amnesty international

Kosovo (Serbia)

The challenge to fix a failed UN justice system

January 2008 AI index: EUR 70/001/2008

TABLE OF CONTENTS

Kosovo (Serbia): The challenge to fix a failed UN justice mission

PRELIMINARY NOTE ABOUT THIS REPORT

Amnesty International delegates visited Kosovo in November and December 2007; they found that little of the substance included in this report had changed. However, in conversations with members of the European Union Planning Team (EUPT), with United Nations Interim Administration Mission in Kosovo (UNMIK) officials, including those responsible for the police and judiciary, and with local and international non-governmental organizations monitoring the international prosecutors and judiciary, Amnesty International found that the situation was even more serious than reported below. More than seven years after the International Judges and Prosecutors Programme was established, hundreds of cases of war crimes, enforced disappearances and inter-ethnic crimes remain unresolved (often with little or no investigation having been carried out); hundreds of cases have been closed, for want of evidence which was neither promptly nor effectively gathered. Relatives of missing and "disappeared" persons report that they have been interviewed too many times by international police and prosecutors new to their case, yet no progress is ever made. Few local police, prosecutors and judges have received effective training to carry out investigations and prosecutions of war crimes and crimes against humanity. Amendments to legislation defining crimes, principles of criminal responsibility and defences and guaranteeing the full range of reparations to victims and their families has not been enacted. Rape and other war crimes and crimes against humanity of sexual violence continue to be ignored.

Criminal trials continue to be delayed for lack of international judges and prosecutors (numbering 13 and eight respectively in December 2007); cases continue to be assigned to new prosecutors unfamiliar with applicable law in Kosovo. There is a massive backlog of prosecutions, and the failure to adequately address the protection of witnesses continues to prevent prosecutions coming before the courts. Some war crimes cases returned for retrial by the Supreme Court have not been retried for almost five years . According to the Acting Head of the UNMIK Department of Justice this backlog will have to be addresses by the planned European Security and Defence Policy (ESDP) mission. Victims and their families are not able to obtain the reparations to which they are entitled under international law in civil cases.

The extent of the failure of UNMIK's international prosecutors and judiciary will only become apparent when UNMIK police and the Department of Justice conclude the current – still entirely confidential - review, required before cases may be transferred from UNMIK to the appropriate authorities in Kosovo. Amnesty International demands that the results of that review be made public. Amnesty International not only reaffirms each of the

recommendations in the report, but also urges the UN not to undertake any similar international justice missions in the future until effective steps have been taken to ensure that none of the extensive flaws identified in this report are repeated.

Research for this report concerning the UNMIK International Judges and Prosecutors Programme established in 2000 on a temporary basis to investigate and prosecute war crimes and crimes against humanity and to help rebuild the local justice system was carried out between early 2006 and April 2007. Amnesty International intended to publish the report following a United Nations Security Council (UNSC) meeting in March 2007, at which it was envisaged that the proposals set forth in the Comprehensive Proposal for the Final Status of Kosovo (Ahtisaari Plan) would be agreed and a settlement reached which would have included the continuation of the international justices and prosecutors programme and have been implemented under the auspices of the ESDP mission. These events did not take place, and so the report was not published at that time. It is now clear that no such settlement will be agreed at the United Nations (UN), however, following a decision of the Council of the European Union (EU) on 14 December 2007, it appears that the planned ESDP mission will now be deployed.

INTRODUCTION

Of all the models for combating impunity for crimes under international law in a state whose criminal and civil justice system has collapsed or been severely damaged, the approach taken by the UN in 2000 in the Kosovo province of Serbia in what was then the Federal Republic of Yugoslavia showed the most promise. Although the International Criminal Tribunal for the former Yugoslavia (ICTY) had jurisdiction over Kosovo, it was clear that it would only be able to try a very limited number of cases. It was, therefore, necessary for there to be another judicial body to conduct the majority of trials for crimes committed during the conflict within the jurisdiction of Kosovo. Instead of another international criminal court established by the Security Council acting pursuant to Chapter VII of the Charter of the UN or by a treaty between the UN and the state for an internationalized special chamber or panels with jurisdiction over such crimes, each of which would have been extremely expensive and able to investigate and prosecute only a small number of cases, the UN established a programme to incorporate a limited number of foreign judges and prosecutors into the local criminal justice system. These judges and prosecutors were expected to ensure that trials would be conducted in an independent and impartial manner consistent with international law and standards.

The Kosovo Judges and Prosecutors Programme was also heralded as providing the possibility of a longer-term legacy for the Kosovo judicial system. By introducing experienced international jurists to work alongside their local counterparts, it was claimed that there would also be capacity-building of local lawyers and judges in conducting trials of persons accused of crimes against humanity and war crimes according to international fair trials standards and establishing the rule of law.

Regrettably, however, the performance over more than seven years of the International Judges and Prosecutors Programme established by the UNMIK Department of Judicial Affairs, later renamed the Department of Justice, has failed to meet up to expectations. Local prosecutors and judges are little better prepared to conduct proceedings in cases involving crimes under international law and legal reforms essential for conducting such proceedings still have not been enacted into law. No date has been set for completing the rebuilding of the justice system so that it can operate without a continuing international component. As explained in this report, this effort has largely failed for a variety of reasons, including flaws in its conception and execution, limited resources and the low priority that international justice has been given in comparison to other UNMIK goals. This failed experiment will soon draw to a close when UNMIK fully transfers its responsibilities to the government of Kosovo. Although at the time of writing, the future of internationalized justice in Kosovo remains to be resolved it is envisaged that a European Union Defence and Security Policy Mission (EDSP) will assist Kosovo in its efforts to rebuild the local justice system.

The model of internationalizing national courts by importing, on a temporary basis, experienced international staff to work alongside national staff in all parts of the collapsed or damaged national justice system, with sufficient resources and training programmes meeting international standards is still one which could prove an effective method in the long-term, sometimes in a complementary role with international courts, to investigate and prosecute large numbers of crimes under international law, provide reparations to victims and re-establish the rule of law through a reconstituted judicial system. However, the structure and operation of the International Judges and Prosecutors Programme have been so flawed that the example in Kosovo cannot serve as a model for internationalizing national judicial systems without major changes such as those recommended in this report.

Furthermore, while the Secretary-General's Special Envoy on Kosovo urged against the withdrawal of international participation in the Kosovo judicial system, which he considered would be premature and counter-productive,[1] it is telling that his report notes, "The Kosovo justice system is regarded as the weakest of Kosovo's institutions" and a lack of respect for the rule of law remained a major problem.[2] While the International Judges and Prosecutors Programme has been beneficial in ensuring individual cases are conducted impartially, the overall structure and operation of the Programme has set a poor example in terms of establishing an independent, impartial functioning judiciary in Kosovo, which

[1] Kai Eide, *A comprehensive review of the situation in Kosovo: Report of the Secretary-General's Special-Envoy*, UN Doc. S/2005/635 (2005), para. 40: "A continued presence of international judges and prosecutors will also be required to handle cases related to war crimes, organized crime and corruption as well as difficult inter-ethnic cases. The currently ongoing reduction in the number of international judges and prosecutors is premature and should urgently be reconsidered. The result of such reductions would be a further loss of credibility of the justice system and of confidence in it among the population in general and the minority communities in particular."
[2] *Ibid*, at 3.

upholds the rule of law. Therefore, a number of important changes need to be made to ensure international judges and prosecutors deliver the benefits they were promised to bring to the Kosovo justice system.

This report briefly describes the collapse of the judicial system in Kosovo which led to the creation of the International Judges and Prosecutors Programme. It compares the stated aims of the UN, and UNMIK in particular, and the broader international community in setting up a transitional justice model with the results of this programme. The report also compares the performance of the programme with international law and standards concerning the right to fair trial and the rights of victims to justice and full reparations. It draws lessons to be learned when developing and implementing future initiatives to incorporate an international component into collapsed national judicial systems. The report concludes with extensive recommendations to the EDSP mission or any other similarly mandated international body for improving the International Judges and Prosecutors Programme so that it will satisfy international law and standards and for rebuilding the Kosovo justice system within a reasonable, but clearly defined time so that a fully local justice system will be able to administer justice in a manner that can guarantee fair trials in all cases and full reparations to victims of crimes under international law and their families.

PART ONE - BACKGROUND

I. Collapse of the judicial system in Kosovo

UNMIK was established by the UN Security Council on 10 June 1999, the day after the North Atlantic Treaty Organization (NATO) suspended air strikes in its eleven-week campaign against Yugoslav and Serbian armed forces. In Resolution 1244 (1999), the Security Council mandated UNMIK to promote, *"the establishment . . . of substantial autonomy and self-government in Kosovo, perform "basic civilian administrative functions where and as long as required" and maintain "civil law and order"*.[3] In a formulation that lay at the root of many of the problems with UNMIK's approach to addressing the problem of the collapse of the judicial system, the Security Council declared: *"All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General[.]"*[4] As discussed below, the consolidation of legislative, executive and judicial functions in one person, instead of ensuring the classical separation of powers with checks and balances between the three branches that Montesquieu considered were necessary for political liberty, led directly to abuses.[5]

UNMIK faced a huge challenge immediately. The majority of the population of Kosovo's population had been expelled. As they began to return over the next few weeks:

> *…an increasing number of returnees resorted to violence and intimidation as a means of retrieving some semblance of their previous lives. Looting, arson, forced expropriation of apartments belonging to Serbs and other non-Albanian minorities, and in some cases, killing and abduction of non-Albanians became daily phenomena. Moreover, organized crime, including smuggling, drug trafficking, and trafficking in women, soon flourished. It was apparent, within the first few days, that the previous law enforcement and judicial system in Kosovo had collapsed.*[6]

[3] UN S. C. Res. 1244 (1999), 10 June 1999, para. 11 (a) and (b).
[4] *Ibid.*, para. 11 (i).
[5] He declared that:

> "there is no liberty, if the judiciary power be not separated from the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting the public resolutions, and of trying the causes of individuals".

Charles de Secondat, Baron de Montesquieu, *L'Esprit des Lois* (1748) Book XI, Ch. 6, 69-70 (Tr. T. Nugent, Revised J. V. Pritchard).
[6] Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," 95 Am. J. Int'l L. 46, at 48 (2001) (footnotes omitted).

As the UN Secretary-General noted: *"The security problem in Kosovo is largely a result of the absence of law and order institutions and agencies. Many crimes and injustices cannot be properly pursued."*[7] The judicial system was in a state of collapse. The withdrawal of the Yugoslav People's Army, Serbian police and paramilitary forces following the Kumanovo Military Technical Agreement on 9 June 1999 also saw the withdrawal of the Serbia state authorities, which included the judiciary. During the Serbian administration of Kosovo the ethnic Albanian population had been all but excluded from the judiciary and the legal profession. In his report to the UN Security Council on the Interim Administration in Kosovo the UN Secretary-General noted; *"Politically-motivated and ethnically one-sided appointments, removals and training led to a judiciary in which, out of 756 judges and prosecutors in Kosovo only 30 were Kosovo Albanians."*[8]

With the departure of Serbian authorities, much of the Serbian judiciary also left and went to Serbia, fearing reprisals from the ethnic Albanian population or in solidarity with Serbia's decision not to participate in or serve the new UNMIK administration.[9]

Furthermore, concerns had already been raised regarding fair trial rights in Kosovo, prior to escalation of the conflict and NATO intervention.[10] In a report on the human rights situation in the former Yugoslavia in 1997, the UN Secretary-General found:

> *Fair trials standards are particularly at risk in cases connected with political activities. Major breaches of international standards for due process and also of several Yugoslav procedural requirements were found by an observer from the Belgrade Office of the United Nations Office of the High Commissioner for Human Rights who attended most of two trials of Kosovo Albanians conducted in the District Court, Pristina, between May and July 1997. The cases were recently described in a special report of the Special Rapporteur*.[11]

[7] Secretary-General report to Security Council, "On the Interim Administration Mission in Kosovo", S/1999/779, 12 July 1999, para. 6, http://daccessdds.un.org/doc/UNDOC/GEN/N99/204/10/PDF/N9920410.pdf?OpenElement.

[8] *Ibid.*, para. 66.

[9] Michael Hartmann, *International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping*, United States Institute for Peace, Special Report 112, October 2003.

[10] For a review of some of these concerns see Amnesty International, *FRY: Kosovo: A Decade of Unheeded Warnings*: *Amnesty International's concerns in Kosovo: volume 1: May 1989 - December 1997*, AI Index: EUR 70/039/1999, 1 May 1999, and *FRY: Kosovo: A Decade of Unheeded Warnings*: *Amnesty International's concerns in Kosovo: volume 2: January 1998 – March 1999*, AI Index: EUR 70/040/1999, 1 May 1999.

[11] Secretary-General report to the General Assembly, Human Rights Questions: human rights situations and reports of Special Rapporteurs and Representatives – situation of human rights in the former Yugoslavia, U.N. Doc. A/52/90, 17 October 1997, para. 166 - http://daccessdds.un.org/doc/UNDOC/GEN/N97/278/02/PDF/N9727802.pdf?OpenElement.

Therefore, one of the initial goals identified by UNMIK to be a priority was the establishment of, *"an independent, impartial and multi-ethnic judiciary with high standards of competence and professional ability"*.[12]

II. The UNMIK response

A. The attempt to rebuild a multi-ethnic judicial system with exclusively local staff

UNMIK first attempted to rebuild the local criminal justice system entirely with local staff. On 28 June 1999, two weeks after the arrival of the first UNMIK staff, UNMIK established a panel of local and international legal experts, the Joint Advisory Council on Judicial Appointments (subsequently replaced by the Advisory Judicial Commission), including two ethnic Albanians, one Bosniak and one Serb, all with previous experience in administration of justice in Kosovo, and three international lawyers from different international organizations, to assist with the appointment of judges and prosecutors.[13] Throughout July and August 1999 local judges and prosecutors identified selected by this panel were appointed to the Kosovo Interim Judiciary, which formed part of what UNMIK referred to as the 'Emergency Judicial System'. While observers for the Organization for Security and Cooperation in Europe (OSCE) suggested from the outset that there was a need to introduce international experts, it was decided that the judiciary was best re-built using members of the local legal and judicial community. This was in part due to fears of appearing 'colonial' in its approach and in part due to the fact that no established, easily deployable body of international judicial personnel existed.[14]

However, UNMIK's attempt to build an independent, multi-ethnic judiciary was thwarted by the two problems discussed above: the absence of an experienced ethnic Albanian judiciary and the withdrawal of the Serbian judiciary, who had relocated to parallel courts within Serbia proper. Those Kosovo Albanians that had participated in the judiciary throughout the 1990s were widely viewed as collaborators with the Serbian regime.[15] Therefore, it fell to Kosovo Albanian jurists who had not practised law since prior to 1989, if ever, to take up appointments in the new judiciary. Meanwhile, when appointments were

[12] UNMIK Press Release – UNMIK/PR/4, 28 June 1999 - http://www.unmikonline.org/press/press/pr4.html. See also Secretary-General report to Security Council, On the Interim Administration Mission in Kosovo, U.N. Doc. S/1999/779, 12 July 1999, para. 18.

[13] Strohmeyer, *supra* note 6, at 52.

[14] Hartmann, *supra* note 9, at 4, Richard Rogers, *How the United Nations Interim Administration in Kosovo dealt with the issue of Ethnic Bias in the Judiciary*, in Humanitarian Law Center, *Strategy for Transitional Justice in the former Yugoslavia – Dealing with the Past – Post-conflict Strategies for Truth, Justice and Reconciliation in the region of the former Yugoslavia*, Proceedings of the International Conference co-organized by the Humanitarian Law Center and the Council of Europe, Belgrade, 1-2 October 2004.

[15] Hartmann, *supra* note 9, at 5.

made in September 1999 to the Ad Hoc Court of Final Appeal, not a single Serb candidate applied.[16] Therefore, the judiciary established by UNMIK largely consisted of ethnic Albanians.

As the ethnic Albanian community had been almost completely excluded from government and other administrative positions from 1991 onwards, there were very few professionals with sufficient skills and experience to conduct serious cases. A number of the cases involving local prosecutors involving alleged ethnically based crimes were poorly prepared[17]. There have also been numerous problems with local judge panels or panels in which they were a majority, including conducting trials in absentia even when prohibited under UNMIK regulations.[18] Furthermore, in addition to the continuing concerns about the quality of the jurisprudence of local judges, in the climate of ethnic tension a judiciary composed almost entirely of ethnic Albanians did little to inspire confidence among Serb and other minority communities of the likelihood of a fair trial before an impartial panel. Finally, it soon became clear that in some instances there was more than just an appearance of bias. Independent monitors reported examples of cases being dismissed and defendants released when those involved were ethnic Albanians and Serb defendants being detained and convicted of war crimes on minimal evidence, either due to sympathy on part of court or due to fear of intimidation from Kosovo Albanian community.[19]

In September 1999 the Special Representative of the Secretary-General (UN Special Representative), established the Technical Advisory Commission on Judiciary and

[16] UNMIK Press Release – UNMIK/PR/43, 14 September 1999 - http://www.unmikonline.org/press/press/pr43.html.

[17] For example, in a trial before an international panel of the District Court of Mitrovica, two ethnic Serbs, Stojan Jovanović and Bogoljub Mišić, charged for acts of violence by Serbian police and armed forces in 1998, were acquitted after it concluded that the prosecution by the District Public Prosecutor of Prizen was based on fundamentally flawed identification procedures as well as testimony by witnesses who may have colluded with each other. *Stojan Jovanović* case, P.No10/2001, Mitrovica Dist. Ct., 2 November 2001.

[18] UNMIK Regulation No 2001/1, On the Prohibition of Trials in Absentia for Serious Violations of International humanitarian Law, (http://www.unmikonline.org/regulations/2001/reg01-01.html)

[19] Amnesty International, *Amnesty International's Recommendations to UNMIK on the judicial system* , AI Index: EUR 70/006/2000, 4 February 2000, at 4. See also OSCE, *Assessment of the Situation of Ethnic Minorities in Kosovo, Period covering November 1999 through January 2000*, para. 20 (http://www.osce.org/kosovo/documents.html) and William O'Neill, UNMIK's senior adviser on human rights from August 1999 to February 2000 in *Kosovo: An Unfinished Peace*:

> "Instances of bias against Serbs and other minorities among the Albanian judiciary surfaced early during the Emergency Judicial System and have continued ever since… Albanians arrested on serious charges, often caught red-handed by KFOR or UNMIK police, frequently were released immediately or were not indicted and subsequently released. Meanwhile, Serbs, Roma, and other minorities arrested on even minor charges with flimsy evidence were almost always detained, and some stayed in detention even though they were not indicted." (Quoted in Hartmann, *supra* note 9, at 6).

