitoring cases in the justice system, assessing their compliance with international standards, and reporting on matters of concern.

International human rights standards[5] are part of the applicable law in Kosovo through, *inter alia*, UNMIK Regulation 1999/24 - which obliges those holding public office in Kosovo to uphold internationally recognised human rights standards - as well as through the Constitutional

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[2] United Nations Security Council Resolution 1244, 12 June 1999, para. 11/j.

[3] "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." See report of the UN Secretary-General to the UN Security Council, On the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999, para. 87.

[4] Justice Circular 2001/15 on OSCE Monitors Access to Court Proceedings and Court Documents, 6 June 2001, reaffirmed that the LSMS trial monitors have access to all criminal court proceedings and documents, with only a few exceptions. This was amended by Justice Circular 2004/6, 30 September 2004, which asserted that LSMS also has access to civil and administrative proceedings and court documents in accordance with an agreement between UNMIK Pillar I and the OSCE. This Circular was intended to enhance the understanding of the judiciary with regard to the OSCE's mandate, and to ensure that the trial monitors maintain complete coverage in criminal, civil and administrative proceedings.

[5] These international standards are detailed, inter alia, in Articles 9, 10, and 14 of the International Convention on Civil and Political Rights (ICCPR) and Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Framework.[6] Thus, in assessing compliance with international standards, the OSCE uses as a basis for its analysis, international human rights instruments, conventions, and jurisprudence.

[6] 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."

CHAPTER 2
CONCERNS THAT HAVE BEEN ADDRESSED

I. INTRODUCTION

In 2004, the OSCE provided a context in its report: "As the UN entered Kosovo in 1999, the dust was still settling from an ethnic conflict which had followed decades of communist rule and ten years of active internal repression from Belgrade. Organised crime was present and the police service was in ruins. No functioning judicial system existed and the rule of law was almost absent. Most of the judges and public prosecutors active before the start of the NATO bombing campaign had fled. The international military force, KFOR, was responsible for maintaining law and order."[7] It went on to conclude: "Four years ago the judicial system was in ruins. It has since been transformed into a functioning system, which incorporates many modern and progressive legal provisions and instruments. These improvements are the product of tremendous effort by both local and international actors, including judges, prosecutors, defence counsel and those within various judicial organs."[8] This Chapter 2 focuses on these efforts by analysing concerns that have been raised by the OSCE and then, partially or wholly, addressed by the authorities.

For convenience, the Chapter is split into four Parts: Institutional Developments, Legislative Developments, Practice Developments, and Developments in the International Judge and Prosecutor Programme. The OSCE is not suggesting that all the reforms mentioned below were the direct result of preceding OSCE recommendations; in some instances the relevant authorities were already considering the reform and the OSCE recommendation merely supported the position. However, many reforms were undoubtedly made in direct response to OSCE recommendations arising from its monitoring and reports. Other reforms were introduced in response to a combination of pressures from a number of interested parties, including the local and international authorities responsible for the justice system.

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[7] 6th Review on the Criminal Justice System titled *Crime, Detention and Punishment* (December 2004), hereinafter: Sixth Review, p. 10.
[8] Sixth Review, p. 13.

II. INSTITUTIONAL DEVELOPMENTS

In order to re-build the criminal justice system and to help it function fairly and effectively, the OSCE has made numerous recommendations to create, bolster or transform legal or judicial institutions in Kosovo. A selection of the institutions are outlined below.

A. The Judicial Inspection Unit and the Kosovo Judicial and Prosecutorial Council

In the year 2000, through its monitoring of cases with an inter-ethnic element (such as war crimes cases), the OSCE formed the view that, either through ethnic bias or incompetence, the courts were failing to conduct certain cases with due diligence, call relevant witnesses, and examine inconsistencies in the evidence.[9] The judiciary needed close supervision. In July 2000, in order to enhance the supervision of the criminal justice system, the OSCE recommended that the SRSG:

> "[E]stablish […] an Office of Judicial Investigation (OJI) within the Department of Justice. The OJI should create procedures for the review and investigation of complaints directly. As a result of investigations, the OJI should be empowered to discipline or remove judges and public prosecutors from individual cases or office."[10]

In response to the OSCE Review and recommendations, the OSCE and the Administrative Department of Justice (ADOJ), established a working group to study the recommendations and determine appropriate action. The ADOJ appreciated the need for closer supervision. Following the above recommendation, UNMIK established the Judicial Inspection Unit (JIU) and the Kosovo Judicial and Prosecutorial Council (KJPC).

The JIU, which currently has 15 international and 14 local staff, is responsible for conducting inspections, audits and investigations within the judicial system in Kosovo, including allegations of misconduct by judges, prosecutors and lay-judges.[11] The Audit Section of the JIU, designed to scrutinise the court system from a wider perspective, became functional in 2005. Following an investigation, the JIU can present a case of misconduct to a disciplinary board of the KJPC, which can take action against prosecutors or judges. To date, the JIU has played an important role in the

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[9] See, OSCE Review of the Criminal Justice System (1 February 2000 - 31 July 2000), hereinafter First Review.
[10] First Review, p. 76.
[11] The JIU was established through UNMIK Administrative Direction 2002/4.

judicial system and has positively responded to the concerns raised by the OSCE by investigating possible cases of misconduct.

The KJPC was established by UNMIK Regulation 2001/8 On the Establishment of the Kosovo Judicial and Prosecutorial Council, which replaced the Advisory Judicial Commission.[12] The Regulation states that the KJPC "shall be responsible for advising the Special Representative of the Secretary-General (SRSG) on matters related to the appointment of judges, prosecutors and lay-judges, as required, and hearing complaints, if any, against any judge, prosecutor or lay-judge."[13] It has also been empowered to decide upon disciplinary sanctions and for adopting a code of ethics and conduct for judges, prosecutors and lay-judges.[14] During its mandate, the KJPC has ruled upon a number of cases of judicial misconduct.[15] The KJPC has proved to be a vital organ in the criminal justice system. Following the transfer of competencies in the field of justice, the KJPC has been subject to transformation. On 20 December 2005 the UNMIK Regulation 2005/52 On the Establishment of the Kosovo Judicial Council, was promulgated. The regulation was adopted as a result of the ongoing reorganization of the justice system in Kosovo, "[…] with the purpose of maintaining an impartial, integrated, independent professional and accountable judiciary."[16] In Section 1 of the Regulation, it is determined that the Kosovo Judicial Council (KJC) is established as a professional body under the authority of the SRSG and succeeds the KJPC, which shall be dissolved once the KJC is established.

B. The Kosovo Judicial Institute

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[12] UNMIK Regulation 1999/7 of 7 September 1999 established the Advisory Judicial Commission (AJC) with the mandate of recommending candidates for judicial and prosecutorial appointment on a permanent basis. The AJC was also empowered to recommend disciplinary measures, including the removal of judges and public prosecutors.

[13] See UNMIK Regulation 2001/8 On the Establishment of the Kosovo Judicial and Prosecutorial Council, 6 April 2001.

[14] "The Council can decide upon disciplinary sanctions, as set out in section 7, other than removal from office of judges and prosecutors and from the function of lay-judges, as well as recommend such removals to the Special Representative of the Secretary-General, where appropriate. Upon request of the Special Representative of the Secretary-General, the Council may render advice on other issues related to the judicial system." UNMIK Regulation 2001/8, see *supra* footnote 13.

[15] Six cases of Commission of Criminal Offence; 15 cases of Neglect of judicial/prosecutorial functions; seven cases of Acting in a manner incompatible with the obligations of a judge/prosecutor to be independent and impartial; eight cases of being placed by personal conduct or otherwise, in a position incompatible with the due execution of his/her office, and in 9 cases of Breach of the Code of Ethics and Conduct. See, Weekly Report of the Department of Justice (29 November – 5 December 2005).

[16] UNMIK Regulation 2005/52 On the Establishment of the Kosovo Judicial Council.

The OSCE, in conjunction with the legal community in Kosovo, created the Kosovo Judicial Institute (KJI). It formally began its activities in August 1999, as the Department's Judicial Training Section, and was established as the KJI in February 2000. The mandate of the KJI is to train judges and prosecutors in order to increase their professional and technical competence. With the promulgation of a draft law, recently approved in the Kosovo Assembly and awaiting promulgation by the SRSG, the KJI will become an independent school of magistrates within the overall governmental structure.

Over the past six years, the OSCE has addressed many of recommendations to the KJI for specific types of training. In almost all instances, the KJI has duly conducted training in the suggested areas. A few examples appear below:

- In September 2000, the KJI, in conjunction with the ICTY, organized a seminar on international humanitarian law for national and international judges, public prosecutors and a core group of defence counsel. In addition, the KJI held induction courses for new judges and prosecutors in November 2000. These seminars included reference to Articles 5 and 6 of the ECHR.[17]

- On 26/27 January 2005, the KJI held a workshop on the Provisional Criminal Procedure Code of Kosovo in which it covered the provisions on summary procedure. [18]

- In a round table discussion organized by KJI and held on 20 September 2005, the issues of punishments, calculation of punishments, and the impact of mitigating and aggravating circumstances were discussed. In this meeting the OSCE discussed its concerns relating to inadequate use of mitigating and aggravating circumstances. [19]

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[17] The OSCE recommended that the KJI should provide more comprehensive training on the application of international human rights law in the criminal justice context to both local and international judges and prosecutors. See OSCE Second Review of the Criminal Justice System (1 September 2000 – 28 February 2001), hereinafter Second Review, p. 97.

[18]The OSCE recommended that the KJI should, as part of the training for judges on the Provisional Criminal Procedure Code, highlight the changes in the summary procedure OSCE's Thematic Report on "Administration of Justice in the Municipal Courts" (March 2004), hereinafter Municipal Courts Report, p. 30.

[19] The OSCE recommended that the KJI should offer training on sentencing, highlighting the need of individualised and detailed reasoning as well as the correct use of mitigating and aggravating circumstances. Sixth Review, p. 62.

- The KJI held two workshops on the newly promulgated Juvenile Justice Code. The first workshop was held on 10/11 March 2005 and the second workshop was held on 12 July 2005. [20]

These trainings have undoubtedly had a positive impact for the judges and prosecutors who attended. On average, approximately 25 or so judges and/or prosecutors have attended each training session.

C. The Criminal Defence Resource Centre

In order to ensure greater equality between the prosecution and the defence, in July 2000 the OSCE recommended that:

> "An office of criminal defence should be established and be made available to act as a resource and assistance centre for defence counsel."[21]

The "Office of the Defence," would be composed of international and domestic defence counsel. Such an Office was considered important to enhance the equality of arms between the prosecution and the defence, particularly in trials where international judges and prosecutors appeared. Specifically, the OSCE recommended that in war crimes and ethnically motivated cases the Office should be empowered to provide material and substantive support to the defence.

Such an office, the Criminal Defence Resource Centre (CDRC), was ultimately established in 2001 by the OSCE, in collaboration with the KCA. The idea was to provide immediate legal expertise in applying international human rights standards in individual cases and strengthen the capacity of local defence lawyers. The CDRC began providing services in April 2001 and received NGO status on 3 May 2001.[22] Since its establishment, the CDRC provided local defence counsel with access to relevant international instruments and research material and assisted local defence counsel in case preparation. Its contribution has been proven quite invaluable. Up to February 2005, the CDRC provided professional assistance to defence counsel in 143 cases. In six cases, the CDRC provided professional assistance to applications sent to the European Court of Human Rights.

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[20]The OSCE recommended that the KJI should continue to offer juvenile judges training on the juvenile justice code, international standards applicable on juvenile justice, and the use of alternative measures. Sixth Review, p. 63.
[21] First Review, p. 55.
[22] OSCE Background Report: The Criminal Defence Resource Centre, 28 May 2001.

The OSCE regrets to report that, due to fundraising problems, the CDRC currently functions with only two jurists and has had to dismantle most of its programmes. It is currently engaged in a project with the KCA on Continuous Legal Education for members of the KCA. In fact, the CDRC is coordinating the overall arrangements for the KCA trainings on Continuous Legal Education and this partnership indicates to be very successful in terms of increasing the professional capacities of members of the Chamber.[23]

D. The Probation Service

The Probation Service was established in 2002. In 2004, its role was redefined in Kosovo's Provisional Criminal Code (PCC), which further described its obligations and tasks. The PCC introduced several new measures of alternative punishment for which the Probation Service has supervisory responsibility, such as community service work, sentences of imprisonment in semi-liberty, and reporting to the judiciary about the implementation of the imposed sanctions.

In 2004, the Probation Service had 48 probation officers allocated to three regions to supervise the implementation of the alternative punishments.[24] However, despite the availability of alternative punishments using the probation service, courts were reluctant to impose these measures. As of October 2004, there had been no cases of suspended sentence and supervision by the Probation Service; no cases of suspended sentence combined with an order for community service work for adults; and no cases for the replacement of imprisonment with community service work. The OSCE found that the judges were not fully aware of the services provided by the Probation Service. Therefore, in December 2004 it recommended that:

> "The Probation Service regional offices should be encouraged to establish contacts with judges and prosecutors at the municipal and district court level to promote a greater understanding within the judiciary of the services provided by the Probation Service and the use of alternative measures."[25]

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[23] By the Decision of the KCA Board, since November 2005, the CDRC is responsible for organizing the Continuous Legal Education trainings, which will become mandatory once the Law on Advocacy is promulgated.
[24] Sixth Review, p. 63.
[25] Sixth Review, p. 63.

According to the District and Municipal Courts there is now good cooperation between the Probation Service's 46 probation officers and the courts.[26] The reports by the Probation Service are delivered in a timely manner and its service is of great assistance to the courts. Between 1 January 2005 and 1 December 2005, over 1209 reports from the Probation Services were submitted to the prosecutors' offices and the courts.[27] To date, the Probation Service has supervised the execution of over 80 alternative sanctions, including several cases of community service, advanced supervision by the Probation Service and imposed diversion measures.[28] The LSMS regularly monitors cases in which the probation officers provide clear testimony about the social circumstances of the offenders, sometimes recommending the imposition of alternative measures. The Probation Service is already proving to be an important addition to the process for rehabilitating offenders.