Prosecution Service to advise on the structure and administration of these two institutions. As the UN Secretary-General in his report to the Security Council in December 1999 noted:

> *One of UNMIK's priorities has been the establishment of an effective, impartial and independent judiciary. To this end the Institution-Building and Civil Administration components have worked together closely on the Emergency Judicial System. A total of 572 interviews have been conducted for the local judiciary database. A total of 328 judges and prosecutors and 238 lay-judges have been recommended for appointment by the Advisory Judicial Commission. However, the Emergency Judicial System at present has only 47 judges and prosecutors – 41 Kosovo Albanians, 4 Muslim (Bosniac), 1 Roma and 1 Turk – following the resignation of 6 Kosovo Serb judges for security reasons and the departure of another to Serbia. Reportedly, judges, prosecutor and lawyers, particularly those belonging to ethnic minorities, have been threatened. As a result, preserving a multi-ethnic judiciary in Kosovo is becoming increasingly difficult.*[20]

B. The proposed Kosovo War and Ethnic Crimes Court (KWECC)

In order to address the difficulties faced by the new judiciary in dealing with ethnically and politically sensitive cases, in December 1999 and the inability of the ICTY to investigate and prosecute more than a handful of the crimes against humanity and war crimes committed in Kosovo, the Technical Advisory Commission on Judiciary and Prosecution Service recommended to UNMIK Department of Justice that a separate court be established to try war and ethnically-motivated crimes: the Kosovo War and Ethnic Crimes Court (KWECC). This court was proposed as an extraordinary court within the Kosovo legal system, composed of local and international judicial personnel. It was to have jurisdiction over cases involving grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, crimes against humanity and other crimes committed on political, racial or religious grounds in Kosovo since 1 January 1998. Crimes identified were murder, extermination, enslavement, deportation and imprisonment:[21]

> *It was anticipated that the KWECC would operate as part of a broader system of adjudication between the domestic courts and those of ICTY, and would handle difficult cases at the same time that it would increase the capacity of Kosovar judges. It would have concurrent jurisdiction with other regular courts, with its Chief prosecutor to determine that it would hear the case or remain in other courts. The*

[20] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, U.N. Doc. S/1999/1250, 23 December 1999, para. 54 - http://daccessdds.un.org/doc/UNDOC/GEN/N99/387/03/IMG/N9938703.pdf?OpenElement.

[21] While the report of the Technical Advisory Commission on Judiciary and Prosecution Service is still not publicly available, a summary of the proposed structure of the Court is contained in the US State Department, *Kosovo Judicial Assessment Mission Report*, April 2000, at 21 - http://pristina.usmission.gov/jud.pdf. See also John W.D. Jones, & Steven Powles, *International Criminal Practice* 3rd Ed., Oxford University Press, Oxford, 2003 at 29.

> *KWECC would have primacy over other domestic courts, and would be able to assume jurisdiction over a case at any given point. It would have concurrent jurisdiction with ICTY and would defer to ICTY's competence. The KWECC was to be composed of panels with both local and international representatives, but its President, Vice President, Chief Prosecutor, Deputy Chief Prosecutor, Registrar and staff would all be international. It was planned that the KWECC would work together with Kosovar judges and prosecutors on these difficult cases as one form of capacity building.*[22]

According to a report commissioned by the Canadian Department of Foreign Affairs and International Trade, *"[i]nitially the proposal to create the KWECC enjoyed good support and the UNMIK Department of Judicial Administration [DJA] spent a great deal of time and effort in developing operational plans to establish the court"*.[23] The UN Secretary-General in his March 2000 report to the Security Council also referred to the Court's establishment:

> *UNMIK is also making concerted efforts to establish a war and ethnic crimes court as soon as possible. The Technical Advisory Commission on Judiciary and Prosecution Service, established pursuant to UNMIK regulation No. 1999/6 of 7 September, 1999, recommended the creation of such a court. The particular nature of war and ethnically related crimes requires that these crimes be tried by panels with both local and international representatives. In this connection, the support of Member States in identifying and fielding expert personnel and in providing material and financial support will be essential.*[24]

UNMIK did not consult civil society in the drafting of the proposal, which has never been made public, despite attempts by Amnesty International to obtain a copy. Indeed, secret preparations for the Court continued well into 2000. In a press release issued on 17 May 2000, UNMIK stated:

> *The [Department of Justice] is also in the process of setting up the Kosovo War and Ethnic Crimes Court ('KWECC'). The court will be competent to try persons for war crimes, crimes against humanity, genocide and other serious crimes committed on the grounds of race, ethnicity, religion, nationality, association with an ethnic minority or political opinion. KWECC will have both local and international judges and prosecutors.*[25]

---

[22] Mark Baskin , Pearson Peacekeeping Centre, *Lessons learned on UNMIK Judiciary*, report commissioned by the Department of Foreign Affairs and International Trade of the Government of Canada, 5 June 2001, at 19.
[23] *Ibid.*, at 19.
[24] Report of the Secretary-General to the Security Council on the Interim Administration Mission in Kosovo,U.N. Doc. S/2000/177, 3 March 2000, para. 111 - http://daccessdds.un.org/doc/UNDOC/GEN/N00/325/36/IMG/N0032536.pdf?OpenElement.
[25] "Reviving the judiciary in Kosovo", UNMIK Press Release, 17 May 2000, UNMIK/PR/242 - http://www.unmikonline.org/press/press/pr242.html.

It was reported in June 2000 that the chief international prosecutor for the KWECC had been appointed and had arrived in Kosovo and that the Court was expected to start work in the summer.[26] However, despite the obviously continuing planning throughout 2000, the Court never materialised. The reasons suggested for its abandonment vary, but it seems concern as to the financial implications, United States reluctance and the establishment of the International Judges and Prosecutors Programme in February 2000 led to the proposal being quietly laid to rest by the end of 2000.[27]

C. Establishment of the International Judges and Prosecutors Programme

In the meantime, the first international judge and first international prosecutor were introduced into the District Court of Mitrovica/Mitrovicë in response to riots and inter-ethnic violence, which broke out following an attack on 1 February 2000 on a UN High Commissioner for Refugees (UNHCR) bus carrying Serbs into Serb-dominated northern Mitrovica/ë.[28] On 15 February 2000, the then UN Special Representative, Bernard Kouchner promulgated Regulation 2000/6, *On the Appointment and Removal from Office of International Judges and International Prosecutors*. This regulation provided for the appointment of international judges and prosecutors to conduct criminal cases within the jurisdiction of the Mitrovica/ë District Court (for the full text, see Annexe One).

In May 2000 Serb detainees in other parts of Kosovo began hunger strikes to protest against their lengthy pre-trial detention periods, which in some cases were up to 10 months. Many of the detainees had not even been indicted.[29] The detainees called for immediate trials with international judges and prosecutors as the detainees in Mitrovica/ë were now receiving. Regulation 2000/6 was therefore amended to allow for more international judges and prosecutors to be appointed and, on 27 May 2000, the regulation was amended to cover all regions of Kosovo.

By December 2000 it was decided that the mere presence of one international on a judging panel was insufficient to ensure a lack of bias as the international judge could still be out-voted by a majority of ethnic Albanian judges. The UN Special Representative therefore promulgated a further regulation; Regulation 2000/64, *On Assignment of International Judges/Prosecutors and/or Change of Venue* (see Annexe Two for the full text of this regulation). This regulation provided for a case to be assigned by the Special Representative,

[26]UNMIK Local Media Monitoring report, 3 June 2000 – available at http://www.unmikonline.org/press/mon/lmm030600.html.

[27] Baskin reports that the proposed court, "*fell victim to the budgetary concerns of the Advisory Committee on Administrative and Budget Questions [ACABQ] in August 2000*": Baskin, *supra* note 22, at 19.

[28] UNMIK Press Release, 1 February 2000, UNMIK/PR/150 – available at http://www.unmikonline.org/press/press/pr150.html

[29] For more on this, see Part Three of this report. See also Amnesty International, *Kosovo/Kosova: "Prisoners in our own homes"* AI Index EUR 70/010/2003, April 2003 at 20.

to an international prosecutor, international investigating judge and/or a majority international panel of judges, on application by the accused, defence counsel, the prosecutor or the UNMIK Department of Judicial Affairs (later Department of Justice) itself. It was not possible for an application to be made once a trial had commenced but the regulation provided that a Regulation 64 panel could be appointed for any appellate proceedings.

Following the promulgation of this regulation all cases involving war crimes, genocide or crimes against humanity are supposed to have been dealt with by Regulation 64 panels [30] (although the reality is that this has not been the case, as discussed in Part Four of this report). International judges and prosecutors have also been responsible for cases involving serious inter-ethnic crimes, organised crime and corruption. They have operated within the domestic court system in the form of mixed international/local, majority international or, in certain particularly sensitive cases, all international judicial panels. Originally the international judges and prosecutors were located in the Supreme Court in Pristina and in district courts in each of the municipalities of Kosovo. However as of 2006, apparently in an attempt to capitalize better on the limited numbers of international judges and prosecutors, the UNMIK Department of Justice has relocated all internationals back to Pristina from where they are to handle cases from around Kosovo under the 'single jurisdiction' approach.[31] As discussed below in Part Four, the single jurisdiction approach has had a number of adverse effects, including further limiting access to international judges and prosecutors and reducing the possibility for interaction with, and mentoring of, the local legal community.

Further changes to the International Judges and Prosecutors Programme by UNMIK before the expected EU takeover of the administration of Kosovo are expected. While in Kosovo in April 2006, Amnesty International delegates were told of a planned restructuring of the International Judges and Prosecutors Programme. A new prosecutor's office (the Special Prosecutor's Office) was planned, which would be made up of ten local and ten international prosecutors who will jointly prosecute organised crime, trafficking in human beings, inter-ethnic crimes, terrorism and corruption.[32] There was also a proposal that was being circulated by Chief International Judge Carol Peralta, which Amnesty International

[30] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: a Review*, September 2002, at 11.

[31] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section , *Kosovo Review of Criminal Justice System 1999-2005: Reforms and Residual Concerns*, March 2006, at 66. Amnesty International Interview with Annunziata Ciaravolo, Deputy Director, DOJ, 7 April 2006.

[32] *Ibid.* at 67. However, it appears that the creation of this office will have to wait until the EU Defence and Security Policy Mission succeeds UNMIK. See European Agency for Reconstruction, *Support to the Establishment of the Kosovo Special Prosecutors' Office*.
An EU-funded project managed by the European Agency for Reconstruction, posted early in 2007 (recruiting a Project Manager with the responsibility for planning, organization and implementation of the Kosovo Special Prosecutor Office (KSPO)) (*Support to the Establishment of the Kosovo Special Prosecutors' Office. An EU-funded project managed by the European Agency for Reconstruction*). The Kosovo Special Prosecutor' Office, under the Ministry of Justice, became operational in April 2007.

understands envisages a special chamber of the Supreme Court made up of mixed international/national panels to hear the cases dealt with by the Special Prosecutor's Office. As the proposal has not yet been made public, the details of the structure are not yet known. However, it currently appears that this could be a return to the KWECC model proposed by the Technical Advisory Commission on Judiciary and Prosecution Service back in 1999. It is not, however, envisaged that this chamber would conduct many war crimes cases, but would rather primarily address issues of corruption and organised crime.

PART TWO – THE FAILURE TO RECRUIT AND TRAIN PROPERLY INTERNATIONAL JUDGES AND PROSECUTORS

I. The ineffective recruitment of international staff

"Some internationals may not be 'up to scratch' but they are better than the locals…"[33]

Many members of the Kosovo legal community and civil society told Amnesty International that they considered the introduction of international judges and prosecutors as an important and useful step towards re-establishing the Kosovo justice system and inspiring public confidence in it as an institution. However, they also expressed doubts as to whether all of those recruited were sufficiently qualified to be capable of this difficult task. This concern was echoed by a number of UNMIK staff[34] and has been commented upon by numerous other international observers. A review of the recruitment procedures adopted by UNMIK makes this concern unsurprising. By failing to adopt an aggressive, targeted approach to recruitment, UNMIK has created a programme in which the standard of judges and prosecutors has varied considerably. Furthermore, as clearly thought-out and detailed selection criteria do not appear to ever have been employed, those recruited have often not held the necessary skills or experience to carry out an extremely challenging and sensitive role in rebuilding the Kosovo judicial system.

A. Absence of an aggressive recruitment programme

In February 2000 Amnesty International made a number of recommendations to UNMIK on the judicial system, including the introduction of a small number of international personnel into the domestic courts to assist local judiciary with sensitive cases and to raise their awareness of international human rights standards.[35] It was recommended that the international personnel recruited be carefully selected from countries with a civil law tradition, to ensure respect for the domestic legal system within which they would be required to operate. Amnesty International also recommended that, "[a]ny international professionals chosen to work in Kosovo should also have training and experience in the application of international human rights law".

[33] Representative of Legal Systems Monitoring Section, OSCE Department of Human Rights and Rule of Law.
[34] Amnesty International interview, April 2006.
[35] Amnesty International, *Amnesty International's Recommendations to UNMIK on the judicial system February 2000*, AI Index EUR 70/006/2000, 4 February 2000.

Considering the seriousness of the crimes the international personnel were introduced to try - crimes such as war crimes, crimes against humanity[36] and genocide - it seems self-evident that the highest calibre candidates, with the greatest experience possible, should have been chosen to serve in Kosovo. In addition, international judges and prosecutors were considered necessary in Kosovo because local judges and prosecutors had, in war crimes cases, been unable to ensure fair trials and human rights protections in accordance with international law and standards.

For those who believed international participation within the judicial system was necessary (at least in the early stages of Kosovo's reconstruction), the international judges and prosecutors were intended not merely to act as outsiders who could give an appearance of independence and impartiality to proceedings, but also to bring experience and knowledge of international law and standards. The additional challenge posed by the decision to insert internationals into the domestic legal system required some attempt to be made to ensure that the internationals selected were both willing and able to work within the system and apply both the applicable domestic law and international human rights conventions and standards incorporated into applicable law under UNMIK Regulations 1999/1 and 1999/24. In order to ensure the most appropriate individuals were appointed, it was necessary for there to be a clear, focused and aggressive recruitment programme.

Amnesty International, in recommendations made concerning the International Criminal Court and the African Court on Human and Peoples' Rights detailed a number of principles for the nomination and selection of judges for international courts. A number of these recommendations are equally applicable in the context of the internationalized panels in Kosovo. For example:

- Ensuring all attempts are made to achieve gender balance among those appointed;
- Ensuring wide advertising of the nomination process;
- Providing transparency in the nomination and selection procedure; and
- Allowing for the inclusion of civil society in nomination process.[37]

The UN Office of the High Commissioner for Human Rights (OHCHR), in its Rule-of-Law Tool for Post-Conflict States entitled, 'Prosecution Initiatives' released in 2006 also notes the importance of recruiting qualified and dedicated international staff to ensure the

[36] Whether crimes against humanity could be charged under the applicable law has been a matter of some controversy and the issue is discussed in further detail in Part Four**.** Article 117 of the new Provisional Criminal Code of Kosovo, which came into force on 6 April 2004, pursuant to UNMIK Regulation No. 2003/25 expressly includes crimes against humanity.

[37] Amnesty International, *International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges,* AI Index: IOR 40/026/2005, September 2005. Amnesty International, *African Court on Human and Peoples' Rights: Checklist to ensure the nomination of the highest qualified candidates for judges,* AI Index: IOR 63/001/2004, January 2004.

effectiveness of a transitional justice model. Among other recommendations, the Tool suggests:

> *"Targeted searches and loan arrangements with host countries may help, as may attractive conditions of service…Rigorous selection criteria should apply, and the process should have similar requirements for international and domestic candidates."*[38]

Unfortunately, in Kosovo it seems none of these possible approaches were ever employed. The first international judge was a member of the UNMIK mission who was 'persuaded' to take the role in response to the emergency situation, which had emerged in Mitrovica/ë (detailed above in Part One of this report)**.** This *ad hoc* approach set the trend for UNMIK's entire approach to the International Judges and Prosecutors Programme (other aspects of this *ad hoc* approach are discussed in Part Four of this report). In terms of recruitment, it appears that at no stage were serious efforts made to identify and recruit the most highly qualified, experienced and appropriate candidates in the world for the job. UNMIK's failure to make these efforts has been reflected in concerns that have been raised ever since regarding the efficacy of the international judges and prosecutors programme.

A former Deputy Special Representative of the UN Secretary-General for Police and Justice and his Senior Adviser have written:

> "*Candidates must have substantial experience as a professional judge dealing with criminal law cases in their home jurisdiction, as well as a knowledge of the civil law system and be familiar with international human rights standards and legal principles."*[39]

These criteria have not been reflected in the job advertisements until very recently. The May 2006 advertisement on the UNMIK website for international judge and prosecutor positions requires no more than an advanced law degree, fluency in English and five years experience as a judge for judicial appointments, or as a public prosecutor for international prosecutor positions.[40] Despite numerous oral and written requests to the UNMIK Department of Justice, Amnesty International has not been provided with a copy of any selection criteria for recruitment, making it difficult to ascertain whether any other qualifications or skills were

[38] OHCHR, *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives*, 2006, at 43 - http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Prosecutions_en.pdf.

[39] Jean-Christian Cady and Nicholas Booth, Deputy Special Representative of the UN Secretary-General for Police and Justice and Senior Adviser to Deputy Special Representative of the UN Secretary-General for Police and Justice, *Internationalized Courts in Kosovo: An UNMIK* Perspective, in Romano, Nollkaemper & Kleffner (eds.) *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, The Project on International Courts and Tribunals (PICT) 71 (New York : PICT & Oxford: Oxford University Press 2004).

[40] http://www.unmikonline.org/boards/JobAnnoun.nsf/f0400?OpenForm as at 31 May 2006.

sought. Former international judge, Judge Lortie of the Court of Quebec believes the UNMIK Department of Justice simply did not develop more detailed selection criteria than those set out in Regulation 2000/6.[41] Judge Lortie also stated that his interview for the position of international judge consisted of little more than a test of his ability to speak English and to check whether he had any preconceived opinions regarding the various parties involved in the war in Kosovo.[42] Since Amnesty International's raised concerns about the qualifications during its visit in 2006, there have been some improvements in the professional qualifications listed in the advertisements for international judges.[43]

In some cases it appears even basic language requirements were not met by those recruited. In the 2005 report of the Council of Europe Committee on Legal Affairs & Human Rights, the Rapporteur noted anecdotal evidence of international judges recruited with insufficient command of any of the official languages of Kosovo (Albanian, English and Serbian). He also reported instances of judges applying their own national laws instead of the law applicable in Kosovo and of judges lacking familiarity with European human rights principles.[44] The report made the following recommendation to UNMIK to reinforce the judicial system, which was adopted by the Parliamentary Assembly of the Council of Europe (PACE) in Resolution 1417 (2004):

> *"Ensuring that all international judges have a proper command of at least one of the official languages, along with sufficient experience of a relevant legal system and of the applicable international human rights instruments."*[45]

---

[41] Jean-Pierre Lortie (2003) *Kosovo: Mission Impossible*, Notes des conférenciers, Association du Jeune Barreau de Montréal (Young Bar Association of Montreal), 36-37 - http://www.ajbm.qc.ca/pub/formation/kosovo.pdf.

[42] *Ibid.*, at 36 (confirmed in telephone interview with Amnesty International delegate, 24 April 2006).