E. The Courts

i. Staffing in the Courts

The backlog of cases in the courts has been, and remains, a major issue of concern; in criminal cases it affects the right of the accused to be tried in a reasonable time and the ability of the courts to find the truth, as delay can affect the availability of evidence. There are many causes of delay.[29] One of those may be the understaffing in the courts. In this regard, in October 2001 the OSCE has recommended that:

> "The appointment of judges in Municipal and Minor Offences Courts, especially in the latter, should be based on each court's caseload, so that disparities amongst the workloads of judges in various courts throughout Kosovo do not occur."[30]

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[26] The composition of the Probation Service is as follows: 24 jurists, 11 pedagogues, one psychologist and nine sociologists. The OSCE was informed by the Chief of Probation Service that recruitment is under way for 23 new Probation Service staff, of which 15 will be working as probation officers.
[27] Interview with the Head of the Probation Service conducted on 7 December 2005.
[28] UNMIK DoJ Weekly Report (29 November 2005 – 5 December 2005).
[29] The judges like to attribute the backlog of cases and resulting delays to the shortage of judges and other court staff. Out of 24 municipal court presidents attending regional meetings conducted by the OSCE, 22 municipal court presidents complained about the understaffing of the court and un-proportional distribution of judges between the courts. In reality, the backlogs are the result of a range of problems, including the inefficiency and poor case management of the judges themselves. See, Municipal Courts Report.
[30] Third Review of the Criminal Justice System (October 2001), hereinafter Third Review, p. 86.

This concern was raised again in the OSCE Report on Administration of Justice in Municipal Courts.[31]

The European Court of Human Rights case law places a duty on the judicial authorities to organize their legal systems so as to allow the courts to comply with the requirements of human rights standards.[32] In 1999, the judiciary was practically non-existent and the progress made by UNMIK to fill judicial posts should not be underestimated.[33] However, not enough has been done in the last few years to further strengthen the judiciary by appointing new judges to empty posts, allocating new posts to overloaded courts, or reallocating resources amongst the courts. This had adversely affected the ability of the courts to reduce their backlog and process cases speedily.

Recently, the authorities have started to deal more seriously with the inadequate distribution of judges. In March 2005, the KJI started training 57 candidates for judicial posts and, following the exam and interview, they will be assigned by the KJPC to municipal and minor offence courts, which have an insufficient number.[34] Further, the re-distribution of judges amongst courts is likely to go hand in hand with the re-structuring of the court system, which will occur if and when the draft Law on Courts is promulgated.

Although the justice system would have been better served if this injection and/or redistribution of judges had occurred years earlier, it is a welcome development and should go some way to relieving the backlog of cases.

ii. Minorities participation in the justice system

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[31] Municipal Courts Report, p. 30.
[32] *Zimmermann and Steiner v Switzerland,* ECHR, A 66 para. 29 (1983).
[33] There are no statistics on the number of judges and prosecutors in 1999. According to the DJA, in 2000 the number of judges in each level was: in Municipal Courts – 137 judges, in District Courts - 45 judges, in Supreme Court - 14 judges, in Municipal Minor Offences Courts – 115 judges, in High Court for Minor Offences – 5 judges. In 2005, there were: in Municipal Courts – 135 judges, in the District Courts - 46 judges, in the Supreme Court – 14 judges, in Municipal Minor Offences Courts – 96 judges and in the High Court for Minor Offences - 5 judges. With regard to prosecutors in 2000 there were: in Municipal Public Prosecutors Offices – 31 prosecutors, in District Public Prosecutors Offices – 19 prosecutors and in Kosovo Public Prosecutor's Office – 4 prosecutors. In 2005, the number of the prosecutors was: in Municipal Public Prosecutors Offices – 51 prosecutors, in District Public Prosecutors Offices – 32 prosecutors and in Kosovo Public Prosecutor's Office – 6 prosecutors. While the number of judges in 2005 is smaller than in 2000, the number of prosecutors in 2005 has increased, this due to the new role that public prosecutor has assumed after the entry into force of the new Provisional Criminal Procedure Code of Kosovo.
[34] Out of these 57 candidates, only 6 (six) of them will be assigned to minor offences courts.

There are enormous barriers to creating a multi-ethnic judiciary following an ethnic conflict. This has certainly been true in Kosovo. The absence of minorities - Kosovo Serbs, Kosovo Bosniaks, Kosovo Turks, Askali, Roma, Egyptians - in the judiciary has long affected the credibility of the judicial system in the eyes of minority groups. In 1999, the OSCE stated, "establishing a judicial system that reflects a diverse and multi-ethnic character is important in enhancing the impartiality of the judiciary and ensuring the non-discriminatory enforcement of the law."[35]

After the establishment of the Emergency Judicial System (EJS) in 1999, the difficulties of convincing minority members to participate in the judicial system became apparent. Between June 1999 and September 1999, the SRSG appointed a total of 55 judges and public prosecutors: 42 Kosovo Albanians, 7 Kosovo Serbs, 4 Kosovo Bosniak, 1 Kosovo Turk and 1 Roma.[36] However, citing security as an issue, the Kosovo Serb judges and prosecutors resigned in October 1999, leaving the EJS almost mono-ethnic. Efforts were made to recruit minority judges, but the participation remained relatively low. In December 1999, the OSCE has pointed out in its semi-public report[37] "[…] the lack of any Kosovo Serbs in the judiciary reduces the credibility of the court system and can lead to at least an appearance of bias. Kosovo Serb legal professionals should, therefore, be urged to resume their participation in the judicial system. Appropriate steps should be taken to address their concerns about participating, for example by providing adequate security measures." The concern about the lack of minority participation in the Kosovo justice system was reiterated in March 2000[38] emphasising that it is necessary to support in a systematic way the presence and effective participation of minority representatives in the judicial system. In March 2002, the OSCE has again recommended:

> "The judicial administrative authorities should appoint more judges and prosecutors from minority groups (especially Serbs) within the court system."[39]

The OSCE recognizes big and consistent efforts and commitment of UNMIK Pillar I for dismantling of the parallel structure of courts, which is one of the reasons for absence of Kosovo

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[35] OSCE Thematic Report no. 2: The Development of the Kosovo Judicial System (10 June through 15 December 1999).
[36] First Review, p. 11.
[37] OSCE Thematic Report no. 2 The Development of the Kosovo Judicial System (10 June through 15 December 1999), p. 5.
[38] OSCE Background report: "The Treatment of Minorities by the Judicial System," p. 6.
[39] OSCE Thematic Report on the "Administration of Justice"(March 2002), p. 20.

Serb judges and prosecutors from the Kosovo justice system and an obstacle for establishment of its multi-ethnic composition.[40]

However, the authorities have continued to encourage recruitment of minorities throughout the judicial system, which has led to a slow, but steady increase. The DoJ established the Judicial Integration Section, which has the mandate to address access to justice problems affecting minorities, monitor the treatment of minorities in the justice system and address instances of discrimination. The Section has been effective. There are currently 14 Kosovo Serb judges and 17 other minority judges, as well as two Kosovo Serb prosecutors and six other prosecutors belonging to minority groups, serving in the Kosovo justice system.[41]

In addition, UNMIK has opened courts or liaison offices in minority enclaves to facilitate the physical access to courts. For example, a branch of the Municipal Court of Prishtinë/Priština has opened in Gračanica/Graçanicë; Court Liaison Offices are opened in Novobërdë/Novo Brdo, Gorazhdevc/Goraždevac, Vrbovc/Verbovac, Hoça e Madhe/Velika Hoča, Priluzhë/Prilužje, Shillovë/Šilovo, Osojan/Osojane, Novak/ Novake, and Mitrovicë/Mitrovica.

The authorities will need to maintain these efforts to ensure that a multi-ethnic judiciary in Kosovo becomes engaged in the long term.

iii. Translation equipment

Following UNMIK Regulation 2000/46,[42] making English a court language in proceedings involving international judges or prosecutors, trials were frequently conducted in Albanian, Serbian and English. Trials conducted without use of simultaneous translation equipment became very lengthy. Thus, in March 2002, the OSCE recommended that:

> "To minimise delays, simultaneous translation equipment should be installed, as a matter of urgency, in every court where international judges or prosecutors are performing their duties."[43]

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[40] OSCE Thematic Report on the "Administration of Justice" (March 2002), p. 8.
[41] UNMIK DoJ Weekly Report,(20- 27 December 2005).
[42] UNMIK Regulation 2000/46 On the Use of Language in Court Proceedings in which an International Judge or International Prosecutor participates, promulgated on 15 August 2000.
[43] OSCE Thematic Report "On the Administration of Justice," p. 18.

Today, all regional courthouses, except in Pejë/Peć District Court, have been provided with simultaneous translation equipment. Delays due to translation have been significantly reduced.

iv. Distribution of Supreme Court decisions

In December 2004, the OSCE pointed out that, in many cases, the courts' reasoning in decisions on punishment does not comply with the requirements of the law.[44] The verdicts did not offer detailed and individualised assessments of the relevant circumstances in relation to the crime and the offender or a proper assessment of the mitigating and aggravating circumstances. The OSCE encouraged the Supreme Court to be bolder in its appellate decisions and recommended that the Supreme Court:

> "Instruct lower courts that verdicts and decisions relating to punishment should include a detailed and individualised reasoning."[45]

However, to have an effect beyond the individual case, Supreme Court decisions needed to be easily accessible to all lawyers and judges. On 2002 and 2003, the Kosovo Law Centre in cooperation with Kosovo Foundation for Open Society (KFOS), published the first two volumes of the Kosovo Supreme Court decisions. This process of publication required to be continuous and sustainable. Thus, the OSCE further recommended that:

> "The Department of Judicial Administration should ensure that all Supreme Court verdicts are published and made readily available to the judges and prosecutors at all levels."[46]

Encouragingly, a Memorandum of Understanding between the Kosovo Law Centre and the Supreme Court, dated 20 July 2005, aims to facilitate the publication of the Supreme Court Bulletin. It should contain all Kosovo Supreme Court's Opinions and Decisions, from 6 April 2004 to present.[47] The first volume is expected to be published in the second quarter of 2006 and it will be distributed to the judges, prosecutors, and defence counsel. The project is funded by the US Office.

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[44] Sixth Review, p. 46.
[45] Sixth Review, p. 62.
[46] Sixth Review, p. 62.
[47] The first volume is in process of finalisation and it contains 141 Supreme Court's verdicts and decisions issued in the period from 6 April 2004 to 6 April 2005.

The publication and distribution of Supreme Court decisions to lower courts should become a regular practice.

III. LEGISLATIVE DEVELOPMENTS

A. Justice Circulars

Justice Circulars are issued by the Director of the DoJ; they are formal, internal instructions for judicial actors. Although the recipient courts and prosecutors do not always abide by the instructions, Justice Circulars have regularly been used by the DOJ as a convenient way to influence practice. Understandably, for administrative issues the DOJ has sought to avoid resorting to the slower option of Administrative Directions.[48] However, the DOJ must be careful not to usurp the authority of the legislature or the Supreme Court by issuing Justice Circulars that effectively legislate or interpret the law.[49] The DOJ has issued a number of Justice Circulars to address concerns raised by the OSCE, examples of which follow:

i. Pre-trial detention decisions

From the start of its monitoring programme, the OSCE noted that many, if not most, pre-trial detention decisions were superficial and inadequate. Thus, in July 2000, the OSCE recommended**:**

> "[T]hat the SRSG revise the applicable law regarding the review of pre-trial detention decisions so as to, amongst others, include a fully reasoned written decision as to the basis for an order for continued detention."[50]

In response, the ADOJ (the DOJ's predecessor), issued Justice Circular 2000/27, dated 19 December 2000, reminding judges that all decisions on detention must be made on the basis of a fully reasoned written decision. Unfortunately, this Justice Circular has had little effect – in

[48] Administrative Directions have to be issued by the SRSG.
[49] This was done in at least one instance. For example in 19 March 2003 the DoJ issued the Justice Circular 2003/1 On the Validity of Driving Licences issued by Authorities of the Federal Republic of Yugoslavia (FRY), by which it instructs the judicial/prosecutorial authorities on how to decide in cases of driving licences issued and renewed by FRY authorities, under threat that any judge or prosecutor found to have not acted upon this Justice Circular, will be referred to the Judicial Inspection Unit and subjected to disciplinary sanctions which may include dismissal.
[50] First Review, p. 42.

December 2004 the OSCE published another substantial report exposing the same concerns that plague the criminal justice system, at all court levels.[51]

ii. Security measures for the mentally ill

In October 2001, the OSCE highlighted the problems relating to the treatment of the mentally ill within the criminal justice system. "Security measures" were being used to keep mentally ill persons, who needed medical help but had not been convicted of any crime, in detention.[52] The OSCE recommended that:

> "The ADOJ should issue its draft circular on the implementation on the Law on Non-Contested Procedure regarding mental health detention and confirming that legal assistance will be provided in all cases."[53]

Following this recommendation, the ADOJ issued Justice Circular 2001/20 On The Application of the Law on Detention of a Person in a Neuro-psychiatry Institution (Law on Non-Contested Procedure, 1986 Articles 45-55). The circular points out that all hearings on this issue should take place in the Municipal Court, before a panel of at least three judges, and sets forth the criteria for detention and the length of detention order.

iii. Witness Protection Programme

Protecting witnesses from threats or intimidation has been, and remains, one of the greatest challenges for the judicial authorities in Kosovo.[54] Research by the OSCE indicated that judicial actors were ignorant about the means available to protect witnesses, in particular, the Witness Protection Unit (WPU), which is a part of UNMIK operations structure. Accordingly, the OSCE recommended that:

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[51] Sixth Review.
[52] Third Review, p. 42.
[53] Third Review, p. 46.
[54] OSCE Fifth Review of the Criminal Justice System: "The Protection of Witnesses in the Criminal Justice System," hereinafter Fifth Review.

"The DOJ should issue a Justice Circular to all judges and prosecutors setting out the role of the WPU and the facilities available under the witness protection programme."[55]

The DOJ duly issued Justice Circular 2003/5 On Witness Protection Programmes, which clarified the procedure to be followed by the WPU with respect to the Witness Protection Programme. The circular described the duties and obligations of the WPU and noted that the WPU may adopt an alternative to enrolment in the programme at the instigation of a prosecutor or a judge. Through the circular the DoJ established a structured, co-ordinated relationship between the WPU, prosecutors and the courts. A number of efforts were made by the DOJ to enter into discussions with third countries to explore relocation possibilities. However, despite these efforts, lack of necessary funding and difficulties to relocate witnesses in third countries are continuously impeding the proper implementation of the programme.

B. Laws

UNMIK Regulation 1999/1 On the Authority of the Interim Administration in Kosovo referring to Resolution 1244, empowered the SRSG with the authority to promulgate laws. In the course of its monitoring, the OSCE has noted instances where it was necessary to introduce a new law or amend an existing law, in order to ensure compliance with international human rights standards. The OSCE has thus recommended changes to the law. The authorities have responded positively to a number of these recommendations. Two of the most important provisions are discussed below.

i. Application of human rights instruments

Immediately following the end of hostilities in the summer of 1999, there was a need to clarify the applicable law. UNMIK's Regulation 1999/24 promulgated on 12 December 1999, created four possible sources of applicable law in Kosovo:

- The law in Kosovo as it existed on 22 March 1989;
- UNMIK Regulations and subsidiary instruments issued there under;

[55] Fifth Review, p. 26.

- The law applied in Kosovo between 22 March 1989 and 12 December 1999 (the date when Regulation 1999/24 came into force) if this is more favourable to a criminal defendant; if it fills a gap where no law from March 1989 exists and, if it is non-discriminatory;
- International human rights standards, as reflected in international human rights instruments.

Regulations were to take precedence over the 1989 law, but the hierarchy between the other sources of law was not made clear and; in particular; the supremacy of international human rights laws over domestic laws was not expressly stated. In July 2000, the OSCE recommended:

> "[T]hat the SRSG issue an Administrative Direction which confirms that:
>
> - international human rights law is supreme over all other laws;
> - judges and public prosecutors are obliged not to apply provisions of the FRY CPC[56] that are in conflict with these standards;
> - in line with these obligations, judges and public prosecutors shall use international human rights standards to address issues which are not addressed by the FRY CPC."[57]

No such Administrative Direction was issued. However, the thrust of the concern was addressed through the issuance of the Constitutional Framework, which was promulgated on 15 May 2001.[58] Article 3.1 states that "all persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms", and that human rights laws as set out in the major international instruments, are directly applicable in Kosovo.[59] Consequently, it became clear that every institution, administrative body, organisation or "presence" in Kosovo, be it local or international, is bound by the requirements of international human rights law.

ii. Provisional Criminal Code and Provisional Criminal Procedure Code

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[56] Criminal Procedure Code of the Socialist Federative Republic of Yugoslavia.

[57] For example, the articles which appeared to be in breach of the ECHR include Article 74 FRY CPC, which allowed the investigating judge to interfere in the defendant's communication with his or her lawyer. Article 152 FRY CPC allowed the police to detain witnesses at the scene of a crime for up to six hours until the arrival of the examining magistrate. This article was in breach of the ECHR as detention for the purposes of being brought before a investigating judge as a witness is not, in and of itself, a valid reason for detention under ECHR Article 5(1). See First Review, p. 18.

[58] UNMIK Regulation 2001/9 On the Constitutional Framework for Provisional Self Government in Kosovo.

[59] See Constitutional Framework, 3.3 "The provisions of rights and freedoms set forth in these instruments shall be directly applicable in Kosovo […]."

The Regulation 1999/24 On the Applicable Law in Kosovo was a useful clarification on a number of issues, but it did not completely drain the legal quagmire. In July 2000, the OSCE has emphasised that, although the existing criminal legislation in Kosovo generally did comply with international standards, many provisions did not.[60] In order to fully clarify the law and to bring it in line with European standards, UNMIK decided to draft an entirely new criminal code. This process commenced in 2000. In November 2001, the Joint Advisory Council on Legislative Matters, in cooperation with the Council of Europe, finalised the initial drafts of the new codes. The process included input from the OSCE, UNICEF, the American Bar Association Central and Eastern European Law Initiative (ABA CEELI),[61] and legal practitioners and academics from Kosovo.

But the finalisation process was slow. Human rights violations, such as inability to challenge lawfulness of detention at any stage of the proceedings, continued to be noted, which would not have occurred had the new codes been introduced. In September 2001, the OSCE recommended that, "the new Criminal Code and Criminal Procedure Code should also be promulgated immediately."[62] Finally, at the beginning of 2003, the Provisional Criminal Code and the Provisional Criminal Procedure Code were sent by UNMIK to the Office of the Prime Minister of Kosovo for review by the Government and Assembly of Kosovo, and on 7 May 2003 the Commission for Judicial Matters, Legislative Matters and the Constitutional Framework reviewed the draft Provisional Codes and submitted its recommendations to the Kosovo Assembly.[63] Both Codes came into force on 6 April 2004.

IV. PRACTICE DEVELOPMENTS

A. The Courts

The OSCE has raised concerns regarding court practices which have fallen short of international human rights standards. Despite continuing concerns (See Chapter IV), there have been some encouraging developments in the Kosovo courts. These can be measured by comparing the frequency of human rights violations observed in 1999/2000 with that of 2005. These

[60] First Review, p. 17.
[61] Now called American Bar Association Central European and Eurasian Law Initiative.
[62] Fourth Review of the Criminal Justice System (September 2001-February 2002) hereinafter: Fourth Review, p. 58.
[63] Fifth Review, p. 53.

improvements are due to capacity building efforts such as trainings and workshops, substantial changes in the applicable law, and in-court efforts by the judges themselves. Examples appear below:

i. Treatment of minorities in the judicial system

Judicial impartiality is a vital component in any justice system. In the post conflict environment in Kosovo, it has been a particularly acute issue. In July 2000, the OSCE observed:

> "A long and continuing climate of ethnic conflict, has severely impacted upon the objective impartiality of the courts and raised concerns as to actual bias on the part of certain judging panels. The response of the relevant authorities has been reactive and *ad hoc* – resulting in the unequal treatment of defendants before the courts and the denial of basic facilities by which to adequately prepare and present the defence."[64]

These concerns were partly addressed by UNMIK through the international judge and prosecutor programme (see section below). But this alone did not resolve the worry about impartiality amongst the local judges. The OSCE has closely monitored cases involving ethnic monitories. Between 2001 and 2005, the OSCE noted that there were no reports by the court monitors which would indicate, in cases monitored, any suspicion regarding bias by judicial panels.[65] These are encouraging signs. From January until December 2005, the OSCE monitored 81 cases involving minorities and has not reported any cases of ethnic bias, in the cases monitored.[66] The Judicial Inspection Unit of the DoJ has not processed any case of allegation against judges to the KJPC, due to ethnic bias.[67] Furthermore, it has also to be taken into account that many high-profile cases with an inter-ethnic element are still being handled by international judges and prosecutors. The OSCE agrees that presence of international judges and prosecutors in the Kosovo justice system is still very much needed because of the "[…] continued presence of security threats which may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly

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[64] First Review, p. 58.
[65] The DoJ Judicial Inspection Unit has informed the OSCE that there were no cases of allegations on ethnic bias during 2005.
[66] In Prishtinë/Priština were monitored 11 cases involving minorities, in Peja/Peć were monitored four cases, in Gjilan/Gnjilane were monitored eight cases, in Prizren were monitored nine cases and in Mitrovicë/Mitrovica were monitored 49 cases.
[67] Information received by the JIU on 22 December 2005.

prosecute crimes, which gravely undermine the peace process and the full establishment of the rule of law in Kosovo."[68]

ii. Victims of sexual assault

In 2000, LSMS monitored criminal cases involving violence against women, particularly sexual assault. It noted with concern the unprofessional attitude of the police, prosecution and judiciary towards the victims, which ran contrary to international standards.[69] For example, in a number of cases the presiding judge asked inappropriate questions, appeared to be biased against the victim, and gave no consideration to the victim's privacy. The prosecutors did little to prevent the harassment of the victim and victim advocates were rarely present.[70] The problem was particularly acute with respect to juvenile victims. In July 2000, the OSCE recommended:

> "The KJI should provide further training for judges, public prosecutors, defence counsel and law enforcement authorities on the appropriate treatment and questioning of victims/witnesses in cases involving sexual violence."[71]

The ability of judges and prosecutors to deal sensitively and maturely with cases of sexual violence has steadily increased. During 2005, the OSCE has observed very few cases in which the courts have failed to act appropriately.[72] Isolated problems are noted, but are no longer systemic. Further, extra protection for juveniles has been introduced through the Juvenile Justice Code (JJC), and currently all cases involving juvenile victims of the sexual crime are handled by the juvenile panel.[73]

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[68] UNMIK Regulation No. 2005/50 Amending UNMIK Regulation no. 2000/64, as amended, On Assignment of International Judges/Prosecutors and/or Change of Venue, enacted on 12 December 2005.
[69] Article 4 (c) of the *UN Declaration on the Elimination of Violence Against Women* places an affirmative obligation on governmental authorities to "exercise *due diligence* to prevent, *investigate* and, in accordance with domestic legislation, *punish acts of violence against women*, whether those acts are perpetrated by the State or by private person" (emphasis added)."
[70] First Review, p. 79-86.
[71] First Review, p. 37.
[72] OSCE's HRRoL Departmental Monthly Report, February 2005.
[73] Promulgated through UNMIK Regulation 2004/8 Juvenile Justice Code of Kosovo (JJC), dated 20 April 2004. Article 141 of the Juvenile Justice Code (JJC) stipulates that the juvenile panel and juvenile judge shall try adults for certain criminal offences which are committed against a child. This provision was introduced with the intent of providing juveniles who have been victims of certain types of serious criminal offences with a special protection within the criminal justice system, in compliance with the applicable international standards.

iii. Access to defence counsel

International human rights law provides suspects and defendants the right to access to defence counsel. It is fundamental that the courts protect this right. However, in 2000, the OSCE has identified a number of breaches of this right and noted, "in many cases the courts have failed to provide [legal] representation, despite the fact that the defendants faced possible imprisonment."[74] This failure was prevalent in cases charging foreign women for prostitution, many of whom claimed to be victims of trafficking. In 2000, the OSCE interviewed detainees throughout Kosovo and found that none had been given access to defence counsel prior to the first detention hearing.[75] The OSCE recommended that:

> "The courts must ensure that the detention hearings are effective and that the detainee has access to an adversarial forum to properly challenge any order for continued detention."

Monitoring of current practices indicates that, in general, the courts have significantly improved. It is now very rare to note criminal cases in which a court has failed to protect the right to access defence counsel respectively to access an adversarial forum to challenge orders for detention.

B. Extra-judicial detentions

i. Executive detentions by the SRSG

In mid 1999, the SRSG began to use his executive power to order extra-judicial detentions. The SRSG ordered the detention of persons whom he suspected of having committed a criminal act and whose identity could not be established, who would flee, destroy evidence, hinder the investigation, or where the criminal act was likely to be repeated. Many of those arrested under these executive orders had already been released by the courts (including, by international judges). The SRSG ordered executive detention on six occasions in 2000 and 2001. The OSCE considered these extra-judicial detentions to be illegal; there was no legal basis for making these decisions and there were

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[74] First Review, p.17. See also LSMS Report No.7: Access to Effective Counsel, Stage 1: Arrest to the First Detention Hearing, 23 May 2000.
[75] See LSMS Report No.7: Access to Effective Counsel, Stage 1: Arrest to the First Detention Hearing, 23 May 2000.

no available means for judicial review.[76] Furthermore, the executive orders amounted to interference in the independence of the judiciary. In April 2001, the OSCE stated:

> "It is a fundamental aspect of international human rights law that a person deprived of their liberty be able to challenge the lawfulness of his detention. Judicial review of executive detentions would ensure that they are not arbitrary."[77]

In an attempt to regulate the detentions, on 25 August 2001 UNMIK enacted Regulation 2001/18 On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders. The Regulation provided for a mechanism to review detentions ordered by the SRSG. However, as the OSCE pointed out, the Detention Review Commission was wholly inadequate due to its lack of independence.[78] More executive detentions took place. In its next major report in October 2001, the OSCE recommended that:

> "[T]he practice of extra-judicial detentions can effectively be replaced by initiating a mechanism (system) to allow sensitive evidence to be heard within the criminal justice system, whilst respecting the rights of the defendant to challenge detention."

In 2001, the DOJ implemented an initiative whereby one of its staff members, who was able to obtain security clearance, would review sensitive or intelligence material. However, successive SRSGs have been reluctant to renounce officially the use of executive detentions and have maintained the possibility of using this mechanism in the future. Notwithstanding the above, the

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[76] Article 9 and 14 of the ICCPR and Article 5 and 6 of the ECHR, provide a framework for the protection of persons subject to any form of arrest or detention. Art. 9(1) states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." This provision is mirrored in Art. 5(1) of the ECHR. The right to be able to challenge any detention before a judicial body with the power to order release (*habeas corpus)* is a fundamental and non-derogable principle of international law, applicable even in times of emergency. See OSCE's Third review of the Criminal Justice System (October 2001), hereinafter: Third Review, p. 34.

[77] Second Review, p. 17.