[43] The current advertisement for international judges lists the following professional qualifications:

> "**Education:** Advanced university degree in law from a recognized university
> **Experience**: Minimum of ten (10) years of relevant criminal law experience as a professional judge/prosecutor/barrister/attorney, of which at least five years as a professional judge, in or before a court equivalent to the District Court in Kosovo or a higher court. Familiarity with international human rights standards and legal principles. Experience in public international law and /or correctional and criminal law."

UNMIK Vacancy Announcement for Mission Assignment, **Vacancy #:** MIK-05-036 (http://www.unmikonline.org/boards/JobAnnoun.nsf/0/591262E4EE91196CC1257114003267A9/$FILE/MIK-05-036,%20International%20Judge,P-5,%20Roster.doc).

[44] Tony Lloyd, Rapporteur, Committee on Legal Affairs and Human Rights, *Protection of human rights in Kosovo*, Report to Council of Europe Parliamentary Assembly, Doc. 10393, 6 January 2005, para. 29(vii).

[45] *Ibid.*, para.4(iii)(f). See also Council of Europe, Parliamentary Assembly Resolution 1417(2004), para. 5(iii)(f). The most recent UNMIK vacancy announcement for an international judge stated: "Fluency in English language with good drafting ability required. Knowledge of another UN language would be an asset." UNMIK vacancy announcement, *supra*.

Similar findings have been made in a government-commissioned report and in reports of non-governmental organizations. For example, a report commissioned by the Canadian Department of Foreign Affairs and International Trade in 2001, also referred to the lack of prosecutorial experience of the international judges and prosecutors:

> *[T]he second wave of recruitment was desperate in an effort to bring in any one who formally filled the bill and these are with judges that often do not speak English well, have little prosecutorial experience, have little experience in criminal law or in war crimes. Even international judges and prosecutors emphasized that they are not well-versed in Kosovar or international war crimes and humanitarian law upon recruitment.*[46]

A report published in 2005 by the Center for International Peace Operations made a similar recommendation:

> *Better recruitment procedures and preparatory training should ensure that international jurists are sufficiently qualified and experienced. Judges and prosecutors should be deployed to post-conflict missions only on condition that they have substantial experience in rule of law based judiciaries, that they are able to adapt to a different legal system and that they have sufficient command of the English language in general and of legal terminology in particular.*[47]

In 2004, former OSCE legal advisers, John Cerone and Clive Baldwin, also criticised UNMIK's recruitment process for failing to ensure sufficient "quality control".[48] According to a report published by the International Center for Transitional Justice (ICTJ) in March 2006 the selection process now involves the Chief International Judge reviewing the applications and a telephone interview of short-listed candidates, usually by two current international judges, the head of the International Judicial Support Section and a representative of UNMIK's personnel office. The ICTJ report however notes that, *"this system has been criticized for being haphazard and for the difficulty in exercising quality control at such a distance"*.[49]

Despite all of the observations and recommendations listed above, in 2006, six years after the creation of the international judges and prosecutors programme, the UNMIK Department of Justice has still failed to address this issue.

---

[46] Baskin, *supra* note 22, at 22.
[47] Almut Schröder, *Strengthening the Rule of Law in Kosovo and Bosnia and Herzegovina: the Contribution of International Judges and Prosecutors*, Zentrum für Internationale Friedenseinsätze (Center for International Peace Operations), April 2005.
[48] John Cerone & Clive Baldwin, *Explaining and Evaluating the UNMIK Court System*, in Romano, Nollkaemper & Kleffner (eds.), *supra* note 39, at 53.
[49] International Center for Transitional Justice (ICTJ), *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, Prosecutions case studies series, March 2006, p15 - http://www.ictj.org/static/Prosecutions/Kosovo.study.pdf.

The global pool of judges and prosecutors qualified to carry out the functions required of international judges and prosecutors in the Kosovo courts is a small proportion of all judges and prosecutors in the world. However, the apparent complete failure on the part of the UNMIK Department of Justice even to attempt to institute recruitment processes that would draw in the most suitable candidates is a matter of deep concern. Despite the small number of lawyers around the world with extensive experience in international criminal law, the pool of lawyers with practical experience in judging, prosecuting and defending criminal cases in the ICTY, ICTR, Special Court for Sierra Leone and the Special Panels for Serious Crimes in Dili, Timor-Leste is sufficiently large to select highly qualified candidates for the small number of judicial and prosecutorial posts in the Regulation 64 panels. With the closure of the Special Panels and as the exit strategy of the ICTY and ICTR progresses, the numbers of such lawyers is continuing to rise. Indeed, the new International Criminal Court and the Extraordinary Chambers for Cambodia do not appear to have any trouble locating qualified international judges and prosecutors.

B. Failure to recruit adequately qualified personnel

Amnesty International has not been provided with copies of the *curriculum vitae* of those recruited, despite having made a written request to UNMIK Department of Justice. This is in marked contrast with the International Criminal Court, the ICTY, the ICTR and the Cambodian Extraordinary Chambers, where a *curriculum vitae* of each judicial and prosecutorial candidate has been made publicly available on the internet prior to appointment. The website for the Special Court for Sierra Leone also provides basic biographical details about each of the judges' professional careers. Without copies of these *curriculum vitae* it is difficult for civil society to determine conclusively whether the international judges and prosecutors who have served or who continue to serve in Kosovo have the appropriate skills and expertise for the task. However, anecdotal evidence suggests that the extent to which those recruited have been adequately skilled and experienced has varied greatly.

i. Lack of relevant experience and knowledge of international human rights and humanitarian law

It may be unrealistic to expect the international judicial personnel introduced into Kosovo to have a sound understanding of the domestic law prior to arrival (although there is no reason they cannot be provided some training). However, in light of the nature of the crimes the internationals were initially expected to prosecute or conduct trials and their intended function as role models in applying international human rights and fair trials standards, it is not unrealistic to expect that those introduced should have some practical experience of international human rights and international humanitarian law. However, a former international judge who spoke to Amnesty International stated that he could not recall during his interview having been asked any questions about his knowledge of or experience in international humanitarian or human rights law– neither of which he had.

As noted above, although there is a limited number of judges and prosecutors with experience in international humanitarian, criminal or human rights law, the number is adequate to supply the small number of international posts in the Regulation 64 panels. Therefore, it is of concern that, apart from the very recent listing in advertisements of knowledge of human rights and experience in criminal law, no real attempt seems to have been made to conduct an aggressive international search effort to locate candidates with such experience. No attempt seems to have been made to seek the advice or assistance of the International Criminal Court, ICTY, ICTR, the Special Panels for Serious Crimes, the Special Court for Sierra Leone or the Extraordinary Chambers for Cambodia for recommendations as to how to recruit appropriate candidates, to secure the temporary loan of judges and prosecutors or to ask retired judges and prosecutors of these tribunals if they would be willing to serve in Kosovo.

ii. Lack of experience in criminal prosecutions

The failure to recruit judicial personnel with international humanitarian and human rights law experience might have been mitigated if those recruited had extensive criminal experience. The UN Secretary-General in his report, *The rule of law and transitional justice in conflict and post-conflict societies* notes:

> *"It is highly desirable…that those nominated, elected or appointed to serve as judges in international and hybrid tribunals possess extensive criminal trial experience, preferably as a judge."*[50]

However, one former local judge of the Supreme Court, who served from 2000 until 2002, told Amnesty International that he has often asked himself whether the internationals introduced had the competence or experience as judges to be capable of judging the cases they were brought in to handle.[51]

He was not alone in voicing this concern. For example, an official in the UNMIK Police told Amnesty International delegates that he believed, even if prosecutors did not have war crimes experience, they at least needed to have strong prosecution backgrounds so that they could properly take statements, ensure searches conducted are legal and evidence is collected properly. In a review that Amnesty International conducted of the still unpublished judgments in war crimes and crimes against humanity cases, the organization noted at least one case that had to be dismissed due to improperly collected evidence. This problem was also observed by the Humanitarian Law Center (HLC), which is the non-governmental organization that has most closely monitored the war crimes and crimes against humanity

[50] UN Doc. S/2004/616, 23 August 2004, p15.
[51] Interview with Amnesty International, 8 April 2006.

cases in Kosovo.[52] Amnesty International also found an example of a case in which the prosecution's application for leave to appeal was refused as it was filed out of time by the international prosecutor.[53] In another example, an international judge told Amnesty International of a war crimes case over which he had presided where he had acquitted the defendant. The international judge stated that he believed at least one of the defence alibi witnesses could have been verified by the International Prosecutor but was not due to incompetence on the part of the prosecutor.[54]

iii. Lack of expertise in dealing with cases of sexual violence

Various international and local non-governmental organizations, including Amnesty International, documented numerous cases of rape in Kosovo.[55] In addition, according to the head of the UNMIK Victim Assistance and Advocacy Unit (for the work of this unit, see Part Four below), NATO forces also documented rape testimonies immediately after they arrived.[56] This along with the experience of Bosnia, where both the 1992 Independent Commission of Expert's Report and the evidence put before the ICTY in a number of cases, should have alerted the international community to the need to ensure sexual violence committed during the conflict was properly investigated and prosecuted. However, it seems no attempts were made to seek any international judges or prosecutors with specific expertise in gender-based or sexual violence. The apparent failure to do so may be a major reason that there has not been a single prosecution for sexual violence as a war crime or crimes against humanity in Kosovo initiated by an international prosecutor, although there was one such prosecution initiated by a local prosecutor against a Montenegrin, which led to a conviction in the *Jokić* case that was reversed on appeal by an international panel of the Supreme Court of Kosovo on the ground that the District Court had failed to consider the evidence carefully and failed to call defence witnesses. A prosecution by an international prosecutor in a retrial led to an acquittal on the ground that the eye-witness identification was not credible.[57]

iv. Conclusion

[52] Interview with Amnesty International, 8 April 2006. Humanitarian Law Center, *Transitional Justice Report: Serbia, Montenegrao and Kosovo 1999-2005*, 27 June 2006 - http://www.hlc.org.yu/english/Other/Other/index.php?file=1443.html.

[53] *Case of Idriz Balaj, Daut Haradinaj, Bekin Zekaj, Ahmet Elshani, Ramush Ahmetaj,* Supreme Court Appeal No. AP95/2003, 1 December 2003.

[54] Telephone interview with Amnesty International, 24 April 2006.

[55] Amnesty International, News Service: 104/99 *KOSOVO: Incidents of multiple rapes*, AI Index EUR 70/076/1999, 27 May 1999; Humanitarian Law Center, *Kosovo: Roma: Targets of Abuse and* Violence, 1 December 1999 - http://www.hlc.org.yu/english/Ethnic_Minorities/Kosovo/index.php?file=177.html, Human Rights Watch, *Federal Republic of Yugoslavia – Kosovo: Rape as a Weapon of "Ethnic Cleansing"*, HRW Index No. D1203, 1 March 2000.

[56] Amnesty International interview, 4 April 2006.

[57] *Jokić* case, Verdict, No. P. no. 27/2000, District Court of Gjilan (local panel), 20 September 2000, *rev'd*, Verdict, No. AP nr. 8/2001, Supreme Court of Kosovo (international panel), *acquittal*, Verdict, , S No. P. No. 45/2001, Verdict, District Court of Gjilan (international panel), 3 May 2002.

The head of the OSCE Legal Systems Monitoring Section has stated that the UN had experienced real difficulties getting qualified professional people, was constantly recruiting and, for that reason, the internationals, while being less than perfect for the job, were considered "better than nothing". This cannot be an excuse for providing second-class justice. If there have been problems attracting the right sort of candidate, the UN needs to reconsider the overall recruitment strategy and incentives provided, in the light of the experience of the International Criminal Court, the ICTY, the ICTR, the Special Panels for Serious Crimes, the Special Court for Sierra Leone and the Extraordinary Chambers of Cambodia to ensure the best possible candidates are attracted. Considering the international judges and prosecutors are being required to conduct trials for the most serious crimes imaginable in the world, including war crimes, crimes against humanity and genocide, the recruitment of international judges and prosecutors for the Regulation 64 international panels and for other international and internationalised courts, should meet the highest standards. This is essential both in terms of ensuring the best-qualified candidates are brought in to assist with local capacity building and enhancing the credibility and integrity of international criminal law. The failure to put in place rigorous recruitment procedures to ensure a consistent selection of the most qualified judges and prosecutors in the world has seriously damaged the credibility of the International Judges and Prosecutors Programme as a model for future internationalized courts. It has also undermined the effectiveness of the model in assisting to establish a strong, solid, well-respected judicial system in Kosovo.

II. Lack of training

Amnesty International is deeply concerned by the failure of the UNMIK Department of Justice to provide even the most basic training in the applicable law, the Kosovo justice system or in international human rights and international humanitarian law, to international prosecutors and judicial personnel introduced into the Kosovo legal system. This is especially worrying, bearing in mind the concerns raised above, regarding the lack of qualifications or experience among some of those recruited. It is not simply a failure to develop and implement training programmes in accordance with international standards, such as Amnesty International's A *12-Point Guide for Good Practice in the Training and Education for Human Rights of Government Officials*", ACT 30/001/1998, February 1998. At no stage has the UNMIK Department of Justice established either an initial training programme or a continuing legal training programme for international judges and prosecutors, despite recommendations by independent observers. There also appear to be serious shortcomings in the training provided by the UNMIK Department of Justice for local judges, prosecutors, court administrators, defence lawyers and detention personnel.

Some training was provided initially to international judges and prosecutors by the Kosovo Judicial Institute set up by the OSCE, not by UNMIK, in 2000. However, in its review of the criminal justice system in August 2000, the OSCE Legal Systems Monitoring Section recommended:

The Kosovo Judicial Institute 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. In particular, all appointed judges and public prosecutors should be required to undergo an intensive legal training course prior to taking their official posts.[58]

Although it appears there are still improvements necessary,[59] the Kosovo Judicial Institute has made significant progress in developing a continuous and comprehensive training programme for the local judiciary in national and international law and in specialized areas, such as crimes of sexual violence.[60] However, the director of the Kosovo Judicial Institute told Amnesty International delegates that it was not entitled to train international judges and prosecutors. International judicial personnel would sometimes be invited for specific training sessions, but generally any involvement was as trainers.[61]

Representatives of the UNMIK Department of Justice International Judicial Support Division told AI that stated it did not have any programme in place for the induction and ongoing training of new international personnel and that this was the responsibility of the Kosovo Judicial Institute. When Amnesty International informed the International Judicial Support Division that it had been told the Kosovo Judicial Institute's mandate did not include the international judiciary, the Division conceded that no training at all was provided.

As explained in the previous section, many of the international personnel recruited have little or no practical experience or knowledge of international criminal law, international humanitarian law and human rights law. This serious gap, coupled with their lack of knowledge or experience of the domestic legal tradition, system and applicable substantive and procedural law, makes it essential for the UNMIK Department of Justice to provide the international judges and prosecutors with comprehensive initial and continuing training.

A number of the international judges interviewed by Amnesty International described a feeling of just being "dropped in". One judge told Amnesty International delegates that he

[58] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, Feb 2000-July 2000 report, 22.
[59] Human Rights Watch, *Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post- March 2004*, HRW Index No. D1804, 30 May 2006, at 29 cites complaints that the training provided remains superficial and does not adequately address the needs of those being trained.
[60] The 2006 programme details plans for approximately 43 seminars and workshops in the areas of criminal, minor offences, civil, European Union and International law as well as in developing practical legal skills. A two-day intensive seminar on substantive and practical aspects of war crimes cases was held in June 2005. Amnesty International delegates were also told that there had been two or three trainings on sexual violence and a number of trainings on gender issues when the anti-discrimination law was passed – interview with director of Kosovo Judicial Institute, 4 April 2006. However, Amnesty International has not had an opportunity to evaluate the quality of this training in accordance with international standards, such as the organization's 12-point programme (see below).
[61] Interview with Amnesty International delegates, 4 April 2006.

was allocated a case the day after he arrived. By way of training he stated he had, *"four or five hours of chat over a couple of weeks with a local law professor. That was about it."* He understood that there were also seminars once every three months but that on top of the workload it was almost beyond the capacity of international judges to participate.[62] Another international judge described a situation in which his lack of awareness of local culture and customs led to him offending a witness who promptly left court and refused to testify.[63]

All the international judges, both current and former, interviewed by Amnesty International stated they had simply requested a copy of the criminal and criminal procedure code and familiarised themselves with it in their own time, prior to or upon arrival. This is not sufficient to allow the international judicial personnel to fulfil their role. It is disadvantageous to the international judges and prosecutors, who are forced to apply the law within a legal system which many of them have no familiarity with, in very serious cases with serious consequences for the individuals involved. It is also disadvantageous to the accused as the certainty of the law and its application is undermined because the international judges and prosecutors are forced to rely on their own legal traditions and principles.

The combination of a lack of training and the lack of clarity regarding applicable law and the ways in which the various sources of applicable law should be read together has also added to this uncertainty. As one former international judge told Amnesty International, *"It was never clear to us* (international judges) *how exactly international standards should be applied to the laws"*. This judge also told Amnesty International:

> *[there was a] giant problem of interpretation between civil law and common law judges. As the first common law judge there I took a lot of hits. I couldn't get a clear answer on how to handle this – it seemed to be 'do your own thing time' so I did!*

One respected local defence lawyer told Amnesty International that he believed international prosecutors simply copied ICTY indictments, without consideration for the fact that Article 7 of the ICTY Statute is different from the applicable law in Kosovo.[64] He told Amnesty International that in his opinion, "the first problem the international judges and prosecutors are facing here is that they don't know the applicable law. This is especially a problem for war crimes."[65] This criticism of the over-reliance on ICTY indictments was echoed by a former international judge.[66] The recent ICTJ report also notes concerns regarding the influence of the different legal traditions from which prosecutors have come on the drafting of indictments and charging practices.[67]

[62] Interview with Amnesty International delegate, 11 April 2006.
[63] Telephone interview with Amnesty International delegate, 24 April 2006.
[64] Amnesty International Interview, 8 April 2006.
[65] Amnesty International Interview with Kosovo Albanian lawyer practising in Pristina, 8 April 2006.
[66] Amnesty International Interview, 11 April 2006.
[67] ICTJ, *supra* note 49, at 23.

The Council of Europe Committee of Legal Affairs and Human Rights also noted with concern the lack of training received by international judicial personnel:

> *As for international judges, whilst in general well appreciated for their experience and ability to deal with politically or ethnically sensitive cases, not all have had the training necessary for the job.*[68]

For this reason, the following recommendation was made to UNMIK by the Parliamentary Assembly in Resolution 1417 (2004):

> *Reinforce the judicial system, including by:*
> …
> *e. providing full and effective training to judges, prosecutors and lawyers on all aspects of the law, in particular new instruments such as the Provisional Criminal Code and Provisional Criminal Procedure Code and international human rights applicable in Kosovo.*[69]

This recommendation has still not been implemented.