[78] The commission established under UNMIK Regulation 2001/18 was an ad-hoc quasi judicial organ, outside the regular court system, whose members were selected and appointed by the SRSG. Thus, it could not be considered as a tribunal within the meaning of Article 6 ECHR and Principle 5 of the Basic Principles on the Independence of the Judiciary - apparent dependency on the executive disqualifies a body from being independent (see *Findlay v. the United Kingdom*, European Court of Human Rights, Judgement of 25 February 1997, para 73). The commission merely usurped the jurisdiction of the regular courts; it did not provide an "independent judicial review" of the detentions, as required under international law. Third Review, p. 34.

actual practice of executive detentions has ceased. The SRSG has not ordered the use of extra judicial detention since 19 December 2001.

ii. Extra-judicial detentions by KFOR

According to UNSC Resolution 1244, KFOR has the responsibility for "ensuring public safety and order." From 1999, KFOR detained persons it considered to be a threat to the "safe and secure environment" (sometimes despite a lawful order to release by a judge).[79] They were detained at the US Military Base, Camp Bondsteel. In total, KFOR has detained around 3,600 persons. In nearly all the instances, the OSCE considered these extra-judicial detentions to be illegal and, since the regular legal system had the capacity to deal with the cases, unjustified.[80] In July 2000 the OSCE recommended that:

> "An order by COMKFOR to detain should cease until such time as they can be appropriately reviewed by a court."[81]

Numerous recommendations to the same effect have been made since.[82] However, KFOR continued to argue that extra-judicial detentions were justified and, until relatively recently, continued to illegally detain persons.[83] This practice now seems to have stopped. With the exception of short, justifiable detentions carried out during the riots of March 2004, the OSCE is currently not aware of any illegal detentions by KFOR.

iii. A mechanism for habeas corpus

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[79] Letter from KFOR to the OSCE's Head of Mission on 6 September 2001.
[80] The two key concerns are the lack of a clear legal basis for the detention compatible with international law, and the absence of judicial review of the detentions. However, the OSCE considered the limited detentions during the extraordinary events of March 2004 to be justified in the circumstances (KFOR detained rioters for a limited period before handing them over to the regular judicial authorities).
[81] First Review, p. 42.
[82] Third Review, p. 45, Fourth Review, p. 51, Fifth Review, p. 34.
[83] According to KFOR, their power to detain was derived from Resolution 1244, which mandated KFOR to "ensure[…] public safety and order until the international civil presence can take responsibility for this task." (Para. 9(d)). KFOR argued that the civil police and judicial system could not deal with the public safety and order.

The lack of a mechanism for *habeas corpus* has been a serious lacuna in the legal protection for detainees, in particular those detained extra-judicially by executive order or by KFOR who had no recourse to the courts. In July 2000, the OSCE recommended that:

> "[…]UNMIK establish a proper mechanism by which all persons detained in Kosovo can challenge the lawfulness of their arrest and detention at any time."[84]

Four years after this recommendation, a mechanism for *habeas corpus* was finally introduced with the new criminal legislation. In article 286 paragraph 2 of the Provisional Criminal Procedure Code (PCPC), it is stipulated that at any time, the detainee or his/her defence counsel may petition any pre-trial judge or presiding judge to determine the lawfulness of detention. This was a welcome, albeit late development.

C. The Defence Bar

Defence counsel play a crucial role in ensuring the protection of human rights in any legal system. In a post conflict, transitional environment such as Kosovo, this is especially important. But the influence of defence counsel can extend beyond the protection of human rights in individual cases – well presented arguments by the defence force the judges and prosecutors to raise their standards generally. This is particularly true in light of the additional responsibilities of defence counsel under the PCPC.[85] Thus, the defence bar has the potential to be a key player in the development of the criminal justice system from a human rights perspective. For these reasons, the OSCE has been keen to work with the defence bar by analysing the effectiveness of the defence, raising concerns observed through monitoring, and suggesting solutions.[86]

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[84] First Review, p. 40.
[85] The OSCE has observed that: "Under the new criminal procedure code, defence counsel's role is more adversarial in nature, demanding a more pro-active, in-depth approach to casework than may have been expected under the previous procedure code. In large part, these developments require more assertiveness on the part of local counsel, closer contacts with the client, in-depth investigative efforts, and more specific and supportive arguments, enabling the accused and his advocate to put forth the best possible defence." Sixth Review, p. 68.
[86] The OSCE has started since 1 January 2005 to deliver to the member of the KCA its monthly reports in which identify shortcomings of the judicial actors, including defence counsel. These monthly reports provide recommendations to remedy the irregular practices. The LSMS has held a number of meetings with the representatives of the KCA to discuss concerns.

Over the last five years, the OSCE has observed cases in which defence counsel have failed to protect the rights of their clients and breached the domestic code of conduct.[87] This has led to violations of the accused's right to an effective defence.[88] These concerns were initially highlighted in July 2000[89] when the OSCE noted that "in trials monitored by LSMS, defence counsel seem more like bystanders than lawyers who should be actively engaged in the effective representation of their client."[90] Subsequent OSCE reports have carried special chapters dedicated to defence related concerns.[91] In response to the recommendations, the KCA, some defence counsel, and other authorities have made efforts to raise the standards of the defence bar or provide better conditions for defence work. Thus, although many concerns remain (see CHAPTER III), there have also been some noticeable improvements in practice, as well as positive institutional steps. A selection is outlined below:

i. The Kosovo Chamber of Advocates

In July 2000,[92] the OSCE recommended that a Code of Ethics be introduced:

> "A Code of Ethics providing guidance as to the conduct and responsibilities of prosecution and defence counsel, particularly court-appointed defence counsel, should be issued."

Over five years later, on 11 June 2005, the Assembly of the KCA approved the Code of Lawyer's Professional Ethics , which came as successor of the Code of Lawyer's Professional Ethics from 30

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[87] The relevant standards are enshrined within the domestic law and the Kosovo Code of Lawyers' Professional Ethics (see Articles 12 and 69-77 PCPC; Articles 11 and 67 -75 FRY CPC; sections 2(d) and 3 of UNMIK Regulation 2001/28 On Rights of Persons Arrested by Law Enforcement Authorities). These provisions oblige defence counsel to play an active part throughout the proceedings so as to ensure that the rights and interests of their clients are protected.

[88] The basic right to legal representation for persons charged with criminal offences is laid down in Articles 5 and 6 of the ECHR and in Articles 9 and 14 of the ICCPR. Other relevant international documents are the Standard Minimum Rules for the Treatment of Prisoners and the Basic Principles of the Role of Lawyers. The right to legal representation applies at all stages of the criminal proceedings and is of particular relevance where a person is detained, to ensure that the principle of fairness and equality of arms is respected. When legal assistance is provided, relevant authorities are under the obligation to ensure that such assistance is effective (*Artico v Italy*, ECHR, 13 May 1980, para. 33).

[89] LSMS reports number 7 and 8 On Access to Effective Counsel, dated 23 June and July 2000.

[90] First Review, p. 49.

[91] See for example, First Review, Section 5: The Right to Counsel, p. 45-57; Second Review, Section 4: The Right to Effective Representation, p. 37-40; Third Review, Section 3: The Right to Effective Legal Representation, p. 19-31; Fifth Review, Section 4(D): Access to Effective Defence Counsel, p. 45-50; Sixth Review, Chapter on The Right to Effective Defence, p. 68-72.

[92] First Review, p. 55.

August 2001, approved by the same body. The Code sets out basic principles and seeks to regulate areas such as professional confidentiality, lawyer client relationships, lawyers' responsibility in criminal cases, lawyers' relationship with the KCA, representation expenses, etc. It is too early to see the benefits of the Code, but the OSCE is hopeful that the extra regulation it provides will help raise standards at the defence bar.

But a Code of Ethics alone is not enough to raise the standard of defence. Intensive training is also required. Thus, in October 2001, the OSCE has recommended that:

> "All relevant personnel, including judges, prosecutors and defence counsel, must be provided enhanced practical training on their roles and responsibilities to ensure that the rights of the accused to an effective defence during both the investigation and the trial phase are upheld."[93]

In response, the KCA has conducted a number of trainings, seminars and workshops, often in conjunction with the OSCE.[94] It has created a special Committee on Continuous Legal Education which designs training programmes. In March 2004, the Committee adopted the Fundamental Rules on the Continuous Legal Education, by which all registered lawyers will be included in the accredited training programmes and special facilities will be provided to minority members and women. Indeed, despite the fact that the continuous legal education for defence counsel is not mandatory (since the Law on Advocacy has not been yet promulgated), it is one of the requirements of the Kosovo Standards Implementation Plan.[95]

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[93] Third Review, p. 31.
[94] The OSCE and KCA have developed the "Continuing Legal Education"(CLE) programme for newly licensed members of the Chamber. It has held 14 sessions from September 2004 until June 2005, for 50 lawyers who became members of the KCA. The current "Training of Trainers for the Kosovo Chamber of Advocates" project, sponsored by the OSCE, envisages intensive three day training of selected trainers on presentation skills and methods for an interactive presentation. Trainers who complete the programme will be engaged by the KCA as lecturers in the continuing legal education projects. Further, the OSCE and KCA designed professional training courses for law graduates undergoing their practitioner period. Twenty one training sessions were held in 2005 for the benefit of 20 practitioners of the KCA and ten judicial practitioners of the Kosovo Judges Association.
[95] Rule of Law Standard 10.5.

More recently, senior members of the KCA have worked closely with the OSCE to address the concerns raised in the OSCE reports. The Vice President of the Chamber of Advocates and the Head of the Committee for Continuous Legal Education, stated:[96]

> "[C]onsidering the need for competency, professionalism and ethics, the Chamber of Advocates is now developing Programmes that would provide professional knowledge to the lawyers and raise their respect for the ethics.[97] […] LSMS reports present a remarkable instrument for identification of the needs for legal education of the lawyers."

The Committee for Continuous Legal Education has dedicated one 'coordinator' to analyse the parts of the OSCE reviews and brief the full Committee on the shortcomings of defence counsel highlighted therein. The Committee uses these findings to design its educational programmes.[98]

On the other hand, the valuable professional support provided by the CDRC has assisted in developing and further strengthening the professionalism of defence counsel.

Over the last six years from its re-establishment on 29 April 2000, the KCA has been gradually developing into a meaningful and effective association for the support and the regulation of the defence bar. It has taken time, but the KCA is finally proving to be an important force for development of effective defence representation.

ii. Defence Counsel

In addition, individual defence counsel have made efforts to raise their standards, partly by learning from the shortcomings highlighted in LSMS reports.[99] The KCA has pointed out that:

> "Under conditions when, as in Kosovo, there is a lack of law commentaries, legal literature and internet access is limited, there is no published court practice or legal data base, the

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[96] Letter from Mr. Musa Dragusha to LSMS, dated 20 April 2005.
[97] The programmes include: intensive legal education; intensive education for new lawyers; continuous legal education; and, continuous compulsory legal education.
[98] "Based on the deficiencies of the lawyers during the representation of cases in legal proceedings identified by the LSMS monitors and published in periodic reports, the Continuous Legal Education Committee identifies the needs for educational programmes." Letter from Mr. Musa Dragusha to LSMS, dated 20 April 2005.
[99] "The lawyers have started to use the findings in the report as a tool for supporting their motions especially regarding the detention." Letter from Mr. Musa Dragusha, to LSMS, dated on June 2005.

> LSMS reports are becoming a priority and incomparably useful, valuable references, and for defence counsel an excellent tool to support their objections and challenge the inconsistent Court practice."

The OSCE has observed improvements in the quality of representation in a number of areas. OSCE monitors have witnessed less instances of inactivity of the defence counsel in relation to cross-examination of the prosecution witnesses, initiative for imposition of alternative measures to punishment and detention and more frequent use of international human rights case law, to support the arguments of defence. For example, the PCPC introduced a number of options for non-custodial punishment. However, during the initial six months of the new codes, defence counsel appeared unwilling to urge the court to consider them. Thus, in December 2004, the OSCE recommended that:

> "Defence counsel should, where appropriate, urge the court to consider alternatives to imprisonment in the event of a guilty verdict, and present relevant mitigating circumstances."[100]

The OSCE has noted positive developments as defence counsel propose the use of alternatives to custody. In many cases, the courts have gone on to impose non-custodial measures.

iii. Other Authorities

The OSCE recognises that defence counsel often have to work under difficult conditions, which makes it harder to use their full potential to represent their clients. Thus, the OSCE has made a number of recommendations to relevant authorities aimed at improving the conditions for defence counsel.

The OSCE noted that Article 74 (2) of the FRY CPC, which empowered the investigating judge to monitor and restrict a defendant's communications with his lawyer, was contrary to international standards protecting the confidentiality of such communications. Authorities who followed this provision were adversely affecting the ability of the defence lawyers to provide an effective defence. Thus, in July 2000, the OSCE recommended:

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[100] Sixth Review, p. 72.

> "KFOR, UNMIK police and UNMIK Penal Management must ensure that the accused and his/her defence counsel are able to communicate freely, without time or other restrictions, at all stages of the criminal process. The accused and his/her defence counsel must be guaranteed confidential communications, whether written or oral, at all stages of the criminal process. Oral communications may take place within the sight, but not the hearing, of others. UNMIK and the courts must provide all necessary facilities for such communications. Provisions of the domestic law in violation with international standards, specifically article 74 (2) FRY CPC, must be amended or abolished."[101]

Initially, the authorities did not act upon this recommendation and the problems continued. In October 2001, the OSCE reiterated its recommendation and stressed that "Article 74(2) FRY CPC must not be applied."[102] Finally, on 28 February 2002, the DOJ issued Justice Circular 2002/2 on Policy of Power Of Attorney Authorised Visits For Lawyers Who Wish To Visit Their Clients In Detention Centre/Prison. The Circular provides that, due to non-compliance of Article 74 of FRY CPC with internationally recognised human rights standards, defence counsel only once need to file their power of attorney with the detention centre authorities and thereafter will be able to meet freely with their clients. The OSCE records that current practice followed by the detention centres, in general, is that the defence counsel only once need to file their power of attorney with the detention centre authorities; the duration of their visit is not restricted and the communication between defence counsel and the detainee is confidential *i.e.* within sight but not earshot of the detention centre personnel.[103]

V. DEVELOPMENT OF THE INTERNATIONAL JUDGE AND PROSECUTOR PROGRAMME

From June 1999, UNMIK had the responsibility to create a competent, independent and impartial judiciary in which people from all the ethnic communities felt represented. This was not an easy task immediately following an ethnic conflict where community distrust was widespread. There

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[101] First Review, p. 55.
[102] Third Review p. 31.
[103] In the Detention Center in Prishtinë/Priština, for example, the defense counsel needs to obtain permission from the pre-trial judge to meet his client. This is in accordance with article 294 of the new PCPC. Once permission is granted, the defence lawyer may visit the detention center without seeking further authorization. In the permission it is pointed out whether or not the lawyer-client communication will be in the presence of prison guards, within sight but not hearing. In Mitrovicë/Mitrovica Detention Centre the rules are the same and communications between the defence counsel and detainee are confidential, except in special cases where, for security reasons, guards might be present, within sight but not earshot.

were two major hurdles to creating a competent, ethnically mixed judiciary: Firstly, finding experienced Kosovo Albanian judges to recruit;[104] and secondly, persuading practitioners from the Kosovo Serb community to participate. In the initial round of hiring, only seven Kosovo Serbs were recruited. However, by October 1999, all had resigned (citing lack of security and discrimination). This left an inexperienced, mono-ethnic judiciary to deal with highly charged ethnically motivated crimes, including war crimes.[105] The looming potential for perceived or real judicial bias needed to be addressed. The introduction of ethnically neutral judges and prosecutors into the domestic criminal justice system became an option.

As early as December 1999, the OSCE recommended the introduction of international judges and prosecutors into the domestic criminal justice system, to deal with the war crimes cases and inter-ethnic cases:

> "Incorporating the participation of international judges or prosecutors: In the early stages of establishing a new judicial system in Kosovo, international judges and prosecutors can assist with disseminating and promoting the application of international human rights standards. The participation of international judges and prosecutors may be particularly helpful in national tribunals for violations of international humanitarian law."[106]

The OSCE considered that the experience and ethnic neutrality of international judges would introduce a greater respect for fair trial norms and reassure the Kosovo Serbs that war crimes trials would be adjudicated fairly.

UNMIK cautiously introduced the international judges and prosecutors into the domestic system. Initially, in February 2000, UNMIK assigned one international judge and one international

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[104] This was a problem because few Kosovo Albanians had practiced law since 1989 because they had been dismissed from the system by the former Serbian regime. And those Kosovo Albanians who had worked throughout the 1990's, after the conflict were denounced as collaborators of the Serbs by the Albanian community.

[105] The Technical Advisory Committee on Judiciary and Prosecution Service (TAC), established in September 1999, in its report dated 13 December 1999, recommended the establishment of an extraordinary domestic tribunal with jurisdiction over war crimes and other serious violations of international humanitarian law and serious ethnically motivated crimes. The proposed court has been named the "Kosovo War and Ethnic Crimes Court" (KWECC). The project for establishment of such court has been abandoned in September 2000, partly due to fundraising issues and difficulties in finding suitable premises, and mainly because the Programme of International Judges and Prosecutors' have shown to be successful.

[106] Report 2 - The Development of the Kosovo Judicial System (10 June through 15 December 1999), 17 December 1999.

prosecutor to Mitrovicë/Mitrovica, to deal with those arrested in the ethnic clashes in early 2000. When, in spring 2000, Kosovo Serb prisoners went on a hunger strike to protest against prolonged detention and demanded that their cases be heard by international judges, UNMIK started to expand the programme and increased the number of international judges and prosecutors.[107]

However, the OSCE noted concerns in the manner in which trials of an inter-ethnic nature were administered by Kosovo Albanian judges and prosecutors. The number of international judges and prosecutors was insufficient to deal with the perceived or real judicial bias.[108] Accordingly, in October 2000 the OSCE recommended:

> "Cases involving allegations of war crimes, serious ethnically motivated crimes or other politically charged offences must be prosecuted by international prosecutors and presided over by a single international judge or a panel with a majority of international judges."[109]

The OSCE also noted that the trial panels were made up of five judges (two professional and three lay) and that "the equal distribution of voting powers to all judges severely reduces any real impact that the international judge may have upon a potential verdict motivated by ethnic bias."[110]

By the end of 2000, ten international judges and three international prosecutors were assigned throughout Kosovo to deal mainly with war crimes cases. However, because there was only one international judge per panel of five, the problem of international judges being outvoted, left the potential ethnic bias issue unresolved. In response, in December 2000 Regulation 2000/64 On the Assignment of International Judges/Prosecutors and/or Change of Venue (Regulation 64) was promulgated. The Regulation gave UNMIK the power to assign to a case a panel of three professional judges with a minimum of two internationals.[111] The SRSG was empowered to assign international judges or prosecutors when "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice." International prosecutors were empowered with broad discretion to take on any of the national pending cases. The enactment of Regulation 64

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[107] This was achieved through UNMIK Regulation 2000/34 Amending UNMIK Regulation 2000/06 of 15 February 2000 On the Appointment and Removal from Office of International Judges and International Prosecutor, promulgated on 29 May 2000.
[108] See the discussion in the First Review, p. 58-75.
[109] First Review, p. 75.
[110] First Review, p. 70.
[111] UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, enacted on 15 December 2000.

went a long way to satisfying the initial shortcomings in the programme and the procedure remains still active today.[112]

Since the enactment of Regulation 64, all war crimes cases have been heard by a panel comprising (at least) a majority of international judges. To date, international prosecutors have prosecuted 502 cases. Although the programme could have been more effective, it has been a vital component in dealing with inter-ethnic crimes and, more recently, organised crime in the post conflict environment.

[112] For a more detailed history of the IJP programme see "How the United Nations Interim Administration in Kosovo Dealt with the Issue of Ethnic Bias in the Judiciary" by Richard Rogers (Strategy for Transitional Justice in the former Yugoslavia, Humanitarian Law Centre, 2005).

CHAPTER 3
CONCERNS THAT HAVE NOT BEEN ADDRESSED

I. INTRODUCTION

In its Reports, the OSCE has continuously raised the concerns and reported on human rights shortcomings observed in the justice system. It has emphasized that both local and international judges and prosecutors regularly breach applicable law, including human rights provisions; defence counsel fail to properly represent their clients; the KCA lacks control over its members; payments to *ex officio* defence counsel and experts are notably slow; appropriate facilities are lacking for juvenile and mentally ill offenders; witness intimidation is rife and courts lack the equipment to apply protective measures; and, perhaps most worryingly of all, UNMIK has only just started to implement its transition strategy in which competences for judicial matters are handed over to local actors and institutions."[113] This Chapter 3 focuses on the concerns that have been raised by the OSCE, but have not been adequately addressed by the authorities, if at all.

Chapter 3 follows the same structure as the previous Chapter. It is split into four parts: concerns relating to institutions; legislative issues; concerns relating to practice; and concerns relating to the international judges and prosecutors programme.

II. CONCERNS RELATING TO INSTITUTIONS

A. The courts

i. Lack of office space

Concerns related to the lack of space both in court offices and courtrooms have been reported by the OSCE in March 2002.[114] In March 2004, the OSCE again reported[115] that the vast majority of trials in municipal courts are held in the offices of the presiding judges. These offices are not designed to allow for the public to attend, given that the presence of the court personnel, the parties, and their legal representatives take up the capacity of the office thus breaching the accused's right to

[113] Sixth Review, p. 13.
[114] Report on the Administration of Justice (March 2002), p. 18.
[115] Municipal Courts Report, p. 25.

a public trial. The OSCE is concerned that the situation regarding the insufficient working space and lack of courtrooms, has not improved.

ii. Salary levels

The low level of salaries has long been a source of discontent amongst Kosovo's judiciary. In most of the meetings with the OSCE, the judges complain about their levels of salary and questioned the authorities expectations of high quality case-work when the compensation package is so discouraging. The OSCE believes that higher salaries are needed to encourage good lawyers to join the bench and to prevent corruption. Thus, as early as December 1999, whilst recognising the inherent limits on the public purse, the OSCE recommended that:

> "The payment of judges, prosecutors, and other civil servants working in the judicial system should be set at levels commensurate with their basic living standards as well as with their specialised skills. In particular, the salaries of judges and prosecutors should be set well above the current stipend levels to ensure that the judicial system is able to recruit the highest quality professionals and to guard civil servants from the pressures of corruption."[116]

Although the levels have increased since 1999, they remained low. In March 2002, the OSCE again raised the issue of low salaries:

> "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."

However, the authorities have resisted the calls for a meaningful increase. Indeed, salaries have not been increased since 2002, when a 5% increase was authorised.[117] Currently, the monthly net

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[116] Observations and Recommendation of the OSCE Legal System Monitoring Section: Report 2 – The Development of the Kosovo Judicial System, 17 December 1999.
[117] ABA CEELI, Judicial Reform Index for Kosovo, October 2004, p. 27.

income for judges is as follows: Supreme Court – 538 EUR; District Court - 479.50 EUR; and Municipal Court - 420.06 EUR.

B. Detention facilities

i. Non-custodial alternative punishments

Non-custodial alternative punishments require institutional support. Without that support, punishments can not be properly implemented, if at all, and thus do not constitute real alternatives. The OSCE has observed a serious lack of institutional capacity in Kosovo, which limits the range of punishments available. Though efforts have been made to bolster institutional capacity, notably the creation of the Probation Service, institutional vacuums still restrict the courts' abilities to apply different punishments. In December 2004, the OSCE recommended that:

> "The Department of Justice should ensure that the necessary institutional capacity for the implementation of the measures and sanctions foreseen in the law is properly established and maintained. This includes: the establishment of an institution for mandatory rehabilitation treatment for drug and alcohol addictions; and, preparations for the execution of imprisonment in semi-liberty."[118]

The lack of institutional capacity is particularly acute in the area of juvenile justice, where the courts are severely restricted in terms of sentencing options for convicted juveniles.[119] Of the institutions foreseen in the law, disciplinary centres, educational institutions, special care facilities, and foster homes are lacking. Thus, in December 2004, the OSCE further recommended that:

> "The Department of Justice should ensure that the institutional capacity necessary to comply with the JJC is in place. This includes the creation of the following institutions:
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> – a disciplinary centre;
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> – an educational institution;
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> – a special care facility; and,

[118] Sixth Review, p. 62.
[119] Sixth Review, p. 6.

– an educational-correctional institution of semi-confined type." [120]

The above recommendations have not yet been addressed. The lack of institutional capacity to serve punishments continues to restrict the courts' ability to use the full range of sentencing options.

ii. Mentally ill persons:

Prior to 1999, if offenders from Kosovo were considered to be mentally ill, they would be detained and treated in Yugoslav hospitals outside Kosovo, such as in Skopje (fYRoM) or Niš (Serbia proper). Thus, when the Kosovo health system was severed from the Yugoslav system in 1999, Kosovo was left without an appropriate institution for the detention and treatment. The most acute cases were sent to Prishtinë/Priština hospital. The OSCE raised this in numerous reports, which have highlighted the need for an improved legal framework and more suitable institutions.[121]

In 2002 the OSCE recommended that:

> "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 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. It has further recommended that a secure acute psychiatric ward, with staff with specialist training, should be created immediately in Prishtinë/Priština hospital, and elsewhere if needed." [122]

On 24 August 2004 UNMIK promulgated Regulation 2004/34 On Criminal Proceedings Involving Perpetrators with a Mental Disorder. Under this Regulation detention may be ordered on the grounds of mental incompetence or diminished mental capacity at the time of the criminal offence if

[120] Sixth Review, p. 63.
[121] See OSCE Mission in Kosovo, Department of Human Rights and Rule of Law Reviews of the Criminal Justice System: Second Review p. 23–28, Third Review, p. 41–42, Fourth Review, p. 52–57 and Fifth Review, p. 34–38.
[122] Fourth Review of the Criminal Justice System (September 2001-February 2002), p. 58.

the person, due to current mental disorder, will endanger the life or health of another person.[123] Importantly, the law stipulates that all measures imposed by the court, including detention, should be served in health care institutions and not in detention centres.

Notwithstanding the new provisions, the major problem in Kosovo in this regard continues to be the lack of an adequate secure facility for the placement and treatment of mentally ill persons. The Psychiatric Ward at Prishtinë/Priština University Clinic, and the Neuro-psychiatric ward at Lipjan/Lipljane Correctional Centre are currently being used, but these institutions can not offer a secure environment with adequate treatment.[124]

III. LEGISLATIVE ISSUES

Whilst UNMIK has introduced a large number of new laws (Regulations) and Justice Circulars in a variety of matters, a number of areas that would have benefited from new or amended legislation or the issuance of a Justice Circular, have been left untouched, despite OSCE's recommendations. Examples follow:

A. Justice Circulars

i. Interpretation/translation issues

In April 2003, the OSCE stressed that one of the main problems in trafficking cases has been the failure of the courts to provide adequate translation to suspects/accused and witnesses.[125] As a result it was recommended that the DOJ issue a Justice Circular to all judges and prosecutors informing them that interpreters are available to attend court proceedings on request.[126] No such Justice Circular has been issued. Trafficking cases are still adversely affected by the availability of the interpreters.

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[123] Section 7 of UNMIK Regulation. 2004/34 On Criminal Proceedings Involving Perpetrators with a Mental Disorder.
[124] Current court practice placing mentally ill persons under security measures are normally sent to the neuro-psychiatric department in Lipjan/Lipljane Correctional Centre as this facility is secure and can provide psychiatric treatment. This facility is equipped with a team of international psychiatrists and treatment facilities. However, it should be noted that the facility both physically and administratively constitutes part of the prison and therefore does not constitute a medical institution in accordance with applicable law.
[125] Fifth Review, p. 40.
[126] Fifth Review, p. 26.

ii. Access to court decisions

Under the current criminal procedure code, defence counsels' role is more adversarial in nature requiring, amongst other things, more specific and supportive arguments enabling the counsel to put forth the best possible defence. To this end, defence counsel need access to written court decisions – including cases in which they were not involved - in order to develop jurisprudential arguments. However, many counsel have complained that it is difficult for them to obtain decisions unless they have been counsel in the actual case. Thus, in December 2004, the OSCE recommended that a Justice Circular be issued informing courts of their obligation to make written decisions and verdicts freely available to defence counsel.[127] No such Justice Circular has been issued. Defence counsel still have difficulties in obtaining copies of other court decisions.

B. Laws

In April 2002, the OSCE recommended the amendment of UNMIK Regulation 2000/47 On the Status, Privileges, and Immunities of KFOR and UNMIK and their Personnel in Kosovo, to allow local courts to review and decide on administrative actions or decisions of UNMIK authorities.[128] It was suggested that the amendment should clearly define regular acts taken by UNMIK in its capacity as local administrator, which should then be subject to judicial review. No such amendment was made. Kosovo still lacks a meaningful system of judicial review with respect to decisions by UNMIK authorities.