PART THREE – THE DENIAL BY REGULATION 64 INTERNATIONAL PANELS OF THE RIGHT TO A FAIR TRIAL

The UNMIK Department of Justice has failed through its International Judges and Prosecutors Programme to fulfil its core mandate to "to build a multi-ethnic, independent, impartial and competent judiciary, while ensuring in the shorter term that inter-ethnic and organised crime are addressed through international judges and prosecutors who can act, and be seen to act, without fear or favour".[70] As a body established by the UN, it must operate in a manner consistent with the purposes of that organization, which include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[71] The human right to a fair trial is recognized in Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) and a wide range of other international instruments. In particular, anyone arrested on a criminal charge is "entitled to trial within a reasonable time or to release".[72] Everyone charged with a crime is "entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".[73] In addition, everyone charged with a criminal offence is

[68] Lloyd, *supra* note 44, para. 29 (vii).
[69] Resolution 1417 (2004), para. 5(e).
[70] http://www.unmikonline.org/justice/index_pillar1.htm.
[71] Charter of the United Nations, art. 1.
[72] ICCPR, art. 9 (3).
[73] *Ibid.*, art. 14 (1).

entitled "[t]o have adequate time and facilities for the preparation of the defence", "[t]o be tried without undue delay" and "[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court".[74]

As discussed below, the UNMIK Department of Justice and its International Judges and Prosecutors Programme has failed to ensure that each of these guarantees was fully respected. The international judges and prosecutors are not properly accountable, they lack independence and they do not operate with the transparency required by a court. They have also failed to ensure that the rights of suspects and accused are fully respected, in particular, by failing to ensure that proceedings are fully and correctly interpreted and that transcripts of proceedings are available in the language of the accused and that an equality of arms between the prosecutors and the accused is maintained.

I. Lack of accountability

The international judges and prosecutors are not accountable to any independent and impartial body. This is in contrast with local judges and prosecutors, who have been subject to a separate (though not fully independent) body, which is now being replaced by two separate bodies, one for judges and the other for prosecutors. Even more disturbing, as detailed in Part Three, Section II, is that international judges and prosecutors are subject to executive interference, seriously undermining their independence. Furthermore, while the OSCE monitoring programme originally monitored and reported on cases conducted by international judges and prosecutors, Amnesty International was told by the head of the Legal Systems Monitoring Section that this is no longer the case.[75]

In an interview with Amnesty International delegates in April 2006, the Deputy-Director of the UNMIK Department of Justice, Ms Annunziata Ciaravolo, stated that:

> *"The main goal of a mission is to establish the rule of law. Without a functioning judiciary you cannot establish democracy."*[76]

That the re-establishment of the judicial system was of paramount importance in Kosovo has already been noted. However, while efforts have been made by the UNMIK Department of Justice to create an independent functioning domestic judiciary, these initiatives have not been applied to the international judges and prosecutors.

The Kosovo Judicial and Prosecutorial Council was established in April 2001 to appoint, regulate and, where necessary, discipline members of the local judiciary.[77] However, despite the presence of international judges and lawyers on the Council, it was not mandated

[74] *Ibid.*, art. 14 (3) (b), (c) and (f).
[75] Amnesty International interview, 3 April 2006.
[76] Amnesty International interview, 7 April 2006.
[77] UNMIK/REG/2001/8, promulgated 6 April 2001.

to recruit, appoint or discipline members of the international judiciary. This omission was in spite recommendations made to the contrary.[78] The Deputy Director of the UNMIK Department of Justice, Annunziata Ciaravolo, herself a former international judge in Kosovo and currently Chief International Prosecutor (Amnesty International's concerns regarding the appropriateness of all three positions being held by the same person are detailed below in Part Three, Section II), stated that she did not consider it appropriate for international judicial personnel to be subject to a council consisting of members of the local legal community, on the ground that it would make them vulnerable to accusations that they were motivated by political reasons (see discussion below Part Three, Section II).[79] However, no attempts have been made to ensure that the international judges and prosecutors are at least answerable to some independent body within Kosovo.

The issue was raised with UNMIK in October 2004 by the Ombudsperson, after he received a complaint of alleged misconduct on the part of an international prosecutor. In a letter[80] addressed to Jean-Christian Cady, the Deputy Special Representative of the UN Secretary-General for Police and Justice, the Ombudsperson noted that he had attempted to follow up the complaint and sought an investigation into the alleged misconduct, but had been informed by the Kosovo Judicial and Prosecutorial Council that, while it could investigate local judges and prosecutors, it was not competent to carry out such an investigation of an international prosecutor. The Ombudsperson stated that he also sought to raise the issue with the then Director of the Department of Justice, Thomas Monaghan, but *"Mr Monagham (sic) could also not give me an entirely satisfying answer"*. The Ombudsperson concluded:

> *This is just another example of the lack of legal mechanisms in Kosovo with regard to the conduct of international staff members working for UNMIK or related institutions. Such double standards greatly undermine the efforts of UNMIK to build a legal system that is in accordance with European principles and values.*
>
> *I consider it very important that effective action be taken to put an end to this absolute lack of accountability, at least for international prosecutors and judges, whose task is particularly important as it constitutes the basis for a proper and qualitatively adequate administration of justice in Kosovo, in particular regarding the most serious and sensitive criminal cases.*

As seems to have been generally the approach of UNMIK to issues of accountability, no response to the Ombudsperson was forthcoming until 28 February 2005. When a response was finally sent to the Ombudsperson, it stated:

[78] Staff member of the UNMIK Office of the Legal Adviser to the Special Representative, interview with Amnesty International delegates, 5 April 2006.
[79] Amnesty International interview, 7 April 2006.
[80] Available in full on the Ombudsperson Institution's website - http://www.ombudspersonkosovo.org/.

> *It is fully accepted and acknowledged that the citizens of Kosovo deserve a right to recourse to a regulatory body that would investigate and adjudicate upon allegations of professional misconduct in relation to [international judges and prosecutors]. However, the system whereby [international judges and prosecutors] are integrated in the Kosovar justice system is unique and unprecedented in the annals of UN peacekeeping operations. Upon due consideration of all legal and procedural aspects of the matter and following consultation with the [Kosovo Judicial and Prosecutorial Council], the Department of Justice is currently considering the establishment of such a regulatory body. This body would submit its recommendations to the authority that is competent to take appropriate disciplinary action against the [international judges and prosecutors], which could be the [UN Special Representative], the UN Administration or the national jurisdiction of the respective [international judges and prosecutors]*[81]

The regulatory body referred to by Thomas Monaghan has not been established. Furthermore, when the issue was raised in various interviews with staff of the Department of Justice conducted by Amnesty International, no one within the Department could point to any attempts to remedy the current situation. On 20 December 2005 the SRSG promulgated a regulation establishing a new Kosovo Judicial Council which replaces the Kosovo Judicial and Prosecutorial Council.[82] A Prosecutorial Council is also to be established shortly. However, as with the Kosovo Judicial and Prosecutorial Council, the Kosovo Judicial Council does not have jurisdiction over international judges and prosecutors, but only over local judges and prosecutors.[83]

At least two of the international judges interviewed by Amnesty International said they would have considered it acceptable to be regulated by the Kosovo Judicial and Prosecutorial Council. Judge Clayson, who served as chairperson of this body for 15 months**,**

[81] The full text of this letter is available on the Ombudsperson Institution's website - http://www.ombudspersonkosovo.org/.

[82] UNMIK Regulation No. 2005/52 – available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2005regs/RE2005_52.pdf.

[83] An important new development has been the adoption of UNMIK Regulation No. 2006/25, 27 April 2006 (http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_25.pdf), which provides for the recruitment and reappointment of Kosovo judges and prosecutors and which is designed to ensure that more members of minority groups and women become Kosovo judges and prosecutors and to ensure that such judicial officers are fully qualified through strict examination requirements. However, it appears that neither the regulation nor Administrative Direction No. 2006/18 Implementing UNMIK Regulation No. 2006/25 on a Regulatory Framework for the Justice System in Kosovo (http://www.unmikonline.org/regulations/unmikgazette/02english/E2006ads/ADE2006_18.pdf) apply to international judges and prosecutors. In addition, there are a number of concerns about these two documents, including inadequate provisions concerning gender balance and threats to the independence and impartiality of the judges and prosecutors in the control of recruitment and reappointment by the Special Representative, an executive official.

said that he felt the concerns regarding international judiciary being vulnerable to politically-motivated attacks could, *"easily have been fixed, especially as the KJPC was majority international, but it was not a high priority"*.[84]

Another international judge said he felt the main reason for the reluctance of internationals to be subject to the Kosovo Judicial and Prosecutorial Council was a, *"lack of communication between international and local judges"*. He said he felt the Council being given the mandate to regulate internationals, *"could have been done"*.[85]

The OSCE has also repeatedly recommended that international judiciary be subject to the same requirements of tenure, accountability and discipline as the locals, including investigation by the UNMIK Judicial Inspection Unit and the Kosovo Judicial and Prosecutorial Council[86] but this recommendation has fallen on deaf ears. Even within UNMIK, the Department of Justice's approach has been met with disbelief. Representatives from the UNMIK Office of the Legal Adviser also told Amnesty International that they considered the Kosovo Judicial and Prosecutorial Council (now the Kosovo Judicial Council) to be the appropriate regulatory body and that they did not understand why this recommendation had not been implemented.[87]

Amnesty International's concerns in relation to this apparent lack of accountability are twofold. First, it appear that there are insufficient safeguards in place, aside from the non-renewal of the international judge or prosecutor's contract, to ensure professional misconduct is properly investigated and disciplined. Second, there exists a complete lack of accountability of international judges and prosecutors to Kosovo institutions and to human rights standards in applicable law, which is unacceptable and must be remedied. This is particularly significant if they are to remain, as recommended by the Secretary General's Special-Envoy (see above in the Introduction to this report), and envisaged by the international community, after Kosovo's final status is decided.

If the international judiciary are to serve alongside their local counterparts within the domestic system then it is imperative that they are subject to the same regulation and standards of accountability. This would address the perception within the local legal community that the internationals are "in a separate world of their own". It would also establish greater equality between the locals and internationals, which would foster greater possibilities for interaction and cooperation. Finally, ensuring proper accountability of all

[84] Amnesty International interview, 11 April 2006.
[85] Telephone interview with Amnesty International, 24 April 2006.
[86] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo - Review of the Criminal Justice System (September 2001 - February 2002)*, at 43, David Marshall & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 Harv. Hum. Rts. J. 96, 122 (2003), OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, 2006, *supra* note 31, at 63.
[87] Amnesty International Interview, 5 April 2006.

individuals within the justice system, international and national, would also enhance the integrity of a judicial system, which up until now has suffered from a serious lack of credibility in the eyes of the local Kosovar community.

Annunziata Ciaravolo's justification for the present situation was, "we don't want to be judged by a body that is not independent". Amnesty International agrees with the concerns of Annunziata Ciaravolo, but it notes that no attempt has been made to establish a truly independent council. This is of importance for both the international and local judiciary. If the Kosovo Judicial Council and its predecessor, the Kosovo Judicial Prosecutorial Council, are not independent, then there is a need to remedy this situation. It seems the current Kosovo Judicial Council contains the Minister of Justice of the Provisional Institutions of Self-Government (PISG). This is unacceptable in terms of judicial independence for both the international and local judiciary. It is not clear why the UNMIK Department of Justice feels this situation is satisfactory for local judiciary, but not for internationals.

Furthermore, as demonstrated in the next section, the asserted concern about the need for the regulatory body to be independent is not reflected in relationship between the UN Special Representative and international judges and prosecutors. As explained in the next section, Annunziata Ciaravolo drew the distinction between the possibility of being fired (or not having the contract renewed) and being disciplined, which she considered far more serious and could potentially damage the individual's career. This is unacceptable. If an individual is found to have acted in a way that is inappropriate to his or her office, whether their future career may be damaged should not override UNMIK's obligations to ensure an independent system of accountability for all judges and prosecutors in accordance with international law and standards. This is regardless whether they are appointed on an international basis or by local authorities.

In addition, accountability of international judges and prosecutors to their home regulatory bodies is not a solution. Rather, they should be accountable to Kosovo's institutions, as the system within which they operate. This is all the more important if they are to remain after determination of Kosovo's final status.

II. Lack of independence

Although, as outlined above, there are serious concerns regarding the lack of appropriate procedures in place to hold international judges and prosecutors accountable, it is also a matter of serious concern that the current ways of holding them accountable seriously undermine their independence. It is a fundamental principle of justice that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[88]

[88] *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewartt, C.J.).

Article 14 (1) of the ICCPR recognizes the right of an individual, "to a fair and public hearing by a competent, independent and impartial tribunal". The right to an independent and impartial court is recognized by other international criminal courts.[89]

It is generally recognised that for a judicial system to be effective it must be independent – and to appear to be independent - of interference by other arms of government, as well as any other external source. As the UN Special Rapporteur on the situation of human rights in the former Yugoslavia explains: "Independence presupposes the judiciary to be institutionally protected from undue influence by the executive branch."[90]

However, the International Judges and Prosecutors Programme is tainted by the fact that all international judges and prosecutors, through various structural aspects of the programme, are ultimately subject to the executive arm of the UNMIK administration.[91] As one former international judge put it, "You can't have one man responsible for all arms of government [the UN Special Representative]" – that's nonsense!"[92] The 2006 International Center for Transitional Justice report makes the observation; *"A hindrance to the 'demonstration effect' in Kosovo has been the perceptions of interference by UNMIK executives in the judicial sector, which reinforces the impression that courts can be manipulated."*[93]

Similarly, US law professor, Edwin Villmoare who worked in Kosovo with the American Bar Association notes:

> *The international judges who were brought in as role models for local judges have had little impact. They work on short-term contracts of less than a year and are tightly controlled by UNMIK's Department of Judicial Affairs. The Department of*

[89] See, for example, Article 40 (Independence of the Judges) and paragraph 1 of Article 42 (The Office of the Prosecutor) of the Rome Statute.

[90] Report of Ms Elizabeth Rehn, Special Rapporteur on the situation of human rights in the Former Yugoslavia, submitted 10 September 1997, U.N. Doc. E/CN.4/1998/9, para. 12. http://hri.ca/fortherecord1998/documentation/commission/e-cn4-1998-9.htm.

[91] The Human Rights Committee in July 2006 expressed its concern about the lack of independence of international judges and prosecutors:

> "The Committee is concerned about the absence of adequate guarantees for the independence of international judges and prosecutors. . . . UNMIK, in cooperation with PISG as required, should establish independent procedures for the recruitment, appointment and discipline of international judges and prosecutors . . ."

Human Rights Committee, Concluding observations of the Human Rights Committee, KOSOVO (SERBIA), U.N. Doc. CCPR/C/UNK/CO/1, 14 August 2006, para. 20 (http://daccessdds.un.org/doc/UNDOC/GEN/G06/436/91/PDF/G0643691.pdf?OpenElement). The Human Rights Committee asked UNMIK to respond to its observations and recommendations within six months; no reply is posted on the UN website.

[92] Amnesty International telephone interview with former international judge, 24 April 2006.

[93] ICTJ, *supra*, note 49, at 32.

> *Judicial Affairs selects particular judges for particular cases. The judges know they are assigned to cases at bureaucratic whim. The judges enjoy nothing approaching judicial independence and act accordingly.*[94]

A. Contractual restrictions

i. Recruitment of international judges and prosecutors as UN Employees

Amnesty International has real concerns regarding the recruitment of international judges as UN employees. As one former international judge notes, the title of his position was not 'judge' but 'Senior Judicial Affairs Officer', making him an international civil servant. In his letter of appointment it stated:

> *As a staff member of the United Nations, you are accorded certain privileges and immunities to enable you to carry out your functions. The standards of conduct and obligations of international civil servants are set forth in article 1 of the Staff Regulations and Rules and include the obligations to conduct oneself only with the interests of the United Nations in view to observe strict neutrality, and to seek or receive instructions from no source external to the United Nations.*[95]

Former International Judge Patrice de Charette, in his book *Les Oiseaux Noirs du Kosovo* ("The Black Birds of Kosovo") also notes:

> *On occasion, during the interviews with candidates for the position of international judge in which I have participated, an official of the Department of Judicial Affairs [now Department of Justice] has asked the candidate about his or her loyalty to the United Nations if recruited.*[96]

The recruitment of international judges as if they were any other UN employee fails to recognise their distinct roles. Judge de Charette notes that this point was made by a number of judicial candidates in response to that question.[97]

It is a widely recognised principle that, *"Judges' appointment, retention and behaviour should always be in conformity with the Basic Principles on the Independence of the Judiciary."*[98]

---

[94] Edwin Villmoare, *Ethnic Crimes and UN Justice in Kosovo: The Trial of Igor Simić*, 37 Tex. Int'l L. J. 373, 384 (2002).

[95] Lortie, *supra*, note 41, at 37.

[96] Patrice de Charette, *Les Oiseaux noirs du Kosovo: un juge à Pristina* 176-177 (Paris: Éditions Michalon 2002):

> *Lors d'interviews de candidates juges internationaux auxquelles j'ai pu participer, il est arrive qu'un responsible du Département des affaires judiciaries demande au candidat quelle serait sa 'loyauté à l'égard de l'ONU' s'il était recruté.*

[97] *Ibid.*, at 177.

Furthermore, according to General Principle 1.3 of the European Charter on the Statute for Judges:

> *In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.*

Para 2.1 of the European Charter on the Statute for Judges states, "Judicial candidates must be selected and recruited by an independent body or panel."

Judge Lortie of the Court of Quebec notes in relation to his recruitment experience:

> *To my knowledge not a single judge has participated in the selection of candidates. Aside from the general criteria set out in Resolution 2000/6, there is no selection committee, no rule or indicator which allows a candidate to know why his or her candidature was accepted or rejected. To my great surprise, upon arriving in Prishtina, I learnt that some of the judges who had applied for the mission to Kosovo had been interviewed by telephone by the Public Prosecutor for Kosovo, the same person who would eventually be appearing before the chosen candidate or else, as the person in charge of the public prosecutors, would choose who represented the state before the chosen candidate.*[99]

A number of the international judges appointed were interviewed by Michael Hartmann, the then Chief International Prosecutor, although it appears this procedure has now been revised.[100] In a review of the IJP programme in 2004 John Cerone and Clive Baldwin, both former Human Rights Legal Advisers with the OSCE-led Pillar of UNMIK, were also

---

[98] OHCHR, *Rule-of- Law Tools for Post-Conflict States: Mapping the justice sector* 10 (2006) - http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Mapping_en.pdf . See also Despouy, Leandro, Civil and Political Rights, including the questions of independence of the judiciary, administration of justice, impunity: report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2006/52, 23 January 2006, para.54.

[99] Lortie, *supra*, note 41, at 36-37:

> *À ma connaissance, aucun juge ne participle à la selection des candidates. Hormis les critères généraux énoncés à la resolution 2000/6, il n'existe aucun comité de selection, aucune règle ou balise permettant au candidat de savoir pourquoi sa candidature a été retenue ou écartée. À ma grand surprise, une fois en poste à Pristina, j'apprends que certains juge postulant pour la mission au Kosovo ont été interviewés par telephone par le Procurer Public pour le Kosovo, c'est-à-dire celui-là meme qui viendra éventuellement devant le candidat choisi ou qui encore, comme patron des procureurs publics, en désignera un pour représenter l'État devant lui.*

[100] ICTJ, *supra* note 49, at 15.

highly critical of the appointment process noting, "*the entire process is carried out behind closed doors…*"[101]

The Kosovo Judicial and Prosecutorial Council was established in April 2001 to appoint, regulate and, where necessary, discipline members of the local judiciary. [102] However, as noted above, despite the presence of international judges and prosecutors on the Judicial and Prosecutorial Council, it has never had the mandate to recruit, appoint or discipline the international judges and prosecutors.