In April 2003, the OSCE recommended that the SRSG should issue an Administrative Direction to introduce a mandatory obligation on the court or the prosecutor, at the first available opportunity, to inform any witness who may be under threat, of the witness protection measures available under the Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings.[129] Such an Administrative Direction would have eased the fear of witnesses and encouraged them to testify. No such Administrative Direction was issued. The reluctance of witnesses to testify continues to plague to legal system.[130]

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[127] Sixth Review, p. 72.
[128] Fourth Review, p. 43.
[129] Fifth Review, p. 26.
[130] See the Report on the Response of the Justice System to the March 2004 Riots (December 2005).

In April 2003, the OSCE has also recommended that the above-mentioned witness protection Regulation be amended to make explicit that it is a criminal offence to breach an order for protective measures, or for an official who performs duties in connection with protective measures to reveal confidential information in relation to the identity of protected witness.[131] Although the Regulation was amended on 24 January 2002, through UNMIK Regulation 2002/1, the new Regulation did not establish the act as a criminal offence, as suggested by the OSCE.

IV. CONCERNS RELATING TO PRACTICE

A. The courts

i. Motions for habeas corpus

A petition challenging detention is also known as a *habeas corpus* motion. A mechanism for *habeas corpus* was finally introduced in 2004 with the PCPC. The judge may hold a hearing if the *habeas corpus* petition establishes a *prima facie* case of the unlawfulness of detention.[132] In December 2004 the OSCE noted[133] that, "despite the fact that there have been few occasions where the defence has used the new *habeas corpus* petition, it has already been noted that the courts may be uninformed on how to address such motions." Thus, the OSCE recommended that:

> "The Kosovo Judicial Institute should offer additional training to judges on the law pertaining to *habeas corpus* petitions."[134]

The KJI duly held a series of workshops relating to detention in April, May and June 2005. Notwithstanding the OSCE analysis and the additional training, courts are still failing to properly consider the *habeas corpus* arguments of the defence. For example:

> On 19 August 2005, the District Court in Prizren extended the detention of three co-defendants accused of kidnapping. On 14 September 2005, the defence filed a *habeas corpus* motion challenging the decision for extension on the basis that the initial reasons for detention had ceased to exist (after all the evidence had been collected and witnesses heard,

[131] Fifth Review, p. 26.
[132] Article 286(3) PCPC.
[133] Sixth Review, p. 29.
[134] Sixth Review, p. 33.

there was no "reasonable suspicion"). By the time the main trial was held on 17 October 2005, the court had still not ruled upon the motion.

Courts should fully consider *habeas corpus* motions and reply to them in a timely manner.

ii. Public trials

The OSCE noted that a number of district and municipal courts have not been publicly displaying a complete and updated trial schedule of all their criminal and civil public hearings. This may breach a defendant's right to a public hearing.[135] In October 2003 the OSCE recommended:

> "[A]ll criminal courts make available information on the date, time and venue of public hearings to the public. This could be achieved by posting a list of the cases to be heard in a place accessible to the public at the courthouse or by making this information available on request to all members of the public, regardless of their involvement with a particular case."[136]

In response, the DOJ issued Justice Circular 2003/7 On Public Access to Justice in February 2004, which prescribed that court administrators and court presidents must ensure that hearing schedules are posted on a bulletin board in public view, in accordance with Article 76 of the Rules on Internal Activity of Courts.

However, the OSCE observed that a number of courts still failed to post complete trial schedules despite the DOJ's specific instructions, and reported this matter again to the DOJ.[137] The courts which have been found in breach of this right include the Municipal Court in Prizren (inaccurate information); the Municipal Court in Suharekë/Suva Reka (information is posted but in the Albanian language only); the Municipal Court in Rahovec/Orahovac (no trial schedule); the

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[135] The right to a public trial is enshrined in international law. International law prescribes that "everyone is entitled to a […] public hearing", see Article 6(1) ECHR; Article 14(1) ICCPR; Article 10 Universal Declaration of Human Rights. The European Court has stated that "[…] a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place […]" (see *Riepan v. Austria*, European Court of Human Rights, 14 November 2000, para. 29). Therefore, as part of their obligation of ensuring the publicity of the hearing, the authorities must ensure that information on the date and place of the hearing is readily available to the public.

[136] OSCE HRRoL monthly report (26 September-2 October 2003).

[137] See Report on the Administration of Justice in the Municipal Courts (March 2004) and in the OMiK-HRRoL monthly report of December 2004.

Prishtinë/Priština District and Municipal Courts (no information provided); the Municipal Courts in Gllogovc/Glogovac, Lipjan/Lipljane and Podujevë/Podujevo (the trial schedules are not consistently displayed); the Pejë/Peć District and Municipal Courts (rarely post information).

It is unacceptable that, despite consistent reminders, court presidents and/or administrators still fail to ensure the consistent posting of accurate, complete and timely public trial schedules.

iii. Reasoned decisions on detention

One of the most significant shortcomings in the criminal justice system is the consistent failure of the courts to properly and fully reason their decisions. This applies to all decisions, but has been particularly flagrant in relation to decisions on pre-trial detention: courts failed to substantiate why "reasonable suspicion" existed; courts failed to state the specific facts of the case which warranted the imposition of pre-trial detention over release or conditional release; and in many decisions, the court merely repeated the wording of the enumerated grounds for pre-trial detention, without applying them to the facts of the case. This has applied to initial decisions, extensions and appeals, including those in the Supreme Court. The fundamental shortcoming has continued to adversely affect the rights of the accused to be informed of the reasons for his or her detention, and his or her ability to appeal. Such decisions are in breach of international standards.[138] The problem was observed in July 2000, at which time the OSCE recommended that:

> "[A]ll detention orders by courts in Kosovo must set out the specific facts that support the imposition of any particular ground of pre-trial detention in line with the domestic law and international human rights standards."[139]

It further recommended that the SRSG revise the applicable law regarding the review of pre-trial detention decisions to include "[…] a fully reasoned written decision as to the basis for an order for continued detention."[140]

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[138] In relation to detention decisions, the ICCPR Article 9(1), demands that deprivation of liberty must be carried out based on such grounds and in accordance with such procedure as established by domestic law (principle of legality); the ECHR Article 5 (1) demands that the deprivation of liberty be in accordance with the law, for the exclusive purposes enumerated therein; international standards and case law require courts to give reasons for their decisions (*Hood v. The United Kingdom*, European Court of Human Rights, 18 February 1999, para. 60).
[139] First Review, p. 43.
[140] First Review, p. 43.

Following the above recommendations, in December 2000, the DOJ issued Justice Circular 27/2000 On Decisions on Detention, which stated that all decisions on detention must be made on the basis of a fully reasoned written decision detailing the grounds for detention and any evidence relied upon in support of those grounds. Notwithstanding this instruction, the local judges continued to issue decisions which, at best, paraphrased the law and, at worst, misapplied it.

Finally, in 2004, the PCPC, introduced specific provisions requiring decisions on detention to be fully reasoned,[141] and established that the absence of proper justification is a violation of the criminal procedure and, consequently, grounds for appeal.[142]

Furthermore, in December 2004, the OSCE issued a substantively detailed report analysing all aspects of the problems relating to the decisions on detention, both before and after the introduction of the provisional criminal and criminal procedure codes, and issued almost two pages of recommendations.[143] In particular, the OSCE emphasised the importance of the Supreme Court in guiding the lower courts and recommended that:

> "Appellate courts, and in particular the Supreme Court, should consistently issue decisions which instruct lower courts that rulings relating to detention on remand should be properly justified according to the law."[144]

However, despite the efforts by various actors to develop the capacity of judges in terms of decision writing, the shortcomings continue to plague the courts in Kosovo, at all levels. For example:

> The Municipal Court in Prizren, on 18 February 2005, extended the detention of a suspect charged with light bodily injury. The Prosecutor requested the extension of detention "for objective reasons," without elaborating. In the decision for extension, the court simply stated that, following the request from public prosecutor and review of the case file, the

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[141] Article 283 (1) PCPC - detention on remand can only be ordered by a written ruling, which should include "the legal grounds for detention on remand… [and] an explanation of all material facts which dictated detention on remand, including the reasons for the grounded suspicion that the person committed a criminal offence and the material facts under Article 281 (1) subparagraph (2) PCPC]."
[142] Article 435 PCPC.
[143] Sixth Review, p. 32.
[144] Sixth Review p. 32.

judge concludes that the legal conditions for which detention is assigned still continue to exist. The court gave no elaboration of the "objective reasons."[145]

It is of grave concern that, five years after the OSCE highlighted the problem of inadequate reasoning there has been little improvement in the overall standard of detention decisions by local judges, despite isolated examples of well reasoned decisions. [146]

iv. Sentencing practices

One of the most significant shortcomings in the criminal justice system observed by the OSCE is the consistent failure of the courts to properly and fully justify the decisions on punishment and to elaborate the mitigating and aggravating circumstances in the decisions on punishment.

In 2004, the OSCE recommended that in appeals decisions, appellate courts, and in particular the Supreme Court, should consistently instruct lower courts that verdicts and decisions relating to punishment should include a detailed and individualised reasoning. It has emphasised in particular that courts should decide on an individualised punishment within the limits established by the law; give full detailed reasoning when deciding on a mitigated punishment, including the existence of such particular circumstance which indicates that the purpose of the punishment may be achieved through a lower punishment; adequately apply mitigating and aggravating circumstances in accordance with the law; and consider the application of alternative measures to imprisonment in all cases.[147]

Even though there are decisions which take into account the recommendations put forward, in general, the practice of issuing decisions without detailed reasoning has continued. This is especially the case with decisions on mitigated punishment, and inadequate application of mitigating and aggravating circumstances. However, the OSCE monitors have noted signs of positive development in regard to application of alternative measures to imprisonment.

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[145] In another example, the District Court in Mitrovicë/Mitrovica ordered the detention of a person suspected of Unauthorised Purchase, Possession, Distribution and Sale of Dangerous Narcotic Drugs and Psychotropic Substances. The defence appealed and requested the detention be substituted with house detention. The appellate court, on 6 June 2005, refused the appeal, reiterating the legal grounds for detention. However, no where in its decision did the court explain why house detention would not be sufficient in the circumstances.

[146] It is worth mentioning that during 2004 and 2005, the Kosovo Supreme Court has overruled or amended 41 decisions on detention of lower instance's courts due to insufficient reasoning.

[147] Sixth Review, p. 62.

v. Trial delays

The inability of the court system to process cases in a reasonable time hinders the proper administration of justice in general. In criminal cases, it adversely affects the right of the defendant to be tried within a reasonable time.[148] A speedy trial is particularly important when the accused is in custody and the applicable law mandates that a detainee has the right to be tried within a reasonable time or released from detention.[149] In February 2001, the OSCE observed that:

> "There is widespread violation of all these provisions, as the district courts often exhibit a lack of urgency in listing and completing criminal trials. For example, cases are often adjourned because of a failure to conduct/request forensic tests, many months after the indictment."[150]

The OSCE has raised this or similar concerns on many subsequent occasions. Additionally, in March 2004, the OSCE provided a lengthy analysis of the problem of court delays in the municipal court system, covering both criminal and civil cases.[151] In that report, the OSCE concluded:

> "It is axiomatic that delays in the processing of cases and the increasing backlog adversely affect the administration of justice in relation to both criminal and civil matters. The growing backlog should therefore be urgently addressed before it is allowed to become a source of additional delays in itself. Greater efficiency could be achieved by identifying the practices used in the courts with a higher level of efficiency and applying these throughout Kosovo. In addition, the vacant posts should be filled and, where necessary, judges redistributed between the courts."[152]

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[148] The right to a trial within a reasonable time is guaranteed under Article 6 (1) ECHR and Article 14(3)(c) ICCPR. This right is especially important in cases where the accused is in detention. The right to a trial within a reasonable time is expressively protected in the applicable domestic law (Article 5 of the PCPCK), which sets specific time limits to regulate the different stages of the proceedings.
[149] The PCPC states, in its Article 5, para. 3 that " any deprivation of liberty and in particular detention on remand in criminal proceedings shall be reduced to the shortest time possible".
[150] Second Review, p. 21.
[151] Municipal Courts Report, p. 8-16.
[152] Municipal Courts Report, p.17.

The UNMIK authorities have tried to tackle this problem from a structural level. In 2003, the KJPC commissioned an assessment of the Kosovo judicial system.[153] The project assessed the existing court structure in Kosovo, including the required number of judicial and prosecutorial posts. On the basis of the report, a Law on Regular Courts has been drafted, which is aimed, partly, at streamlining the court system and enhancing their efficiency.

However, for the time being, delays continue. The following cases illustrate the serious consequences a delay can have:

> In a case before the Mitrovicë/Mitrovica District Court, the defendant stood trial, under the FRY CPC, for unlawful possession of weapons and explosive substances. The indictment against the defendant was filed on 20 August 2000, but the main trial did not commence until 17 January 2005, almost four and half years after filing of the indictment.
>
> In another case, which followed the summary procedure under the FRY CPC before the Mitrovicë/Mitrovica Municipal Court, the defendant was charged with the offence of abandoning a helpless person. The summary indictment was filed on 28 February 2003, but the main trial was not held until 19 January 2005, almost two years after the summary indictment was filed.

In these cases the prescribed time limits for commencing the trials were flagrantly disregarded. The delays were not attributable to the complexity of the cases nor to the conduct of the accused. Moreover, the ECHR places a duty on the contracting parties, to organise their legal systems so as to allow the courts to comply with the requirements of Article 6(1).[154] It follows that authorities may be held liable for failure to increase resources in response to a backlog of cases and for structural deficiencies that cause delays.[155]

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[153] This was carried out in co-operation with the Judicial Development Division of the UNMIK DOJ, the US Department of Justice Office of Overseas Prosecutorial Development, Assistance and Training, and the Council of Europe.

[154] *Zimmermann and Steiner v Switzerland*, ECHR, A 66 para. 29 (1983).

[155] It is worth noting the European Court of Human Rights judgment in *Eckle v. FRG* (15 July 1982), para. 92, where the Court deemed that the Government could not rely on the argument of the heavy work-load confronted at the time by the relevant chambers, which caused, among other delays in the case, the lapse of nearly three years between the preferment of the "bill of indictment" and the opening of the trial.

In Kosovo, delays are caused by a range of shortcomings or combinations thereof, which the courts and UNMIK authorities must address. Over the years, the OSCE has analysed a number of these shortcomings and made recommendations for resolving them.[156] A few of the main causes are discussed below.

The failure of the courts to secure the attendance of victims and witnesses has been a problem since 1999. It remains so today. This is partly due to the difficulty in keeping an accurate record of addresses, which leads to problems in delivering summonses. Although Administrative Direction 2002/16[157] establishes a procedure for UNMIK judicial authorities to request the disclosure of personal data from the Civil Registry, most municipal court judges and the police have not been aware of this possibility for obtaining a person's address.[158] To remedy this, in March 2004 the OSCE has recommended that:

> "The DOJ should issue a Justice Circular informing judges, investigating police and members of Regional Unit of Warrants and Courts of the procedure established by Administrative Direction 2002/16. Additionally a more flexible system for requests of information from the courts to the Civil Registry should be designed, including a standardised form to be filled out by the presiding judge and passed on to the Civil Registry through the co-ordination of the DOJ."[159]

These measures would have assisted the courts in quickly locating witnesses or victims who failed to attend the trial. However, to date, the DOJ has not issued a Justice Circular to inform the courts. Further, the courts have not used the procedure established by Administrative Direction 2002/16 and no court has initiated standardised forms to request information from the Civil Registry. Most judges and the police still do not even seem to be aware of the possibility for obtaining a person's address through this procedure. Seemingly, the courts can not muster the initiative to tackle this problem.

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[156] First Review, p. 36-37; Second Review, p. 19, 21 and 80; Third Review, p. 44; Fourth Review, p. 21 and 25; Sixth Review, p. 30-31; Municipal Courts Report, p. 8-17; OSCE Report on the Administration of Justice (March 2002), p. 10-19.
[157] Administrative Direction No. 2002/16 Implementing UNMIK Regulation 2000/13 On the Central Civil Registry, as amended by Administrative Direction 2003/19.
[158] The Direction states that the request should be submitted through the Director of the DoJ and addressed to the Directorate of Administrative Affairs. In practice, once authorised, a search takes approximately five minutes to process.
[159] Municipal Courts Report, p. 30.

vi. Case-flow management

The OSCE highlighted that poor case-flow management by some courts was another factor contributing to delays. In March 2002, the OSCE recommended that:

> "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."[160]

Pillar I and its DOJ did very little to address the problems of poor case management. And the OSCE continued to document cases where unnecessary delays were caused by shortcomings in the case management system. To help to diminish delays, in March 2004 the OSCE recommended that:

> "The DOJ should conduct research to establish the reasons for greater case-flow management in certain municipal courts. Once determined, these administrative 'best practices' of the courts should be shared with the presidents of all the courts. The DOJ should assist the courts in the implementation of these best practices to help the courts make better use of their resources and avoid unnecessary delays in processing cases."[161]

A best practices project has not been undertaken by the DOJ. The problem continues. However, the National Center for the State Courts (NCSC) has conducted four seminars/workshops on case flow management for the presidents and administrators of the courts.[162] Indeed, on 6 December 2005, the NCSC held regional workshops on the reduction of backlog of civil execution cases, aiming to determine time standards. The NCSC also developed draft time standards for use in measuring delay, and to provide a benchmark for courts to use in analyzing their case flow. These efforts by the NCSC represent a positive start in the dealing with this important issue.

vii. Assignment of municipal prosecutors

The OSCE has observed that, in Municipal Courts, trials are regularly delayed because the prosecutor has not turned up for the hearing, seemingly due to a lack of coordination between the

[160] Report on the Administration of Justice (March 2002), p. 20.
[161] Municipal Court Report, p. 30
[162] National Center for State Courts (NCSC), is a USAID contracted agency undertaking a project for the reform of Justice Sector in Kosovo.

courts and prosecutors' offices. The OSCE assessed that the problem was partly due to the fact that municipal prosecutors are assigned to the municipal court of the district centre and may be asked to cover any of the municipal courts within the district.[163] Thus, in March 2004, the OSCE recommended that:

> "The DOJ should introduce a mechanism that ensures a more direct link between the municipal courts and the respective prosecutors. In all regions, the prosecutors should be assigned to one or several municipal courts, rather than being assigned to an entire region."[164]

To date, the prosecutors have not been assigned to specific courts and the coordination problems continue to affect the hearings. The OSCE is concerned that a number of trials, especially in smaller municipal courts are continuously postponed due to the non attendance of public prosecutors, resulting in extended delays.

viii. Expert evidence

Expert evidence is often required to conduct a criminal investigation and/or trial. In Kosovo, obtaining expert evidence has been slow and problematic for two reasons: firstly, the lack of qualified experts in Kosovo itself means that judicial authorities have resorted to foreign experts, which takes time; and secondly, experts from Kosovo have regularly failed to attend trial when summoned. Experts have been unreasonably slow in submitting their reports. Some reports have been never completed. The OSCE has noted that cases are regularly delayed due to the lack of expert evidence. In February 2002, the OSCE pointed out that:

> "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. 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."[165]

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[163] Municipal Courts Report, p. 15-16.
[164] Municipal Courts Report , p. 30.
[165] Fourth Review, p. 21.

Part of the problem was the late payment of the already low remuneration that was paid to experts. Indeed, from January to March 2001, protests were held by forensic experts who refused to provide reports until their financial demands were met. In February 2002 the OSCE reported that:

> "[D]ue to financial and logistical constraints, there is also a reluctance and even a refusal by the forensic experts in Kosovo to provide services, such as attending scenes of crimes and providing testimony in courts. This has hampered the functioning of the courts.[166]

The OSCE recommended that "court experts be paid in due time."[167]

On 31 October 2002, the DOJ established the Medical Examiner's Office which has exclusive authority to coordinate the conduct of expert evaluation of psychic injuries.[168] This was a first step. However, there has been little action taken by the authorities since to remedy the problems in obtaining timely expert reports, both from local and foreign experts. Consequently, this continues to cause delays in the trials.[169]

B. Defence Counsel Issues

Throughout its monitoring, the OSCE has continued to observe cases in which defence counsel have failed to represent their clients effectively and/or have breached the domestic codes of conduct. In many cases this has led to a violation of the accuseds' right to an effective defence. The concerns have been highlighted regularly by the OSCE since 2000.[170] Unfortunately, many of these are still pervasive today.

i. Recommendations to defence counsel

Notwithstanding the improvements discussed in Chapter 3, the majority of defence counsel are still under-performing and failing to meet the requisite standards in the protection of the rights of their

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[166] Report on Administration of Justice (March 2002), p. 13.
[167] Report on the Administration of Justice (March 2002), p. 20.
[168] *See* Justice Circular 2002/08.
[169] In December 2004, the OSCE reported that it had noted "numerous other cases, in which the detainee's right to a speedy trial may have been breached due to considerable delays in obtaining expert reports." *See,* Sixth Review.
[170] See, First Review p. 42, 55 and 75; Third Review p. 31; Fifth Review p. 45-50; Sixth Review p. 33 and 72.

clients. Since the last OSCE Review on the Criminal Justice System published in December 2004, the OSCE has continued to observe shortcomings in defence work, examples of which follow.

The OSCE continues to observe cases where the defence counsel fail, without justification, to appear at court on the day of the hearing. This concern was raised by the OSCE in December 2004. In most cases the courts treat the presence of a defence counsel as a formality and simply nominate the first defence counsel available for the particular session, even though s/he is not familiar with the case. It is of concern that the newly nominated defence counsel rarely requests an adjournment of the trial session in order to become familiar with the case.

> In a confirmation of indictment hearing held before the District Court in Prishtinë/Priština, on 21 March 2005, four accused pleaded not guilty for the commission of the criminal offence of trafficking in persons. The confirmation judge noted that the defence counsel of one suspect was not present and asked the representative of the injured party to find someone to represent that accused. A new defence counsel appeared before the court, received the indictment and was introduced with his new client. The new defence counsel did not ask for a postponement of the session in order to consult with his client and to prepare for the case. The accused pleaded not guilty. The *ad hoc* appointed defence counsel appeared very passive as he was not familiar with the case. In the subsequent hearings, the accused was represented by his initially assigned defence counsel.[171]

The failure of defence counsel to attend hearings and/or to request adjournments when newly appointed seriously jeopardises the right of a person to a fair trial. It is of particular concern that, in the above cases, the courts fail to protect the rights of the accused who has already been let down by his originally assigned counsel (by not turning up) and by his newly assigned counsel (for agreeing to proceed with the hearing unprepared). The human rights case law emphasises that whilst the courts are not responsible for every failure or shortcoming on the part of defence counsel, they

[171] In another example, in a case before Prizren District Court, on 17 March 2005, three accused stood trial on charges of Sexual Abuse of a Person Under the Age of Sixteen Years. The ex officio defence counsel failed to appear. The court appointed another defence counsel who was completely unaware of the circumstances of the case, but the main trial continued without the defence counsel having requested time to consult with his client.

should intervene where there is a obvious failure to provide effective representation.[172] However, the courts in Kosovo are more likely to be part of the problem rather than the solution.

The OSCE also noted instances in which the same defence counsel has represented different defendants in the same case. This concern was initially raised by the OSCE in October 2001.[173] However, the practice continues to be noted:

> For example, in a case before the Municipal Court in Gjilan/Gnjilane, three defendants were jointly charged with attempted aggravated theft. One day before the main trial session, held on 30 May 2005, the same defence counsel was appointed *ex officio* to represent two of the defendants. One of the defendants was sentenced to five months imprisonment suspended for a period of one year, while the other defendant was acquitted. [174]

Such action by defence counsel is in violation of the applicable law and Code of Conduct.[175]

ii. Recommendations to judicial authorities

Many of the recommendations made to relevant authorities, aimed at improving the conditions for defence counsel, have not been addressed. The failure of authorities to address these issues makes it harder for defence counsel to improve the standard of their work.

The concerns about inadequate representation are particularly acute in relation to *ex officio* (court appointed) defence counsel. The OSCE has noted that defence counsel who are engaged *ex officio* are far more likely to provide inadequate representation. Defence counsel have stated to the OSCE that the remuneration for *ex officio* counsel is a disincentive to provide a good defence. In the end, because of lack of resources to privately hire a counsel, the poorest members of society receive the

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[172] *Kamasinski v. Austria,*ECHR, A 168 para. 65 (1989), referred to at page 264 by Harris, O' Boyle and Warbrick in The Law of European Convention on Human Rights (Butterworths 1995).
[173] Third Review, p. 25.
[174] In a second example, at the Mitrovicë/Mitrovica Municipal Court, two defendants were charged with unlawful occupation of real property. During the trial session, held on 23 May 2005, the two defendants were represented by the same, privately engaged, defence counsel. After the conclusion of the trial, the first defendant was found guilty and sentenced with a fine, whilst the second defendant was acquitted.
[175] The PCPC states that "[i]n criminal proceedings a defence counsel is not allowed to represent two or more defendants in the same case" (Article 71(1)). Furthermore, according to the Code of Lawyers' Professional Ethics, a lawyer "should not be advisor or representative of more than one client in the same subject if there are conflicts of interests between the clients or there exists a serious risk for such conflict" (Section 4, sub-section 4.1).

lowest level of representation, which is often ineffective. This is unacceptable. In December 2004, the OSCE has recommended a two fold solution – a reassessment of fees for *ex officio* counsel and a stricter policy by the KCA with respect to lawyers who fail to provide an effective defence:

> "The Department of Judicial Administration should re-examine the system of payment for court appointed advocates."[176]

> "The Kosovo Bar Association should be open for complaints and take disciplinary action against its members who fail to fulfil their professional duties to their clients, in particular, ex officio defence counsel who fail to represent their clients without proper justification."[177]

The OSCE is informed that the level of payment for defence counsel appointed *ex-officio* has not been increased by the Department of Judicial Administration (DJA). It therefore remains inadequate. Further, although the KCA has dealt with a number of complaints against lawyers, considering that defence counsel regularly offer an ineffective defence and sometimes behave inappropriately in court, the KCA has not been active enough in regulating its profession. Since 2001, the Chamber has imposed only three disciplinary sanctions against its members: one suspension for six months, one reprimand, and one fine. Even though there were complaints presented to the Disciplinary Commission of the KCA, in 2004 and 2005 there were no cases of disciplinary sanctions against the defence counsel by the Chamber. Both the DJA and the KCA need to work together to find a solution to this ongoing problem.

The authorities have failed to deal with a number of other areas affecting the work of the defence counsel. For example, in its last Review, published in December 2004, the OSCE issued the following recommendations, none of which have been addressed:

> "The Special Representative to the Secretary-General should promulgate the Law on Advocacy as a priority so that continuous education for defence counsel becomes mandatory."[178]

To date the Law on Advocacy is still in draft form and is pending promulgation by the SRSG.

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[176] Sixth Review p. 73.
[177] Sixth Review, p. 72.
[178] Sixth Review, p. 72

> "The Department of Justice should forward newly issued Justice Circulars to the Kosovo Bar Association for distribution to its members."

The Kosovo Chamber of Advocates still has not received any Justice Circulars issued by the DoJ.

> "The Department of Judicial Administration should ensure that at least one consulting room in each court is available for defence counsel."[179]

According to the information received by the presidents of district and municipal courts, there is still a crisis in terms of office space; there is barely enough rooms for the judges and their support staff. Therefore, the courts are apparently unable to dedicate a room for defence counsel. Currently, the judges try to accommodate defence counsel by temporarily vacating an office, if requested. In reality, defence counsel and client often resort to meeting in the corridors of the court house.

V. CONCERNS RELATING TO THE INTERNATIONAL JUDGE AND PROSECUTOR PROGRAMME

UNMIK's IJP programme was the first time that international judges and prosecutors worked alongside their local counterparts in regular domestic courts, applying local laws. The mechanism was a necessary component met with overall success in fighting inter-ethnic and organised crime in the period after June 1999. However, not surprisingly considering the novelty, it had a number of shortcomings. Although many of these have been addressed by UNMIK (see pages 40 - 42 above), some have not been dealt with.

A. Inadequate contractual arrangements

Any judiciary must enjoy functional independence, namely, freedom from interference by the executive in the performance of judicial work. The OSCE has been concerned that, due the nature of the contracts under which the international judges and prosecutors were hired, they did not enjoy functional independence from the executive.[180] More specifically, decisions on the extension of judge's contracts were taken by the executive branch of UNMIK (DOJ and, ultimately, the SRSG).