The incompatibility of an international judge and prosecutor's role with that of a regular UN employee was also noted by the OSCE monitoring body in its September 2001 to February 2002 report.[103] However there have been no moves on the part of the Department of Justice to address this issue. Indeed, the current Deputy Director of the Department of Justice has also served as an international judge in Kosovo and is currently serving as Chief International Prosecutor, prompting one local lawyer to ask, "*is her position professional or political?*"[104]

ii. Short-term contracts

Another threat to the independence of international judges and prosecutors is that they have no security of tenure as they are recruited on short-term contracts, subject to renewal by the UNMIK Department of Justice and the UN Special Representative. The absence of security of tenure for judges and for prosecutors is contrary to international standards, undermines the efficiency of court proceedings (a concern raised by many international and local observers as well as some of the international judges themselves) and infringes on the right of suspects and accused to a fair trial – and costly to the public - when trials have to start over when international judges or prosecutors contracts end and are not renewed.

The short-term contracts are contrary to international standards concern the independence of judges and of prosecutors. The Special Rapporteur on the Independence of Judges and Lawyers stated in his 2006 report:

> *The task of judicial renewal may be approached in different ways, but in all cases with due regard for the Basic Principles on the independence of the judiciary"*[105]

Principles 1 and 2 of the UN Basic Principles on the independence of the judiciary are particularly relevant:

[101] John Cerone & Clive Baldwin, *supra* note 48, at 53.
[102] UNMIK Regulation 2001/8, 6 April 2001.
[103] At 27-28.
[104] Amnesty International Interview, 8 April 2006.
[105] Special Rapporteur on Independence of Judges and Lawyers report 23/01/2006, para. 54.

> *1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
>
> *2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*

The importance of respecting the Basic Principles on the independence of the judiciary has been restated by the Office of the High Commissioner for Human Rights in its Rule-of-Law Tools for Post-Conflict States, entitled "Mapping the Justice Sector".[106]

Guideline 6 of the UN Guidelines on the role of prosecutors requires that *"[r]easonable conditions of . . . tenure . . . shall be set out by law or published rules or regulations"*.

Security of tenure is generally regarded as one of the important guarantees of judicial independence. Given that the International Judges and Prosecutors Programme is envisaged to be temporary, with all judicial and prosecutorial functions eventually being taken over by local judges and prosecutors, lifetime tenure or long terms, such as as the nine-year non-renewable terms in the International Criminal Court, would not have been feasible. However, a solution that would be fully consistent with the need for judicial independence would have been for the contracts to have been for several years and renewable in fixed-term contracts solely at the option of the holder of the position for as long as the caseload assigned to international judges and prosecutors warranted it. Such a procedure would have excluded the executive interference with the independence of judges and prosecutors that infects the current programme. The current short-term contract system does not even satisfy international standards for the reappointment of judges, which provide that, at the very least judicial appointments should be for a substantial period of time, with the decision regarding their re-appointment in the hands of an independent authority.[107]

Contracts for international judges and prosecutors are generally six-month contracts, with the possibility of extension, subject to UNMIK Department of Justice and UN Special Representative approval. In some instances the contracts are even shorter. One International Judge in the Supreme Court told Amnesty International that her last two contracts have been for three-month periods. This tenure is completely at odds with the notion of judicial independence through security of appointment and tenure. There is no way in which a three-month or six-month contract of employment for an international prosecutor can be deemed a

[106] At 10.
[107] European Charter on the Statute for Judges, adopted at a multilateral meeting organized by the Council of Europe, 8 to 10 July 1998 (http://www.legislationline.org/legislation.php?tid=112&lid=4867).

reasonable condition of tenure. In failing to ensure these basic guarantees of judicial and prosecutorial independence are put in place in relation to the International Judges and Prosecutors Programme, UNMIK has created a fundamentally flawed model for the internationalized courts, instead of setting up a judicial system based on the highest international standards of independence. Even the Deputy Director of the Department of Justice has conceded that the system of short-term contracts, *"was one of the worst ideas they had from the beginning"*.[108] Both she and Acting Chief International Judge Weir identified this as being, *"very dysfunctional for the judiciary"*.[109] As of the date of this report, international judges and prosecutors were still subject to short-term contracts, renewable solely at the discretion of the executive.

B. Executive allocation of cases

The independence, as well as the appearance of independence, of the international judiciary is further undermined by the process of executive case allocation to international judges and prosecutors adopted by UNMIK. Without clear guidelines and procedures for case allocation in place, UNMIK Department of Justice runs the risk of being accused of failing to satisfy a basic principle of judicial independence. As the 2006 International Center for Transitional Justice report notes:

> *Among the war crimes and inter-ethnic cases that constitute the bulk of the [international judges and prosecutors] caseload to date, the primary controversy has been whether the Special Representative of the Secretary-General] and [Department of Justice's] selection of cases has been politically biased. Many observers, including both Kosovars and internationals, believe that the UNMIK executive exerts too much influence on the criminal justice process.*[110]

The recent attempt by the UN Special Representative to interfere in the prosecution of former member of the Kosovo Liberation Army (KLA) Anton Lekaj before the Belgrade War Crimes Chamber demonstrates that the possibility of UNMIK executive interference with the criminal justice process is not beyond imagination (see also the discussion below in Section C).[111]

[108] Amnesty International interview, 7 April 2006.
[109] Amnesty International interviews, 5 and 7 April 2006.
[110] ICTJ, *supra* note 49, at 20.
[111] Following the indictment of Lekaj and three others for war crimes, the UN Special Representative wrote to the Serbian authorities seeking withdrawal of the indictment. When the matter was raised by Amnesty International delegates, the Office of the Legal Adviser to the UN Special Representative stated that the War Crimes Chamber did not have jurisdiction, but was not able to demonstrate that any investigation of Lekaj had been conducted by UNMIK. Nor could the Office confirm that such an investigation and, if necessary, prosecution would occur in the event of the matter being handed over by Serbia to UNMIK. For further detail, see Amnesty International, *United Nations Interim Administration Mission in Kosovo (UNMIK): Briefing to the Human Rights Committee: 86th Session, July 2006*, AI Index EUR 70/007/2006.

Despite numerous recommendations throughout the international judges and prosecutors programme's history, UNMIK Department of Justice has not developed a set of criteria or guidelines for when a case will be allocated to an international prosecutor or internationalised panel of judges. When Amnesty International delegates raised this matter with the International Judicial Support Division, they were told this was to ensure flexibility and allow as wide access as possible to internationals.[112] However, as the 2006 International Center for Transitional Justice report points out:

> *[T]he appointment of [international judges and prosecutors] sometimes seemed arbitrary and ad hoc. This aspect of the process has been subject to repeated criticism by OSCE and others, but no changes were made. In some instances internationals have been assigned to cases that are not serious and do not require their involvement, such as traffic accidents involving UNMIK officials or illegal woodcutting. No directive explicitly guides this decision-making process and the deployment of [international judges and prosecutors] has not always been strategic.*[113]

This point was also reiterated by the OSCE Department of Human Rights and Rule of Law Legal Systems Monitoring Section which, in noting its recommendations dating back to 2001 regarding the need to establish clear and transparent criteria for case allocation to international judges and prosecutors, stated:

> *The OSCE has been concerned with the lack of transparent criteria for choosing the cases to be assigned to Regulation 64 panels. International judges and prosecutors 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 or prosecutors to the case were made.*[114]

In a press release on 26 October 2006 UNMIK announced the successful prosecution by an international prosecutor of two people for electricity theft.[115] The defendants were sentenced to serve a minimum of 30 days and 15 days respectively after they reconnected their electricity, which had been cut off due to a failure by each of the defendants to pay the approximately 1,000 euros they owed. In light of the apparent failure to address adequately

[112] Amnesty International interview, 5 April 2006.
[113] ICTJ, *supra* note 49, at 17.
[114] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, 2006, *supra* note 31, at 65.
[115] UNMIK press release, "Two Convictions for Electricity Theft" UNMIK/PR/1599, 26 October 2006 - http://www.unmikonline.org/dpi/pressrelease.nsf/0/73FFD42DDBB8F96AC1257214002646FB/$FILE/pr1599.pdf.

the issue of impunity for serious crimes under international law committed in Kosovo and the Department of Justice's repeated assertion that resource limitations have hampered its ability to conduct more cases, Amnesty International is concerned as to why this relatively minor case required the intervention of an international prosecutor.

The Criminal Division of UNMIK Department of Justice did provide Amnesty International with a set of draft guidelines that were awaiting approval from UNMIK police. These guidelines provide an outline of the types of cases that should be referred to an international prosecutor and procedures for how the Kosovo Police Service is to work with the Office of the Chief International Prosecutor. However, the draft guidelines do not set out the criteria to be applied in deciding which cases are in fact taken up by international prosecutors. They simply state that it will be left to the discretion of the Office of the Chief International Prosecutor to decide which of the referred cases it takes on. As noted above, the current Chief International Prosecutor, Ms Annunziata Ciaravolo, is also the Deputy Director of the Department of Justice. She is a member of the UNMIK executive and not independent or neutral. With the allocation of cases still left to the executive, such allocation is not likely to be perceived as truly independent.

Furthermore, the draft guidelines still fail to set out a transparent process, with neutral criteria, for the allocation of cases to international judges. They, therefore, fail to address the concerns raised repeatedly by the OSCE Department of Human Rights and Rule of Law Legal Systems Monitoring Section (most recently in its 2006 report as discussed above) that similar cases are being treated differently.[116] These guidelines must provide for a neutral body or method, such as a random allocation, to allocate cases. These guidelines must also establish when and how an application can be made to that body for an international prosecutor and/or an internationalised panel of judges and the criteria on which such an application will be decided. As of the date of this report, UNMIK had not provided Amnesty International with final guidelines.

The mere possibility of executive interference undermines the appearance of independence of the judiciary. As the *Bangalore Principles of Judicial Conduct* adopted at the Round Table Meeting of Chief Justices in 2002 states:

> ***Value 1: Independence***
> *Principle:*
>
> *Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.*
>
> *Application:*

[116] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, 2006, *supra* note 31, at 65-66.

> *…1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.*

By failing to set out clear and transparent procedures, UNMIK has failed to enshrine the value of independence in the Kosovo judicial system. Furthermore, UNMIK Department of Justice has violated Principle 14 of the UN Basic Principles on the Independence of the Judiciary, which provides that case allocation is an internal matter of judicial administration.

The issue of case allocation is not only troubling in terms of which cases are allocated to internationals but also in terms of the possible interference in which case is allocated to which particular international judge or prosecutor. This point was raised by Judge de Charette in his book. The judge notes his shock upon discovering that he was in fact able to pick his own cases, something he considers contrary to fair trial standards and insulting to the local judiciary.[117] International prosecutors also have the right to pick and choose their own cases, resulting in complaints that they have taken up and dropped cases on whim.[118]

Amnesty International was told by a former international judge of one case where an international judge was presiding over the trial of a Egyptian police officer accused of killing his ethnic Albanian translator and girlfriend. Due to the immunity in place for all UN personnel, there was a need for a waiver of immunity to be given by the UN Secretary-General. [119] When the Office of Legal Affairs in New York was contacted, it said a waiver had been given, but it was not provided in writing by the Secretary-General. The international judge considered the waiver of immunity to be a non-delegable power and said that on that basis the case could not proceed. The Department of Justice simply removed the case from this international judge's docket and assigned it to another judge and the trial proceeded.[120]

Amnesty International believes immunity should be waived in such cases as a matter of course and has expressed its concern regarding the UN's failure to waive immunity from prosecution in the past.[121] However, in terms of judicial independence it is completely inappropriate for a case to be re-allocated to a different panel of judges purely on the basis that the decision of the first panel was not desirable. Allocation of judges must be made in a strictly impartial manner in accordance with neutral criteria, by the chief judge or by an automatic system or lottery system. If there is a concern that the judge in a particular case is

[117] de Charette, *supra* note 96, at 73-74.
[118] Amnesty International interviews.
[119] UNMIK Regulation 2000/47, *On the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo*, 18 August 2000. Convention on the Privileges and Immunities of the United Nations 1946, Article V, section 18 & 20.
[120] Amnesty International telephone interview, 24 April 2006.
[121] Amnesty International, *Kosovo (Serbia and Montenegro): "So does it mean we have rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo*, AI Index: EUR 70/010/2004, 6 May 2004.

acting improperly, this should be an issue for an independent judicial monitoring body, such as the Kosovo Judicial and Prosecutorial Council (see previous section on lack of accountability). If it is merely a question of disagreement as to the decision, the correct approach would be for the Prosecutor to appeal the decision.

C. Executive interference in the conduct of cases

It is a matter of deep concern that the interference of the executive arm of the UNMIK administration has not been limited to the choice and allocation of cases, but may also have extended into interference in the actual conduct of cases.

> Principle 4 of the UN Basic Principles on the independence of the judiciary states:
>
> *4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*

The former Deputy Special Representative of the UN Secretary-General for Police and Justice, Jean-Christian Cady, and his Senior Adviser wrote in defence of UNMIK's approach:

> *[I]t is important to distinguish between the appointment and deployment of judges and prosecutors, a strategic function which is quite properly under UNMIK control, from their independence in the exercise of their functions, which is sacrosanct. Once a judge has been assigned to a case, he or she will try it as he or she thinks fit, and UNMIK may not – and does not – interfere.*[122]

However, this was not the impression an international judge who served in Kosovo had; *"If you acquit too many Serbs they [the UNMIK Department of Justice] probably won't give you any more war crimes cases…"*[123]

Another former international judge told Amnesty International delegates that a senior UNMIK official had in fact been known to place pressure on judges in certain cases and that political pressure had been used to force at least one judge and one prosecutor to leave.[124](See also the case of Zoran Stanojević, detailed in Part Four of this report).

Credible evidence also suggests that decisions were made within the UNMIK Department of Justice to refrain from the investigation and prosecution of high level political

[122] Cady & Booth, *supra* note 39, at 76.
[123] Amnesty International telephone interview, 24 April 2006.
[124] Amnesty International interview, 11 April 2006.

figures, including against Ramush Haradinaj (elected leader of the Alliance for the Future of Kosovo in 2000 and subsequently Prime Minister), in connection with allegations relating to the death of a member of the Musaj family.[125]

Furthermore, although no longer in use, the controversial executive orders for detention by which the UN Special Representative overruled decisions by international judges for the release of suspects demonstrates that the UNMIK executive is not beyond interfering in the exercise of the judicial function.[126]

III. Lack of transparency

A particularly shocking aspect of the system of justice established by the UNMIK Department of Justice and its International Judges and Prosecutors Programme has been its lack of transparency and its refusal to provide complete or prompt access to all public documents, as well as documents that should be publicly available, to civil society in Kosovo and abroad. As detailed below, this lack of transparency applies even to indictments and judgments, documents that are generally accessible to the public in almost all legal systems worthy of the name. This lack of transparency has undermined outreach efforts and efforts to develop respect for the rule of law in Kosovo among both the legal community and all sectors of the general public.

All local and international non-governmental organizations that spoke to Amnesty International expressed frustration at the lack of responsiveness of the UNMIK Department of Justice to requests for information. Even a representative of the Kosovo Law Centre, the non-governmental organization established by the OSCE Rule of Law Section to promote legal awareness and education and which, according to the Department of Justice has the official mandate to produce a bulletin of Supreme Court decisions, told Amnesty International that she had faced difficulties obtaining copies of decisions.[127]

In a report entitled, *Transparency of Trials for Breaches of International Humanitarian Law in the Region of the Former Yugoslavia* and published in March 2006, the regional non-governmental organization, Youth Initiative for Human Rights, noted that, following an e-mail sent on 29 January 2006 to UNMIK Information Service:

> *…the working group representatives did not manage to obtain from the UNMIK Justice Department copies of their press releases on war crimes trials, nor the information on the operational system of their public relations section.*

[125] "Kosovo War-Crimes Trial Splits West and Prosecutors", *New York Times*, 8 April 2007, and subsequent email and telephone conversations, April 2007.
[126] See Amnesty International, *United Nations Interim Administration Mission in Kosovo (UNMIK): Conclusions of the Human Rights Committee: 86th Session, July 2006*, AI Index: EUR 70/011/2006, pp.37-39.
[127] Amnesty International Interview, 4 April 2006.

The working group was not alone:

> *The working group's media interviewees expressed dissatisfaction at UNMIK's Justice Department's public relations service. Examples of total exclusion of the public from the trial to the so-called the 'Lap Group' provide the main core of journalists' dissatisfaction. Furthermore, they used journalists' associations to complain through them to UNMIK's Justice Department's decision [sic], but they never received any answer.*[128]

It took Amnesty International three official letters, approximately 15 e-mails and numerous attempts on a weekly basis to contact the Department of Justice by telephone for a period of almost one year to obtain some copies of judgments and indictments of the Regulation 64 panels.[129] The delays are similar to those encountered by Joseph K. in Franz Kafka's *The Trial*. As detailed below, the judgments and indictments provided are far from complete and the UNMIK Department of Justice has failed to assist civil society to obtain the numerous missing documents and to make any efforts to publish all the other court documents, such as motions and briefs, that other international criminal courts routinely publish on their internet sites as soon as they are filed. Such publication is not a option; it is part of the right to a fair trial, which includes the right to a public trial. That right is a right shared by the accused and by the general public, both in Kosovo and, because the crimes are crimes against the entire international community, the international public.

A. Failure to provide copies of indictments

After more than a year of persistent requests, Amnesty International has to date received copies of only 11 indictments. In an e-mail on 20 September 2006, a representative of the Criminal Division of UNMIK Department of Justice claimed that she did not have copies of any other indictments:

> *[W]e can only give you what is available to us, that is, since the creation of Criminal Division in 2003. The rest of the indictments are either in IJSD [International Judicial Support Division] or the competent District Court...*[130]

International Judicial Support Division had told delegates of the organisation back in April 2006 that it did not keep copies of indictments, which were the responsibility of the Criminal Division.[131] Acting Chief International Judge Weir also suggested Amnesty International

[128] Youth Initiative for Human Rights, *Transparency* of *Trials for Breaches of International Humanitarian Law in the Region of the Former Yugoslavia*, March 2006 at 23-24 - http://www.yihr.org/english/Reports/reports.php.
[129] Copies of all correspondence held on file by Amnesty International.
[130] Copy of E-maile-mail held on file by Amnesty International.
[131] Amnesty International interview, 5 April 2006.

contact the individual court registries. However, at the same time, she told Amnesty International delegates that international judges and prosecutors had been unable to interact with Court registries due to language difficulties.[132] When Amnesty International delegates attended the Supreme Court Registry, they were told to contact the Department of Justice with their request. Attempts to obtain these documents from individual court registries have proved unsuccessful.

B. Failure to provide copies of judgments

Amnesty International made its first requests to UNMIK Department of Justice by e-mail in August 2005. Following repeated requests over almost a year, copies of some judgments were sent informally and intermittently by staff at the UNMIK Department of Justice. Finally, Amnesty International was told that for further documentation to be sent a formal request needed to be made to the Department of Justice. A letter addressed to Thomas Monaghan, then the Director of the Department of Justice, was sent by mail and electronically on 25 October 2005. No response was received. When a representative of Human Rights Watch raised the issue of Amnesty International's requests for war crimes trial judgments and indictments at a meeting with the Deputy Director of the Department of Justice on 16 November 2005, she was told that, *"All (Amnesty International) has to do is write to us"*. Amnesty International subsequently sent two further letters; one addressed to Annunziata Ciaravolo, Deputy Director of the UNMIK Department of Justice, on 28 February 2006, and the other to Albert Moskowitz, Director of the UNMIK Department of Justice, on 10 March 2006. No response was received until 5 April 2006 when a letter was handed to Amnesty International delegates during a meeting with the International Judicial Support Division of the Department of Justice. This letter did not include any documents. Amnesty International delegates were instead referred by Acting Chief International Judge Weir to the Supreme Court Registry.

On 7 April 2006 Amnesty International delegates went to the Supreme Court Registry and requested copies of the judgments for cases conducted by Regulation 64 panels. They were told that the Registry could not provide these documents without the request being made in writing and authorised by the individual judges and the Chief Justice of the Supreme Court. Amnesty International delegates presented a copy of the letter sent to the UNMIK Department of Justice and contacted Judge Weir's office to inform the Registry staff of Judge Weir's authorisation. The Amnesty International delegates were told to leave contact details and they would be contacted shortly. As at the time of writing, one year later, Amnesty International has not received any judgments or response from the Supreme Court Registry.

In an attempt to end the confusion as to who is responsible for providing access to these public documents, a delegate of Amnesty International asked Annunziata Ciaravolo, as

[132] Amnesty International interview, 5 April 2006.

Deputy Director of the Department of Justice, to set out the procedure that must be followed to obtain copies of the documents.[133] The delegate was told it was necessary to:

1. Get the authorisation of the judges involved in the case as there was a need to protect the identities of the parties;

2. Go to the relevant registry (there is no central registry for these documents. They will be with each of the different court registries);

3. Explain that the individual or organization has a public interest in the document;

4. Write to Chief International Judge specifying the particular documents required and stating that the information will not be distributed.

Amnesty International was also told that no comprehensive list of cases for the past seven years involving international judges and prosecutors is available.

When asked why the process for obtaining documents that should be in the public domain should be so complicated, Annunziata Ciaravolo stated that the Department of Justice, *"can't allow all personal information out to be made public all around the world"*. When it was pointed out that these documents (judgments and indictments) were documents of public record and could easily be redacted to protect the identity of injured parties or witnesses, Amnesty International was told that the trials themselves were public, but that Article 143 of the Provisional Kosovo Criminal Procedure Code restricted the access to documents.

Article 143 of the Provisional Kosovo Criminal Procedure Code reads as follows:

(1) The injured party and his or her legal representative or authorized representative shall be entitled to inspect, copy or photograph records and physical evidence available to the court or to the public prosecutor if he or she has a legitimate interest.
(2) The court or public prosecutor may refuse to permit the inspection, copying or photocopying of records or physical evidence if the legitimate interests of the defendant or other persons override the interest of the injured party or if there is a sound probability that the inspection, copying or photocopying may endanger the purpose of the investigation or the lives or health of people or would considerably delay the proceedings or if the injured party has not yet been examined as a witness.
(3) If the public prosecutor refuses the inspection of the files, the injured party can file, the injured party can file an appeal with the pre-trial judge. The decision of the pre-trial judge is final.

[133] Amnesty International Interview, 7 April 2006.

> *(4) If the pre-trial judge refuses the inspection of the files available to the court, an appeal can be filed with the three-judge panel.*
> (5) *The provisions of the present article are subject to the measures protecting injured parties and witnesses and their privacy and the protection of confidential information as provided for by law.*

This provision refers to inspection of court files prior to or during trial proceedings. It should not affect the status of judgments and other court documents as documents of public record.

Judge Weir told Amnesty International that there were efforts being made for judgments to be published and this task had been given to the OSCE-funded Kosovo Law Centre. However, while staff at the Kosovo Law Centre confirmed this, as noted above, they also told Amnesty International that they had encountered similar difficulties obtaining copies of judgments, but they were told the documents were not kept at registries, but by individual judges.[134] When the difficulties that the Kosovo Law Centre were raised with Judge Weir, she then stated that the Department of Justice felt obliged to work within the local legal tradition and system. She asserted that, as Kosovo had never had a tradition or system of publishing decisions, it would be inappropriate to publish some documents and not others. Judge Weir told Amnesty International that the responsibility lay with the local registries and UNMIK Department of Justice could not go around the local structure, as this would be *"discrimination"*.

However, as Thomas Monaghan, the Director of the Department of Justice, declared in response to the Ombudsperson regarding why the international judges and prosecutors were not subject to the Kosovo Judicial and Prosecutorial Council like their local counterparts, *"the IJPs perform their function under a different mandate and institutional arrangement to that under which Kosovar judges and prosecutors operate"*. If this is the case for their regulation, it should also be the case for their accountability to the international community. Judge Weir referred to the risk of double standards, but the UNMIK Department of Justice has intentionally created, through the International Judges and Prosecutors Programme, two separate judicial systems. It appears this risk of 'double standards' is only raised when there is a possibility of greater responsibility being taken by the UNMIK Department of Justice and not when it comes to issues in which they are afforded greater freedom and lack of accountability.

Judge Weir also contended, without any basis, that Amnesty International was seeking "special treatment" to obtain copies of these documents. The organisation has, however, repeatedly made it clear that it was seeking to have the judgments and other records of the proceedings made public, not to have privileged access to them. It explained that under international law UNMIK is accountable to both the Kosovar and international community and should, therefore, provide free access to *all* public documents, and documents which

[134] Amnesty International Interview, 5 April 2006.

should be made public, concerning judicial proceedings to *all* members of the international community in the same way that other international criminal courts do.

The right to a public trial, which includes public access to all relevant documents, is a fundamental component of the right to a fair trial and a right not only of the accused, but also a right of the general public to ensure that the criminal justice system is administered fairly and effectively.[135] Public access is particularly important when the documents involve the conduct of internationalised trials for crimes under international law. Public access to these documents is essential to allow for comment, analysis and research. In addition, public access is an essential component of any justice system and will contribute to the acceptance of the decisions of the Regulation 64 international panels as legitimate by increasing the transparency of proceedings and ensuring that they are accountable to civil society and the general public. None of the public interest grounds listed in Article 14 (1) of the ICCPR permitting the press and public to be excluded from all or part of a trial "in special circumstances" apply to indictments, judgments and other documents sought by Amnesty International and other non-governmental organizations. Indeed, Article 14 (1) requires that "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." Neither of these grounds applies to the judgments in cases involving war crimes and crimes against humanity.

The failure to provide public access to these documents calls into question what UNMIK and the Department of Justice, in particular, has to hide. One international judge currently serving in Kosovo told Amnesty International that they believed there had been a specific order issued by a senior UNMIK official, to not make judgments too widely available for fear of scrutiny as many of the judgments are of poor quality.[136] As discussed below in Part Four, some of the judgments reviewed do, indeed, support this fear. However, for UNMIK Department of Justice to ensure the credibility of the International Judges and Prosecutors Programme it is essential that it remains open to comment and criticism from all parts of international and local civil society. Moreover, public scrutiny of court proceedings can only improve the quality of the jurisprudence of the Regulation 64 international panels.

IV. Failure to protect the rights of the accused effectively

[135] Universal Declaration of Human Rights, Art. 10 ("Everyone is entitled in full equality to a fair and public hearing . . .."); ICCPR, Art. 14 (1) (". . . In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; . . .").

[136] Amnesty International Interview, 4 April 2006.

A significant concern regarding the fairness of the trials conducted by international judges and prosecutors is the lack of attention that has been given to the rights of the defence. A review of the judgments demonstrates that defence counsel in cases conducted before internationalized panels at the District Court and Supreme Court of Kosovo levels have been almost exclusively local lawyers.[137] Limited by a shortage of resources and experience, forced to contend with an often foreign legal process in a foreign language, the ability of defence counsel to secure a fair trial for their client has been a challenging, if not impossible, task.

As UNMIK Department of Justice has itself found, the number of lawyers with skills and experience in international human rights and humanitarian law in Kosovo is limited. Furthermore, the limited practical experience of many of the local lawyers was one of the reasons the introduction of international judges and prosecutors into the Kosovo justice system was necessary. The recognition on the part of the international community of the limited local capacity to conduct trials in accordance with international standards, means there was (and continues to be) a need for UNMIK to ensure *all* sectors of the criminal justice system were strengthened.

A fundamental principle in ensuring a fair trial is the right to equality of arms. As explained in the Amnesty International *Fair Trials Manual*:

> *The principle of equality of arms ensures that the defence has a reasonable opportunity to prepare and present its case on a footing equal to that of the prosecution. Its requirements include the right to adequate time and facilities to prepare a defence, including disclosure by the prosecution of material information [Case of Fouchner, European Court, 25 EH RR 234, at p.247]. Its requirements also include the right to legal counsel, the right to call and examine witnesses and the right to be present at the trial. This principle would be violated, for example, if the accused was not given access to information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing.*[138]

A broad range of international instruments, including Article 14 (3) (b) of the ICCPR and constituent instruments of international criminal courts recognize the right of an accused to have adequate time and facilities for the preparation of a defence.

While some international judges have made genuine efforts to guarantee this right to equality of arms,[139] overall the defence has been severely impeded by a lack of resources,

[137] See also ICTJ, *supra* note 49, at 30.
[138] Amnesty International, *Fair Trials Manual*, AI Index POL 30/002/1998, 1 December 1998, at 82.
[139] The Humanitarian Law Center in its 2006 report noted that in the case of Rustem Mustafa *et al.*, *"[t]he criminal chamber under President Timothy Clayson took care to ensure absolute equality of defence and prosecution."* - *supra* note 52, at 34.

training, adequate interpretation and translation, access to documents, funding and access to international expertise.

A. Lack of resources and training

In the initial proposal for the KWECC, the proposed internationalized court for Kosovo, one feature of the structure was an internationally funded and supported defence office.[140] With the abandonment of the KWECC in favour of the International Judges and Prosecutors Programme, the only support provided to defence lawyers has been the Criminal Defence Resource Centre (CDRC), a non-governmental organization set up by the OSCE. This centre has provided some very useful assistance to defence lawyers, but it had run out of funding. All the international staff had left and the local staff was reduced to two people; the CDRC no longer exists. While UNMIK DOJ is currently planning for the creation of a special prosecutors unit and a special mixed chamber of the Supreme Court to assist with building local judicial and prosecutorial capacity to try serious and sensitive crimes, Amnesty International is not aware of any initiative to assist defence lawyers.

The importance of bolstering defence lawyers' capacity has been recognised by the UN Office of the High Commissioner for Human Rights (OHCHR) in its Rule-of-Law Tool entitled *Mapping the Justice Sector*:

> *Defence lawyers: also frequently ignored or forgotten in peacekeeping, defence lawyers are absolutely vital if the justice system is to work. In many States, the existence of a vibrant, independent defence bar will be new. In the Balkans, for example, under the previous socialist system of justice, defence lawyers merely tried to mitigate the sentence, not fight for their clients' innocence…*
>
> *Training and equipping defence counsel so that there is some semblance of 'equality of arms' in a criminal procedure is a keystone to building the rule of law in post-conflict situations.*[141]

Mapping the Justice Sector goes on to refer to the Criminal Defence Resource Centre:

> *OSCE, as part of the United Nations Mission in Kosovo, established a training and resource centre for defence lawyers and for the first time in Kosovo's history defendants have lawyers who challenge evidence, assert their clients' rights and try to keep the system honest.*[142]

[140] See ICTJ, *supra* note 49, at 17 and Rogers, *supra* note 14.
[141] OHCHR, *supra* note 98, at 11.
[142] *Ibid.*

Although there is no doubt the Criminal Defence Resource Centre is an important and useful organization, it must be properly funded and staffed with experienced local and international staff if it is to provide meaningful assistance.

Furthermore, a single non-governmental organization alone is insufficient to ensure equality of arms when the prosecution is assisted with the direct involvement of international lawyers. This was the observation of a UK barrister who did a brief consultancy with the Criminal Defence Resource Centre. She told Amnesty International that, as far as she was aware, she was the only international lawyer who directly assisted defence lawyers. She was involved with two important war crimes cases, in a limited capacity and told Amnesty International that she did not consider the local defence lawyers sufficiently skilled or experienced to conduct the cases against an international prosecutor with a background in the adversarial system. She remarked that the local defence lawyer was not even aware of the need to cross-examine witnesses on the evidence they gave.[143] This point was reinforced by a local defence lawyer who was previously associated with the Criminal Defence Resource Centre and who has been involved in cases involving the international judiciary:

> *[I'm] not saying we don't need trainings, we had plenty of them, international experts should be working together [with local lawyers] directly in cases… A local lawyer like me is definitely disadvantaged . . .*

At the same time he noted:

> *It has been a great advantage that I communicate in English and a great privilege to work with internationals and learn some good new things.*[144]

It is only through experienced international lawyers working with enthusiastic domestic lawyers that proper skills transfers can take place and true equality of arms be ensured.

B. The failure to provide effective translation and interpretation

Many of the trial proceedings before Regulation 64 international panels have been fundamentally flawed because they are conducted in a language not understood by the accused or their counsel. They are not simultaneously translated in full, but simply summarized. In some cases, translated transcripts of trial proceedings are not available until long after the time for an appeal has passed. Convictions in such circumstances are not simply unsafe, but are grossly unfair and should be vacated.

Aside from anything else, local defence lawyers are disadvantaged by the fact that all trials involving international judges and prosecutors are conducted in English. Of the defence

[143] Amnesty International Interview, 9 February 2006.
[144] E-mail correspondence with Amnesty International.

lawyers conducting war crimes and other serious cases in Pristina interviewed by Amnesty International delegates, very few spoke any English and of the few that did, only one had a detailed legal and professional vocabulary.

When one defence lawyer who has been involved in a large number of important war crimes cases was asked if everything said during hearings was translated he responded that it was not. He said that in the beginning a number of interpreters simply summarised. He also told Amnesty International delegates that the one court interpreter present in the courtroom did not translate all conversations between international prosecutors and judges. The judge would then decide if the matter was important enough to be translated for the whole court/defence lawyers or if it was, *"just casual"*. He added:

> *I can't demand everything be translated – it makes me like 'an enemy with the judges'. I only ask if I think I am missing something important.*[145]

He also told Amnesty International that as all the court reporting was done in English, he would be required to wait for the translation of the transcript:

> *I usually ask to have minutes [transcript] before the end of the case but sometimes the judge says I can't have all of it in time so I pick the important things.*[146]

The inadequacy of interpretation/translation facilities was also noted by OSCE Legal Systems Monitoring Section monitors.[147] It appears this situation may have been remedied for current and future cases, with the OSCE Legal Systems Monitoring Section stating in its 2006 report that all regional courthouses, except Peć/Peja District Court now have simultaneous interpretation equipment.[148] However, these belated interpretation and translation facilities are of no use to persons unjustly convicted on the basis of proceedings where the written evidence was not translated and the oral testimony not interpreted, but only summarized.

A problem that has not been remedied, however, is the length of time taken to provide translated copies of judgments to the parties. Amnesty International was told of instances where translated versions of the final judgment have not been received until after the time to appeal has passed. Amnesty International was told of one war crimes case finalised in mid-2005, in which it took eight months for a copy of the judgment to be provided to the defendant and his lawyer. The Humanitarian Law Center also noted in its 2006 report two cases, one where the judgment at first instance had been handed down on 30 November 2004,

[145] Amnesty International Interview, 4 April 2006.
[146] Amnesty International Interview, 4 April 2006.
[147] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *2000 Review of Criminal Justice System*, at 21-22.
[148] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section 2006, *supra* note 31, at 22-23

the other where the judgment had been handed down on 19 May 2005 and no written, translated versions had yet been provided to the parties.[149]

C. Protracted proceedings and denial of access to documents

The time taken for cases conducted before internationalised panels is also a serious concern. These delays are a particular concern since many of the accused are held in detention throughout (see the box below for examples). Such delays deny the accused the right to a speedy trial recognized in Articles 9 (3) and 14 (3) (c).

In addition, the problems that Amnesty International has encountered in obtaining indictments, judgments and other court documents have a serious detrimental impact on the ability of the accused to mount an effective defence, thereby denying them their right to adequate facilities to conduct a defence and to examine witnesses and evidence against them.

The short-term contracts and constant changes in international judicial personnel has on more than one occasion required trials to be recommenced before a new panel.[150] (For an example of this problem, see the case of *Veselin Besović*, set out below in Part Four of this report).

Aside from the additional difficulties faced by defence lawyers dealing with international judges and prosecutors due to the language barrier, many also complain they are unable to obtain basic documents and information about their cases. As one lawyer (a deputy of the Chamber of Advocates and former judge of the Supreme Court) described it; *"There are always fights, insistence and disappointments to get any legal documents."*[151]

Case Example: The case of 'AB'

This case involves an international prosecutor under Regulation 2000/64. *AB*, the mother of two small children, had been in detention since 23 February 2006. She was initially held for over 45 days without any information regarding the case against her having been provided to her defence lawyer.

During this time, the international prosecutor also made an application for an extension of the detention period. The defence lawyer made written submissions to the court (a local judging panel), but these submissions were not mentioned in the decision to grant an order for further detention. The defence lawyer filed an appeal, but despite the 10-day time

[149] Humanitarian Law Center, *supra* note 52, at 34.
[150] Schröder, *supra* note 47, at 25.
[151] Amnesty International interview, 8 April 2006.

limit for deciding the appeal set out under Kosovar procedural law, this appeal was not heard within that time. [152]

An indictment was issued on 29 December 2006, *AB* then having been in pre-trial detention for over 10 months, Until 4 December 2006, *AB's* contact with her defence lawyer had been limited to four phone conversations lasting approximately 5 minutes.[153]

A hearing was finally held at Pristina District Court on 31 May and 1 June 2007, in which AB and two other defendants agreed to plea bargains, AB taking this decision as there appeared to be no other prospect of release. Each defendant was found guilty of assistance in smuggling persons into Kosovo, and sentenced to a suspended sentence of two years' imprisonment.[154]

The failure to meet the deadlines set under Kosovar procedural law, particularly in relation to the delivery of files and decisions on detention and requests for release, was noted by various lawyers. They agreed that it was endemic across the legal system and both local and international judges and prosecutors were responsible for these problems.

LENGTHY PRE-TRIAL & ONGOING DETENTION PERIODS

In its review of war crimes cases, Amnesty International noted with concern the lengthy periods of detention to which defendants were subjected. This is an issue that has also been raised by the OSCE Legal Systems Monitoring Section.[155] Listed below are some examples:

Agim, Lulzim and Bajram Gashi, three Kosovo Roma men were detained without charge for a period of twelve and a half months from 7 October 1999 until 21 October 2000, when they were finally released through the intervention of an international prosecutor.