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[179] Sixth Review, p. 73.
[180] Fourth Review, p. 29.

The OSCE had monitored a small number of cases in which the executive improperly interfered in judicial decision making.[181] Therefore, in February 2002, the OSCE recommended a system whereby an independent organ would decide upon the renewal of the contracts for international judges:

> "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."[182]

For similar reasons, the OSCE also recommended that:

> "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." [183]

Unfortunately, the SRSG and DOJ have taken no action on these issues. The international judges' six month contracts are renewed by the executive authorities. Further, the KJPC has not been given the authority to subject international judges to disciplinary measures. Thus, the authorities were left with the option of disciplining a judge through the renewal, or otherwise, termination of the contract. This lack of functional independence continues to undermine the reputation of the IJP programme.

Another concern stems from the employment contracts of the IJP. The OSCE noted that, in a number of cases, international judges were leaving the mission before completing trials that had started. At best, this led to the awkward situation of a panel composition change during trial; at

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[181] Fourth Review, p. 34-36.
[181] Fourth Review, p. 43.
[183] Fourth Review, p. 43.

worst, the trials had to be re-started. This compromised the administration of justice, caused unnecessary suffering to witnesses who had to re-testify, and ultimately impacted on the right of the defendant to a speedy trial.[184] In July 2003, the OSCE recommended that:

> "UNMIK should ensure that international judges are able to complete their cases prior to leaving the mission."[185]

This could have been achieved quite simply by adding a clause in a judge or prosecutor contract that s/he must remain in mission until his or her ongoing trial is complete. However, no such clause has been added to the contract and the problem continues.

B. Inadequate procedures for case assignment

The OSCE has been concerned with the lack of transparent criteria for choosing the cases to be assigned to Regulation 64 panels. International judges have in some cases been assigned to cases that could have been properly handled by the local judges, such as cases of traffic accidents involving UNMIK officials, or lesser crimes. It was unclear how assignments of judges and prosecutors to the case were made. In its "Strategy for Justice" report in June 2001, the OSCE recommended that:

> "There should be an immediate formalisation of the criteria upon which Regulation 64 petitions are reviewed. These criteria should be disseminated to defence counsel with the assistance of the Criminal Defence Resource Centre and the Kosovo Bar Association. These criteria should be likewise disseminated directly to all appointed judges and public prosecutors."[186]

The OSCE considered that the lack of clear criteria for applying Regulation 64 might lead to similar cases being treated differently. In April 2002, the OSCE urged the authorities to make the criteria "transparent and precise" and suggested that "[t]o enhance accountability, the decisions of the SRSG to apply the Regulation should be legally and factually reasoned."[187] The situation remains

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[184] Department of Human Rights and Rule of Law, Departmental Weekly Report 30 June – 6 July 2003.
[185] Department of Human Rights and Rule of Law, Departmental Weekly Report 30 June – 6 July 2003.
[186] OSCE Strategy for Justice report, June 2001, p. 6.
[187] Fourth Review , p. 44.

unchanged and to date there is no administrative direction that specifies the criteria for the application of Regulation 64.

The OSCE has also expressed concerns that international judges are not assigned to cases through a random mechanism - as they should be - but are designated by the DOJ, upon approval of the SRSG.[188] Thus, the OSCE recommended that Regulation 64 be amended to address this concern and, in May 2003 reiterated its recommendation:

> "A mechanism should be established for randomly selecting which judges are assigned to a specific case; the assignment of judges to cases should not be left to the discretion of the Director of the DOJ and the SRSG. Judges assigned under UNMIK Regulation 2000/64 should abide by all the procedural guarantees provided by domestic law, including the provisions on disqualification on the grounds of partiality."[189]

In 2002, on the basis of a similar recommendation, the then Director of the DOJ had initiated consultations with the OSCE and reviewed all UNMIK Regulations relating to the appointment of international judicial officials.[190] The DOJ had even drafted a new Regulation, which was intended to replace all the existing legislation on the issue. However, to date the Regulation has not been promulgated into law. Consequently, the concerns relating to the appearance of a lack of judicial independence persist.

C. Lack of mentoring

The OSCE has been concerned with the lack of proper co-operation between IJP and their local counterparts. The organisation of the IJP programme, which is viewed as a parallel system - with its own administration, legal officers, advanced logistics, different case assignment procedures, and greater levels of personal security - portrays a picture of division between international judges/prosecutors and local judges and prosecutors. Considering the local judges and prosecutors' lack of knowledge of international human rights standards, the OSCE was of the opinion that the

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[188] Fourth Review, p. 25.
[189] Fifth Review, p. 30.
[190] UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors, as amended by UNMIK Regulations 2000/34 and 2001/2, and, UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, as amended by UNMIK Regulation 2001/34.

IJP should expand its mandate so that the internationals serve as mentors to their local counterparts; helping them in more serious cases and training the local judiciary to apply human rights provisions. In the report on Strategy for Justice in June 2001 the OSCE recommended:

> "There should be the development of a coherent approach to the work distribution between international and local judges and public prosecutors involving ways to enhance working relationships and professional courtesy. For example, the use of international and local prosecutor teams would be effective in capacity building of local public prosecutors particularly in difficult cases such as organised crime prosecutions."

The OSCE considers that the IJP programme, as a whole, did not fulfil its much needed, and expected, role of mentoring the local judiciary. Aside from working together with local judges and prosecutors on some criminal cases, there was no apparent overall strategy to make the most of the presence of the IJP to provide hands-on mentoring or to meaningfully include IJP in trainings. The decision to relocate all the IJP to Prishtinë/Priština from where they are able to try cases around Kosovo (so called "single jurisdiction approach") will undermine hopes for any mentoring aspect of the programme.

The OSCE welcomes the efforts undertaken in establishing the Kosovo Special Prosecutor's Office. According to the DOJ, it is envisaged that a total of 10 local prosecutors and 10 local legal officers will be monitored and mentored by international prosecutors and legal officers as they prosecute selected cases of organised crime, trafficking in human beings, inter-ethnic crimes, terrorism and corruption.
It remains to be seen whether this would remain the only legacy of the IJP programme left to Kosovo justice system.

CHAPTER 4
CONCLUSION

In the case of Kosovo, the road to a modern criminal justice system with respect for human rights is proving to be long and difficult. There is a long way to go. However, whilst both local and international community had hoped for quicker, better and more focused reform, few can doubt that lasting progress has been made.

The OSCE has worked closely with its international and local partners, not least in monitoring the justice system and raising concerns with respect to fair trial and due process. This report illustrates that a great number of the OSCE recommendations have been implemented; institutions have been established, major legislative reforms have modernised the judicial system, the standard of professional practice for both judges and lawyers has improved in certain areas, and the introduction of international judges and prosecutors has helped tackle the sensitive inter-ethnic cases and organised crime.

However, almost six years after UNMIK started to administer Kosovo, there is no shortage of problems; breaches of human rights norms occur daily. Disappointingly, many of the shortcomings which have been highlighted by the OSCE have been left untouched: new institutions need to be created or old ones improved; judges and prosecutors need a salary increase; amendments to the law are still required; judges make the same mistakes after years of training; defence counsel still fail to properly represent their clients; and, the shortcomings inherent in the international judges and prosecutors programme still diminish an otherwise successful initiative.

As many of the remaining legal and judicial responsibilities are handed over from the UNMIK to the PISG, this report can serve as a reminder of what, with goodwill and great effort, can be achieved. Perhaps more importantly, this report represents a reminder of what remains to be done in order for the criminal justice system to meet international standards and to diligently serve the people of Kosovo.

ANNEX

RELEVANT CRIMINAL LEGISLATION DEVELOPMENTS 2000 – 2005

2000

- UNMIK Regulation 2000/62 On the Exclusion of Persons for a limited Duration to Secure Public Peace, Safety and Order. UNMIK Regulation 2000/62, enacted on 30 November 2000.
- UNMIK Regulation 2000/64, On Assignment of International Judges and Prosecutors and/or Change of Venue, enacted on 15 December 2000, amended by UNMIK Reg. 2001/34 and UNMIK Reg. 2005/50.

2001

- UNMIK Regulation 2001/1 On the Prohibition of Trials In Absentia for Serious Violations of International Humanitarian Law, enacted on 12 January 2001.

- UNMIK Regulation 2001/2, Amending UNMIK Regulation 2000/6 as amended, On the Appointment and Removal from Office of International Judges and International Prosecutors, enacted on 12 January 2001.

- UNMIK Regulation 2001/4 On the Prohibition of Trafficking in Persons in Kosovo, enacted on 12 January 2001.

- UNMIK Regulation 2001/07 On the Authorisation of Possession of Weapons in Kosovo, enacted on 21 February 2001.

- UNMIK Regulation 2001/08 On the Establishment of the Kosovo Judicial and Prosecutorial Council, enacted on 6 April 2001.

- UNMIK Regulation 2001/09 On a Constitutional Framework for Provisional Self-Government in Kosovo, enacted on 15 May 2001..

- UNMIK Regulation 2001/10 On the Prohibition of Unauthorised Border /Boundary Crossings, enacted on 24 May 2001.

- UNMIK Regulation 2001/12 On the Prohibition of Terrorism and Related Offences, enacted on 14 June 2001.

- UNMIK Regulation 2001/18 On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders, enacted on 25 August 2001.

- UNMIK Regulation 2001/20 On The Protection Of Injured Parties And Witnesses In Criminal Proceedings, enacted on 20 September 2001.

- UNMIK Regulation 2001/21 On Co-operative Witnesses, enacted on 20 September 2001.

- UNMIK Regulation 2001/22 On Measures Against Organised Crime, enacted on 20 September 2001.

- UNMIK Regulation 2001/28 On The Rights Of Persons Arrested By Law Enforcement Authorities, enacted on 11 October 2001.

2002

- UNMIK Regulation 2002/1, Amending UNMIK Regulation 2001/20 On The Protection Of Injured Parties And Witnesses In Criminal Proceedings, enacted 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, enacted on 24 January 2002, extended the applicability of UNMIK Regulation 2001/21 to criminal proceedings between 10 June 1999 and the date of the present Regulation.

- UNMIK Regulation 2002/20 amended UNMIK Regulation 2000/64 On the Assignment of International Judges/Prosecutors and or Change of Venue, enacted on 14 December 2002.

- UNMIK Regulation 2002/7 On the use in Criminal Proceedings of Written Records of Interviews conducted by the Law Enforcement Authorities, enacted on 28 March 2002.

- UNMIK Regulation 2002/6 On Covert and Technical Measures of Surveillance and Investigation, enacted on 18 March 2002.

2003

- UNMIK/Regulation 2003/1 amending the Applicable Law On Criminal Offences involving Sexual Violence, enacted on 6 January 2003.

- UNMIK Regulation No. 2003/12 On Protection Against Domestic Violence, enacted on 9 May 2003.

- UNMIK Regulation No. 2003/25 On the Provisional Criminal Code of Kosovo, promulgated on 6 July 2003. The Code entered into force on 6 April 2004.

- UNMIK Regulation No. 2003/26 On the Provisional Criminal Procedure Code of Kosovo, promulgated on 6 July 2003. The Code entered into force on 6 April 2004.

- UNMIK Regulation No. 2003/34 amending the Applicable Law on Procedures for the Transfer of Residents of Kosovo to Foreign Jurisdictions, enacted on 14 November 2003.

- UNMIK Regulation No. 2003/36 amending UNMIK Regulation no. 2000/64, as amended, On Assignment of International Judges/ Prosecutors and/or Change of Venue, enacted on 14 December 2003.

2004

- UNMIK Regulation No. 2004/2 On the Deterrence of Money Laundering and Related Criminal Offences, enacted on 5 February 2004.

- UNMIK Regulation No. 2004/8 On the Juvenile Justice Code of Kosovo, enacted on 20 April 2004.

- UNMIK Regulation No. 2004/10 amending UNMIK Regulation no. 2004/2 On the Deterrence of Money Laundering and Related Criminal Offences, enacted on 29 April 2004.

- UNMIK Regulation No. 2004/19 Amending the Provisional Criminal Code of Kosovo, enacted on 16 June 2004.

- UNMIK Regulation 2004/29 On Protection Against International Child Abduction, enacted on 5 August 2004.

- UNMIK Regulation No. 2004/34 On Criminal Proceedings Involving Perpetrators with a Mental Disorder, enacted on 24 August 2004.

2005

- UNMIK Regulation No. 2005/9 Amending UNMIK Regulation No. 2004/2, as amended, on the Deterrence of Money Laundering and Related Criminal Offences, enacted 23 February 2005.

- UNMIK Regulation No. 2005/26.On the Promulgation of the Suppression of Corruption Law adopted by the Assembly of Kosovo, enacted 12 May 2005.

- UNMIK Regulation No. 2005/53, enacted 20 December 2005, Amending UNMIK Regulation No. 2001/19 On the Executive Branch of the Provisional Institutions of Self-Government in Kosovo. It establishes the Ministry of Justice and Ministry of Internal Affairs.

- UNMIK Regulation No. 2005/52 on the Establishment of the Kosovo Judicial Council (KJC) was enacted on 20 December 2005.

- UNMIK Regulation No. 2005/54 On the Framework and Guiding Principles of the Kosovo Police Service, enacted on 20 December 2005.

KOSOVO ASSEMBLY LAWS

- Law on Health no. 2004/4, approved by the Assembly on 19 February 2004, promulgated through UNMIK Regulation 2004/31, enacted on 20 August 2004.

- Law on Co-operation with the Hague Tribunal, approved by the Assembly on 19 February 2004, pending promulgation by the SRSG.

- Law on Anti-Corruption no. 2004/34, approved by the Assembly on 8 September 2004, promulgated by the SRSG on 7 June 2004.

- Law on Gender equality no. 2004/2, approved by the Assembly on 19 February 2004, promulgated by the SRSG on 7 June 2004.

- Law on Anti-Discrimination No. 2004/3, approved by the Assembly on 19 February 2004, promulgated by the SRSG on 20 August 2004.

- Law on the Rights and the Responsibilities of Citizens under Health Care No. 2004/38, approved by the Assembly on 8 September 2004, promulgated by the SRSG on 19 November 2004.