Saša Grković, a Kosovo Serb, was detained in July 2001. An indictment was not issued until 19 February 2002. On 4 September 2002 Grković was acquitted of all charges due to a lack of evidence. The Humanitarian Law Center is assisting Grković to file a lawsuit against the Kosovo Ministry of Justice, seeking compensation for the 457 days he spent in detention.

[152] Amnesty International interview with defence lawyer, 8 April 2006.
[153] E-mail correspondence from defence lawyer.
[154] Email correspondence, op cit.; R.E., Balkan Sunflowers, June 2007.
[155] See for example, OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Review 2: The Criminal Justice System (September 2000 – February 2001)*, 28 July 2001 and *Review of the Criminal Justice System: Crime, Detention and Punishment,* 14 December 2004.

Zoran Stanojević, a Kosovo Serb was held in pre-trial detention for 17 months due to various adjournments. He was convicted by the trial chamber on 18January 2002, having been in detention since 14 August 1999.

Veselin Besović, a Kosovo Serb was detained from 6 October 2000 until 13 December 2002 when he was acquitted by a Regulation 64 panel. He was subsequently detained again on 8 April 2003 and, as of December 2006, remained in detention awaiting his third re-trial.

Momčilo Trajković, a Kosovo Serb was detained from 7 August 1999 until 26 July 2002, when he was released on bail.

Miroslav Vučković, a Kosovo Serb has been in custody since 23 August 1999 and spent 14 months in pre-trial detention. He was first convicted of genocide in January 2001. This decision was appealed to the Supreme Court sent his case back for re-trial. He was then convicted of war crimes in October 2002. His latest appeal was allowed by the Supreme Court on 15 July 2004 and the case sent back from re-trial. There is no information available regarding whether Vučković remains in detention.

Igor Simić, a Kosovo Serb was held in pre-trial detention from 11 August 1999 until April 2001. His case was taken over by an international prosecutor during pre-trial proceedings. The international prosecutor abandoned the prosecution due to lack of evidence five months into the trial.

Bogoljub Mišić and Stojan Jovanović, two Kosovo Serbs were detained on 31 January 2000.While the authorised 12 month period prior to an indictment being issued expired in January 2001, they were not released. They were eventually indicted in February 2001 and acquitted by a Regulation 64 majority international panel on 2 November 2001.

Miloš Jokić, a Kosovo Serb was detained in 26 August 1999. An indictment was not issued until 25 February 2000. He remained in detention until 3 May 2002 when he was acquitted of all charges.

D. Failure to establish a funded Office of Defence

As noted above, the Criminal Defence Resource Centre has provided assistance to defence lawyers involved in war crimes and other sensitive and complex cases. Among the types of assistance provided, the Criminal Defence Resource Centre helped with legal research on international human rights, ICTY and European Court of Human Rights jurisprudence and international humanitarian law, with the preparation of legal memoranda, the dissemination of legal documents and the provision of training courses using international legal experts.[156] All

[156] Amnesty International interview with former director, Criminal Defence Resource Centre, 4 April 2006.

of these were extremely useful services but, due to the lack of funding and reduced staff, the Criminal Defence Resource Centre has had to dismantle most of its programmes.[157]

Furthermore, a non-governmental organisation, dependent on funding, with severely limited resources and a mandate limited to providing legal research assistance is insufficient to ensure an equality of arms between the defence and the prosecution. In both the Special Court for Sierra Leone and in the War Crimes Chamber in Bosnia, there is a funded office of defence which forms a permanent part of the structure of the court. In the context of Bosnia, the Criminal Defence Support Section (known as the "OKO" or *Odsjek krivicne odbrane*) provides assistance to both the defendants directly and to defence counsel, through both legal and administrative support. There are five regional teams and those teams are able to provide specific assistance in individual cases. Furthermore, the Criminal Defence Support Section acts as the licensing authority for lawyers who wish to appear on the list of possible counsel. It, therefore, provides training. While the OSCE Legal Systems Monitoring Section in its 2006 report noted the importance of ensuring skills development among defence lawyers, there has been no commitment of funds to an initiative similar to the Bosnian Criminal Defence Support Section. It appears that the new proposed special chamber also does not include reference to a funded defence office.

Amnesty International considers an office such as the Bosnian Criminal Defence Support Section to be a necessary component of any proposal for a special chamber in Kosovo. As the former local director of the Criminal Defence Resource Centre told Amnesty International, in his opinion it had been very good having the international judges and prosecutors around, but as local lawyers had no relationship with the internationals outside of the courtroom, defence lawyers had no opportunity to discuss and learn from their international colleagues.[158] The OSCE Legal Systems Monitoring Section in its 2006 report noted the great progress made by the Kosovo Chamber of Advocates in strengthening the capacity and professionalism of defence lawyers. However, in order for there to be a real possibility of skills transfer to local defence lawyers and true equality of arms during the trial process, it is necessary for there to be international legal experts and resources available to assist the defence.

PART FOUR: THE FAILURE TO IMPROVE THE KOSOVO JUSTICE SYSTEM

"As matters now stand, the UN in Kosovo is presiding over a grand debacle in the Kosovo legal system. If the UN cannot arrange fair war crimes and genocide trials in Kosovo, where

[157] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, 2006, *supra* note 31, at 18.
[158] Amnesty International interview, 4 April 2006.

it controls all the organs of government and rules by fiat, how can it hold others to human rights standards?"[159]

More than seven years after UNMIK was established and nearly six years after the establishment of the International Judges and Prosecutors Programme, the Kosovo criminal justice system is unable to investigate and prosecute war crimes and crimes under international law effectively and fairly or to provide reparations to victims for such crimes without international involvement. Moreover, the International Judges and Prosecutors Programme itself is unable to do so either. In the light of the fundamental flaws in the conception and execution of the international component of the Kosovo justice system outlined above, Amnesty International has serious doubts whether the UNMIK Department of Justice, and the International Judges and Prosecutors Programme in particular, will be able to establish a solid judicial system in Kosovo able to investigate and prosecute crimes against humanity and war crimes through fair trials in the foreseeable future without radical changes. The EU will face enormous challenges in addressing these problems.

The failure to recruit and train effectively international judges and prosecutors inserted into the domestic system has weakened their impact and credibility in the eyes of the local judicial and legal community. Furthermore, the relatively limited interaction between international and local judges and prosecutors (particularly the latter) has resulted in little skills transfer. In addition, many of the members of the local judiciary and legal community who spoke to Amnesty International complained of arrogance and disrespect on the part of international judicial personnel. These complaints were reinforced by the observations of a number of international judges and prosecutors themselves, international observers and members of the UNMIK Department of Justice.

At the same time, international judges and prosecutors told Amnesty International that they felt their workload as well as language and cultural barriers made it difficult for them to maintain any sort of professional relationship with their local colleagues. There was also great divergence between what the international judicial personnel understood their role to be in Kosovo. Some considered theirs to be a role of capacity-building and professional mentoring,[160] others to simply process cases.[161]

As former OSCE legal advisers Clive Baldwin and John Cerone point out, assessing the success of the International Judges and Prosecutors Programme is difficult because it was never made clear what its role was supposed to be.[162] This is perhaps not accidental. By never being clear regarding the aims of the International Judges and Prosecutors Programme, aside

[159] Edwin Villmoare, *supra* note 94, at 385. Edwin Villmoare worked on a project with the American Bar Association in Kosovo in 2001.
[160] Amnesty International interviews with two former international judges, 11 April 2006 and 24 April 2006.
[161] Amnesty International interview with current international judge, 5 April 2006.
[162] Cerone & Baldwin, *supra* note 48, at 50.

from stating internationals were to be introduced to "assist in the judicial process", UNMIK appears to be seeking to avoid all criticism levelled at it. When Amnesty International raised concerns with various staff members throughout UNMIK regarding the structure and efficacy of the programme, "this was not our aim" became a regular refrain.

However, a local legal professional who works with the international community told Amnesty International that, as far as he was concerned the international judges and prosecutors, *"haven't delivered"*. He considered the programme to be, *"another set of imposed ideas (like the 'Brotherhood and Unity' ideals of the former Yugoslavia), just this time flying a blue flag."* [163]

While UNMIK disputes that mentoring was an intended part of the international judges and prosecutors' roles, from the interviews Amnesty International conducted mentoring was certainly an expectation among the local legal community, the OSCE Legal Systems Monitoring Section and many of the international judges themselves. In its 2006 report the OSCE Legal Systems Monitoring Section states, "The OSCE considers that the [international judges and prosecutors] programme, as a whole, did not fulfil its much needed, and expected, role of mentoring the local judiciary".[164] The report goes on:

> *The OSCE welcomes the efforts undertaken in establishing the Kosovo Special Prosecutor's Office. According to the [UNMIK Department of Justice] 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 [international judges and prosecutors] programme left to the Kosovo justice system.*[165]

The Special Prosecutor's Office initiative would appear to suggest the UNMIK Department of Justice has recognised its failure up until now to facilitate a proper transfer of skills from members of the international judiciary to their local colleagues.

However, the new "single jurisdiction approach", whereby all international judges and prosecutors are based in Pristina instead of in district courts throughout Kosovo, as the OSCE Legal Systems Monitoring Section points out, has further reduced the possibility for interaction between international and local members of the judiciary and prosecution service. This is but one of the problems with the "single jurisdiction approach". Aside from reducing interaction and, therefore, any possibility of skills transfer between the international and the

[163] Amnesty International interview, 7 April 2006.
[164] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section 2006, *supra* note 31, at 67.
[165] Ibid.

local legal communities, it further enhances the perception of the International Judges and Prosecutors Programme as establishing a parallel system. Furthermore, it greatly reduces the already limited access that the local judges and prosecutors have to international involvement in cases. This is of particular concern for members of minority communities. As Amnesty International documented in a report in 2003, restrictions on freedom of movement due to fear of attack has been a major obstacle for members of minority communities seeking access to the justice system. Kosovo Serbs living in Serb enclaves expressed their unwillingness to attend courts in Pristina and requested their own courts with international judges.[166] This situation has not changed greatly. Various Serb community leaders told Amnesty International that the issue of greatest concern continued to be the lack of freedom of movement for members of minority communities in Kosovo. Randjel Nojkić, a community leader in the Serb enclave of Gračanica/Graçanicë and PISG Chairman of the Committee on Community Rights and Interests and Returns gave an example of why Serbs continued to be afraid:

> *Everyone says [there is] "freedom of movement" and Serbs are not travelling because of a psychological block. The KFOR commander said I should travel without an escort, so I did. I was driving a vehicle with Belgrade number plates. I went to Serbia and came back. Back in Kosovo a car forced me from the road and [they] threw something out of the window onto my vehicle, which I managed to avoid…*[167]

Despite the limited or non-existent transfer of experience from international prosecutors and judges to their local counterparts, it should be noted that international prosecutors and judges, primarily at the Supreme Court of Kosovo level, have in certain cases rectified some of the worst flaws and abuses in the local system (see Part Four, Section II below).

I. Impunity

A. Continuing impunity for war crimes and other crimes under international law

The Office of the Legal Adviser to the UN Special Representative told Amnesty International that long-term capacity building was never an aim of the International Judges and Prosecutors Programme (which begs the question of what UNMIK's intentions were for the future of the Kosovo judicial system). However, it is not only in terms of capacity-building that the International Judges and Prosecutors Programme has failed to provide the legacy it might have done. In failing to address properly the issue of impunity for crimes committed during and immediately after the conflict, UNMIK has left behind what one Kosovo Albanian

[166] Amnesty International, *Serbia and Montenegro (Kosovo/Kosova): "Prisoners in our own homes": Amnesty International's concerns for the human rights of minorities in Kosovo/Kosova,* AI Index: EUR 70/010/2003, April 2003, at 25.
[167] Amnesty International Interview, 6 April 2006.

described in a recent Human Rights Watch report as, "unfinished business".[168] One of the most serious failures of the UNMIK international justice strategy was its failure to ensure at the outset that crimes under international law, including genocide, crimes against humanity, war crimes and torture, as well as principles of criminal responsibility and defences were defined in accordance with the strictest requirements of international law. The Federal Republic of Yugoslavia, later Serbia and Montenegro, became parties to such international treaties as the Convention for the Prevention and Punishment of Genocide (Genocide Convention), the Geneva Conventions of 1949 and their 1977 Protocols, the Rome Statute of the International Criminal Court and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, these treaties and customary international human rights and humanitarian law have never been fully implemented. Although the law incorporates a more expansive definition of the crime of genocide than in the Genocide Convention and defines grave breaches of the Geneva Conventions as crimes, there is some ambiguity in the law about the scope of war crimes, crimes against humanity are not defined as crimes and the principle of command and superior responsibility is not expressly included in the law.

Although it is impossible to establish exactly how many cases involving crimes committed during the conflict have been conducted in Kosovo (as discussed in the next section), according to the UNMIK Department of Justice's estimate, in the more than seven years that UNMIK has administered Kosovo, only 23 trials had, until April 2007, been conducted for war crimes, genocide and crimes against humanity.[169] The Human Rights Committee, after reviewing in July 2006 UNMIK's record of investigating and prosecuting war crimes and crimes against humanity, severely criticized UNMIK.[170] The majority of

[168] Human Rights Watch, *supra* note 55, at 18.

[169] Figure provided by International Judicial Support Division, UNMIK Department of Justice.

[170] It stated:

> "The Committee is concerned about the continuing impunity enjoyed by some perpetrators of war crimes and crimes against humanity committed prior to the UNMIK mandate and about ethnically motivated crimes perpetrated since June 1999, including those committed in March 2004, as well as the failure to effectively investigate many of these crimes and bring perpetrators to justice. The Committee regrets the failure of UNMIK to fully cooperate with the International Tribunal for the Former Yugoslavia (arts. 2 (3), 6 and 7).
>
> UNMIK, in cooperation with PISG, should investigate all outstanding cases of war crimes, crimes against humanity and ethnically motivated crimes committed before and after 1999, including where the perpetrators may have been Kosovo Albanians, ensure that the perpetrators of such crimes are brought to justice and that victims are adequately compensated. It should provide effective witness protection programmes, including by means of witness relocation, and extend full cooperation to International Criminal Tribunal for Yugoslavia prosecutors."

Human Rights Committee, Concluding observations of the Human Rights Committee, KOSOVO (SERBIA), U.N. Doc. CCPR/C/UNK/CO/1, 14 August 2006, para. 12 (http://daccessdds.un.org/doc/UNDOC/GEN/G06/436/91/PDF/G0643691.pdf?OpenElement). The Human Rights Committee asked UNMIK to respond to its observations and recommendations within six months; no reply is posted on the UN website.

these are cases were commenced before local panels and involve Serb defendants.[171] On appeal to Regulation 64 international panels many of the convictions have been overturned and the cases sent back for re-trial (and in some cases, multiple re-trials) before Regulation 64 international panels. These re-trials have often resulted in acquittals, mainly due to a lack of sufficient evidence or improperly obtained evidence. However, very few new trials have been commenced.

Based on the experience of the past seven years since the conflict and the failure of the UNMIK Department of Justice to implement many of the recommendations made by independent observers, it is unlikely that much further progress will be made under UNMIK. Between 2002 and April 2007 only six new war crimes cases had been opened.[172] Amnesty International delegates were also told by the UNMIK Police Director of Criminal Investigations, Wayne Hissong, that it was unlikely any new investigations would be commenced, which would result in continuing impunity for many persons who committed serious crimes under international law in Kosovo, unless the EU opens new investigations into the thousands of crimes under international law that have been committed in Kosovo.[173]

Among the problems is UNMIK's haphazard and *ad hoc* approach to justice sector development. As was pointed out in a report by the Conflict Security and Development Group, King's College London published in 2003; "the graduated approach to building an international judicial capacity led to an extended period of near-impunity for serious crimes".[174] This view is endorsed by John Cerone and Clive Baldwin, who write, *"due to the ad hoc nature of [the appointment of an international judge and international prosecutor to the Mitrovica District Court], uncertainty about their role, and the conditions in which these personnel were deployed, little meaningful work was to be performed by them until months later."*[175]

Former Chief of the OSCE Legal Systems Monitoring Section of the Department of Human Rights and Rule of Law, David Marshall and one of his legal advisors, Shelley Inglis, both of whom witnessed UNMIK's attempts at building a judicial system, are even more

[171] 17 of the 25 cases Amnesty International has been able to document involve Serb defendants.
[172] According to the OSCE Legal Systems Monitoring Section, these are the cases of Latif Gashi, Nazif Mehmeti, Naim Kadriu and Rrustem Mustafa (the *Llap* trial or *Gashi* case); Ejup Runjeva, Nuhi Provoliu, Rrustem Dema, Bujar Tafili and Enver Axhani; Selim Krasniqi et al.; Ljubiša Perić, Slobodan Maksimović, Živorad Maksimović and Milovan Maksimović; Zarija Cvetanović et al.; and Agron Krasniqi. It appears that, as of late 2006, only two of these cases had led to a final judgment after exhausting all appeals, the *Llap* trial and the case involving Ejup Runjeva, Nuhi Provoliu, Rrustem Dema, Bujar Tafili and Enver Axhani, although, as explained below, this information may be incomplete or inaccurate.
[173] Amnesty International interview, 2 April 2006.
[174] Conflict Security & Development Group, International Policy Institute, Kings College, London, *A Review of Peace Operations: A Case for Change - Kosovo Report*, 28 February 2003, para. 290 – available at http://ipi.sspp.kcl.ac.uk/rep005/index.html.
[175] Cerone & Baldwin, *supra* note 48, at 49.

damning. They concluded that. "*UNMIK failed to develop any coherent strategy for the justice sector, including war crimes cases. It opted instead for a dithering approach that proved catastrophic for defendants and victims alike, particularly Kosovo Serbs.*"[176]

Juvenile Z, a 15-year-old Kosovo Serb, was convicted of genocide by an all local panel on 13 September 2000. Although both the international prosecutor and the defence lawyer recommended that Juvenile Z be released from custody, he was sentenced to serve one to five years in a juvenile correctional facility. The defence appeal to the Supreme Court was heard by an all local panel, who affirmed the trial court decision on 8 March 2001.[177]

US Law Professor, Edwin Villmoare, in an article focussing on the prosecution of Igor Simić, a Kosovo Serb, for genocide, further emphasised this point:

> *After a year and a half of dubious convictions of Serb defendants roundly criticised by the court-monitoring unit of [OSCE] and other legal observers, UNMIK was finally embarrassed into action. It adopted Regulation 2000/64, which created special three-judge tribunals consisting of at least two international judges. It was common knowledge that the purpose of these tribunals was to provide Serb defendants with more or less fair trials. However UNMIK unaccountably refused to establish standards for invoking the jurisdiction of these tribunals. Moreover, UNMIK failed to provide additional international judges. By this time UNMIK's derelictions did not seem to matter much. Many of the Serbs in custody had already been tried and convicted in the regular courts. Others had successfully escaped…Despite the establishment of the three-judge tribunals during Igor's wait in jail, his case remained in the District Court of Mitrovica.*[178]

As detailed in an earlier section, UNMIK's approach to building the judicial system continues to be marked by a lack of clear planning or vision. The international judges and prosecutors were introduced gradually, one at a time in response to a crisis in the justice system, allowing the rest of the trials to proceed without any scrutiny or independent and impartial judicial correction. It is, therefore, little wonder that the vast majority[179] of war crimes cases have involved ethnic Serb accused, which then needed to be reviewed and often re-tried by international panels. Independent monitors pointed to the tendency of local

[176] Marshall & Inglis, *supra* note 86, at 96.
[177] See OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *supra* note 31, at 15-16.
[178] Villmoare, *supra* note 94, at 376. Villmoare goes on to detail numerous inadequacies he witnessed within Igor Simić's trial.
[179] Of the 17 war crimes cases reviewed by the OSCE Legal Systems and Monitoring Section in its 2003 report, 15 involved all Serb defendants and one involved a Serb and a Roma defendant.

prosecutors to drop charges or local judge panels to acquit Albanian accusedi[180] and these or other cases have simply never been taken up by international prosecutors.

Furthermore, the cases of *Juvenile Z* and *Igor Simić* discussed above suggest that UNMIK Department of Justice's claim that following the promulgation of Regulation 2000/64 all war crimes cases have been conducted before majority or all international panels is not true. With no comprehensive list available of war crimes cases conducted and the varied charging practices making it impossible to identify easily which cases involve war crimes allegations (this issue is further elaborated on in the next section), there is a real risk that other war crimes cases involving members of minority communities may have been conducted without international involvement.

Time and money were invested into the development of the proposed KWECC. This proposal was eventually abandoned only to now, seven years on, be revived in a slightly different form. During these seven years valuable evidence has been lost and investigations have either not been commenced or have been abandoned. At this stage, it is doubtful whether this new court, if it were ever to be established, would be able to make serious headway in addressing crimes committed during the conflict. Based on past experience and the Kosovo Standards Implementation Plan, it is likely that its focus would be combating organised crime and corruption, rather than the far more serious crimes against humanity and war crimes. This concentration of international judicial involvement in cases involving organised crime and corruption has also been criticised as reflecting external political concerns and interests, not local interests.[181]

It is disturbing that of the war crimes cases conducted only one - the *Llap* case – has involved a non-Albanian victim. In that case one of the 26 victims was Serb.

B. The failure to investigate and prosecute sexual violence committed during the conflict as war crimes

It is clear that the numerous crimes of sexual violence committed during the conflict have not been one of UNMIK's concerns. Despite extensive documentation by women's groups, non-governmental organizations and NATO of rape and other crimes of sexual violence committed on a large scale during the conflict in Kosovo (as referred to in Part Two above), it appears that there had,up to April 2007 been only one indictment including a charge of rape or sexual violence as a war crime or crime against humanity and that indictment in the *Jokić* case, presented by a local prosecutor, led to an acquittal.[182]

[180] Hartmann, *supra* note 9, & ICTJ, *supra* note 49, at 14.
[181] ICTJ, *supra* note 49, at 19.
[182] Of course, until the UNMIK Department of Justice publishes all the indictments it cannot be determined definitely that there have not been any other indictments for such crimes, but Amnesty International has not been able to find any evidence that any other indictments exist. The absence of

When interviewed by a delegate of Amnesty International, the head of the UNMIK Victims Advocacy and Assistance Unit confirmed that although there was a large file of statements taken by NATO forces in 1999 documenting rapes committed during the war, there had been no war crimes or crimes against humanity cases involving charges of sexual violence. She explained this failure by stating that when UNMIK police officers had attempted to go back two years later to women who had given statements, the women denied the statement or said they were unwilling to testify. The UNMIK Victim Advocacy and Assistance Unit representative blamed this on the social pressure on women in Kosovo and the shame associated with rape. She did not explain why UNMIK had failed to investigate any of these reports for two years. The failure to do so appears to be the result of the absence of any qualified expert among the UNMIK police and international prosecutors on crimes of sexual violence in UNMIK.

It is well documented that a culture of shame exists for women who have suffered sexual violence in the majority of cultures. This culture of shame was certainly present in Bosnia but did not inhibit some very important prosecutions for crimes of sexual violence arising out of the conflict in Bosnia. The culture of shame has also been documented in Sierra Leone. However, all of the indictments in the Special Court for Sierra Leone, aside from the case of *Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (the Civilian Defence Force trial) include charges for rape, sexual slavery and other acts of sexual violence. The reluctance of women to speak about the atrocities they have suffered was overcome in the case of Sierra Leone, by a concerted effort by the Office of the Prosecutor of the Special Court to make gender-based and sexual violence a cornerstone of prosecution policy.

No such approach has ever been adopted by UNMIK in Kosovo. UNMIK Police Director of Criminal Investigations, Wayne Hissong conceded that none of the international police officers recruited to conduct war crimes investigations had any specific expertise, nor had they received any training, in dealing with survivors of sexual violence. He said that in his opinion such expertise should have been sought.[183] Equally, as detailed in Part Two of this report, the selection criteria for the recruitment of international judges and prosecutors did not include any requirement for expertise in the area of crimes of sexual and gender-based violence. As Amnesty International has not been able to obtain copies of the *curriculum vitae* of those who have served or are currently serving in Kosovo, it is impossible to know whether any of the international judges or prosecutors has ever had any experience in this area. Similarly, the lack of a training programme in place for internationals serving in Kosovo has meant that there has been no on-the-job training to raise awareness and competence in this area. This failure is in contrast with the Special Court for Sierra Leone, where training has been conducted with all the organs of the Court (most recently with the Defence Office in

any other indictments for rape and other crimes of sexual violence was confirmed by the UNMIK Police Director of Criminal Investigation and the UNMIK Victim Advocacy and Assistance Unit.

[183] Amnesty International interview, 2 April 2006.

July 2006) in dealing with survivors of rape and other crimes of sexual violence. It is also in stark contrast to the significant efforts to investigate and prosecute post-conflict trafficking of women and to incorporate gender-sensitive courses into training for local judges and prosecutors.

Amnesty International is aware of one case involving a Serbian woman who filed statement with the police stating she and another woman had been raped and tortured by men they believed to be members of the KLA on 16 June 1999. An official complaint was made and a medical examination conducted, which verified the complainant's allegations. However, no prosecution had been opened by April2007.[184] While Amnesty International was not able to talk to the victim herself, delegates were told by a Serbian community leader who provided a copy of the police statement and the medical reports that at no stage was the victim informed of the possibility of her case being taken over and run by an international prosecutor. When the possibility of cases "slipping through the cracks" was raised with Chief International Prosecutor, Annunziata Ciaravolo, she conceded that this was possible as case referrals to international prosecutors rely on the police or a local prosecutor referring the matter or the international prosecutor becoming aware of the case in some other way.[185] The latter is unlikely considering the majority of international prosecutors have no familiarity with Albanian or Serbian.

II. Lack of useful jurisprudence

Former Deputy Special Representative of the UN Secretary-General for Police and Justice, Jean-Christian Cady, saw one possible aspect to capacity-building by international judges to be through the strengthening of the role of jurisprudence in the Kosovo judicial system.[186] Certainly the internationalised panels in Kosovo provided a possibility for developing Kosovar law and legal process by providing better reasoned judgments that referred to the relevant law and cited legal authorities. These panels could also have added to the development of international criminal jurisprudence.

Unfortunately, most observers have not noted a significant improvement in the quality of the jurisprudence produced by courts in Kosovo.[187] The OSCE Legal Systems Monitoring Section report reviewing war crimes cases conducted in Kosovo up until 2002 notes:

[184] The details of this case are set out in Amnesty International, *Kosovo* (*Serbia): The UN in Kosovo: A legacy of impunity*, AI Index EUR 70/015/2006, 8 November 2006, at 5. Amnesty International has received a still unconfirmed report that one prosecution for rape or other sexual violence as a war crime has occurred since April 2007.
[185] Amnesty International interview, 7 April 2006.
[186] Cady & Booth, *supra* note 37, at 74-75.
[187] Cerone & Baldwin, *supra* note 48, at 52, ICTJ, *supra* note 49, at 22.

> *Supreme Court judgments in Kosovo are a meagre source of war crimes jurisprudence. They are characterised by brevity, poor legal reasoning, absence of citations to legal authority and lack of interpretation concerning the applicable law on war crimes and human rights issues.*[188]

As indicated below, the weaknesses identified by the OSCE Legal Systems Monitoring Section and by other observers continue to characterize the jurisprudence of international panels and the investigations and prosecutions by international prosecutors and investigating judges. If nothing else, the proposed development of Kosovar jurisprudence concerning international law would only be possible if copies of the judgments were in fact made available. Aside from the limited public access to these documents (discussed above in Part Three), local and international lawyers and judges told Amnesty International that they were not able to obtain access to judgments to assist them in developing their legal arguments or reaching their decisions.

Due to the failure of UNMIK Department of Justice to provide copies of all of the judgments and indictments for war crimes cases to Amnesty International, despite the numerous requests made by the organization and detailed in Part Three of this report, it is impossible to conduct a comprehensive review of the jurisprudence. Of the 23 war crimes cases the UNMIK Department of Justice International Judicial Support Division has recorded, many of them involving multiple re-trials and appeals, Amnesty International has only been able to obtain copies of 10 indictments and 22 decisions of trial and appeal courts.

Furthermore, due to the fact that charging practice has varied greatly, it is very difficult to ascertain whether there are in fact other cases also involving acts committed during the conflict amounting to crimes under international law. It seems the UNMIK Department of Justice is not itself able to provide accurate figures, having kept no database containing a comprehensive list of cases, even of just those cases involving international judges and/or prosecutors, and having set up no case tracking or case management system.[189] Indeed, it is often not possible to determine from the decisions whether the prosecutions were conducted by international or local prosecutors. Although the International Judicial Support Division states there have been 23 war crimes cases conducted, a presentation paper by UNMIK Pillar 1 in June 2004 stated that at that time, according to the UNMIK Department of Justice Criminal Division, international prosecutors were involved in 38 active war crimes cases.[190] What has become of these cases is not known. The OSCE Legal Systems Monitoring Section told Amnesty International that, aside from the 17 war crimes cases detailed in its

[188] OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *supra* note 30, at 48.
[189] In a presentation of UNMIK Pillar I in June 2004, there is reference to the Criminal Division of the UNMIK Department of Justice logging cases from the pre-judicial investigation stage to final verdict. However, this does not seem to have been an ongoing activity (http://www.unmikonline.org/justice/documents/PillarI_Report_June04.pdf).
[190] http://www.unmikonline.org/justice/documents/PillarI_Report_June04.pdf.

2002 report, there had been six new war crimes cases. This list included cases that were currently only at the investigation stage. Neither the UNMIK International Judicial Support Division nor the UNMIK Criminal Division have been able to provide a list of the names of the cases, making it impossible to cross-check whether all three departments are talking about the same cases. The 2006 US State Department Report on Human Rights Practices in Serbia and Montenegro claims trials have been conducted in Kosovo courts for approximately 40 cases involving allegations of genocide or war crimes.[191] Amnesty International has been unable to confirm these figures, but it was able to obtain information concerning 26 cases. One of these cases was dropped prior to an indictment being issued.[192] However, there remain two cases in which war crimes charges were presented to the court and which do not appear on the OSCE Legal Systems Monitoring Section's list of war crimes cases.

In an attempt to clarify matters, Annexe Three provides a list of the cases with international prosecutors or international judges that Amnesty International believes involve war crimes, crimes against humanity or genocide. This is not a comprehensive list, however, for the reasons set out above.

A. Common problems with investigations, prosecutions and jurisprudence

Amnesty International has also reviewed a number of the cases involving international prosecutors or international judges in which documents have been obtained. The quality of the reasoning in the judgments varies greatly, from very poor to some decisions providing thorough analysis and carefully reasoned factual findings and legal conclusions. The following case examples highlight some of the problems. Until all indictments, motions, briefs, judgments and other decisions are made publicly available on the UNMIK website or by the EU on its website, in the same manner as they are published by other international criminal courts or made available to non-governmental organizations for publication, it will not be possible to conduct a comprehensive analysis of the jurisprudence of the Regulation 64 international panels or to compare them with the legal proceedings in local courts. Amnesty International plans to make any such previously unavailable documents of public record available on its website or on the websites of other organizations as a first step to make such jurisprudence available to the public in Kosovo and around the world.

In addition to the numerous cases of prolonged pre-trial detention, sometimes without charge, noted above, other problems with cases involving international prosecutors have included:

[191] US Department of State, *Country Report on Human Rights Practices 2005: Serbia and Montenegro*, March 2006 - http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.html?tbl=RSDCOI&id=4418219f11&count=7.

[192] Agim, Lulzim and Bajram Gashi, three Kosovo Roma men who were arrested and detained for 12 and a half months on suspicion of war crimes.

- failure to obtain forensic evidence in time which might have secured a murder conviction (Balaj);[193]
- the presentation of extremely weak cases (Nikolić, Stanojević);[194]
- the presentation of fundamentally flawed eye-witness identifications (Grković);[195]
- arguing that Kosovo courts could not exercise jurisdiction over crimes against humanity (Trajković);[196] and
- the failure of an international prosecutor to file an appeal on time, resulting in dismissal of appeal (Balaj).[197]

Problems with international panels at the District Court level have included:

- conducting a trial in absentia even though such trials were prohibited under UNMIK regulations (Ademi, Ajeti);[198]
- the use of anonymous witnesses (Gashi);[199]
- conducting reconstructions of the crime without the accused and defence counsel being present (Stanojević);[200]

[193] *Balaj* case, Verdict, AP. 95/2003, Supreme Court of Kosovo (international panel), 30 January 2004, 8 (forensic evidence presented on appeal identified one of the persons allegedly killed by the accused and would, therefore, have permitted prosecution on a murder charge).
[194] *Nikolić* case, Verdict, P. No. 47/2001, District Court of Gnilane (international panel), 18 April 2001; *rev'd*, Verdict, "AP" – "KZ" 194/2002, Supreme Court of Kosovo (international panel), 5 May 2003; *acquittal*, Verdict, P. No. 126/2003, District Court of Gjilane (international panel), 17 December 2003. See below in this part for a discussion of the *Stanojević* case.
[195] *Grković* case, Verdict, C. No. 45/2002, District Court of Prizen (international panel), 4 September 2002, 6 (acquitting accused because "the identification process was seriously flawed in and of itself, calling into question the reliability of even the first identifications" and the subsequent identifications were "inherently unreliable as they are at that point not an independent identification").
[196] Office of the Public Prosecutor of Kosovo, PP.Nr.68/2001, PPP Nr. _/2001 and K. 31/99, Opinion on Appeals of Convictions of Momčilo Trajković, Supreme Court of Kosovo (international panel), filed 30 November 2001, 72.
[197] *Balaj* case, Verdict, AP. 95/2003, Supreme Court of Kosovo (international panel), 30 January 2004 (rejecting appeal by International Public Prosecutor on the ground that it had been filed seven days after the 15-day deadline), 8.
[198] *Ademi* case, Verdict, P. No. 29/99, District Court of Mitrovica/ë (local panel), 30 August 2000, *rev'd*, .Verdict, AP. 155/2001, Supreme Court of Kosovo (international panel), 9 December 2002, 4 (ordering new trial before an entirely different panel); *Ajeti* case, Verdict, P. No. 28/2000, District Court of Gjilan (majority local panel), 9 October 2000, *rev'd*, Verdict, Supreme Court of Kosovo (international panel) (ordering retrial) (copy of this judgment and any judgment after retrial not provided to Amnesty International).
[199] *Gashi* case, C.Nr. 425/2001, District Court of Pristina, 16 July 2003, 29-30 (approving the use of anonymous witnesses on the ground that the court had the opportunity to interview the witnesses *before* they testified and had the benefit of their testimony before the investigating judge); rev'd on appeal by an international panel of the Supreme Court of Kosovo, which ordered a retrial. No information has been provided to Amnesty International on whether the retrial occurred and, if so, what was the outcome.

- visiting the scenes of the crimes without the presence of the accused (Jokić);[201]
- poor translation and interpretation (all cases) and use of summaries by interpreters instead of verbatim interpretation (many cases before 2005);[202]
- a lack of impartiality and judicial decorum by an international investigating judge who became embroiled in a public controversy in the local press with defence counsel (Gashi);[203]
- poorly reasoned, unclear and "incomprehensible" decisions (Bešović, Kolašinac);[204]
- judgments based on eye-witness testimony contradicted by forensic evidence or the prior testimony of the witnesses (Stanojević);
- discrepancies between the evidence and the verdict or insufficient evidence to support the verdict (Bešović, Matić);[205]

---

[200] See below in this part for a discussion of the *Stanojević* case.

[201] *Jokić* case, Verdict, P. No. 45/2001, Verdict, District Court of Gjilan (international panel), 3 May 2002, 3.

[202] See, for example, *Dema* case, Verdict, District Court of Prishtine/Priština (international panel), P. No. 215/04, 12 May 2005, 8. The court noted translation problems with one witness and stated that "he often used terms that the translators, who are unfamiliar with his rural Kosovar dialect, found difficult to translate. He also used many Serbian words that the Albanian translators did not know." Despite these problems, the District Court decided to proceed with the faulty translation, stating that the witness's "account of events was understandable to the Trial Panel" and that the inconsistencies because of "differences in words used by different translators" did "not bear on the truthfulness of the testimony or the accuracy of his account of events".

[203] OSCE Legal System Monitoring Section, Case Report: The Public Prosecutor's Office vs Latif Gashi, Rrustem Mustafa, Naim Kadrin and Nazif Mehmeti, The "Lapi Case" (no date), 10. The report expressed particular concern about a news paper article written by the investigating judge in the case

> *which contained the investigating judge's views on aspects of the case, [and] which was published notwithstanding that the written verdict had not been released and despite the fact that the decision could have been appealed by the parties. This article sparked an exchange of newspaper articles concerning the trial as one of the defence counsel from the case published a reply entitled* "There are 8 Reasons why Kosovars do not Believe in International Judges" *(Koha Ditore, Aug. 12). This vitriolic, public exchange between an international investigating judge and a defence lawyer concerning an emotive case (on which they had both worked) can only damage the dignity of the court. The Legal System Monitoring Section concurs with the trial panel who considered that the article was "inappropriate".*

[204] *Bešović* case, Verdict, AP-KZ No. 80/2004, Supreme Court of Kosovo (international panel), 7 September 2004, 9 (finding "major internal contradictions", "patent inadequacy of the trial court's approach to evidence", failure "to give sufficient reasons to support its findings" and "a lack of complete and critical evaluation of the testimonies"). On remand, the international prosecutor decided not to seek a retrial.

[205] *Bešović* case, *supra*, note 196XXX; *Matić* case, Verdict, C.No. 48/2000, District Court of Prizen, 29 January 2001; rev'd, Decision Act, AP. Nr. 94/2001, Supreme Court of Kosovo (international panel), 13 June 2001, 2 (granting appeal of local prosecutor based on the inadequacy of the evidence to support the acquittal and requiring that the District Court on retrial "investigate[] the scene of the claimed crime of massacre, confront[] the witnesses as far as the contradictory witness statements are concerned, stud[y] and examine[] the elements and details of the criminal offence in relation to the

- significant differences between the oral judgment and the written judgment (Bešović)[206] and
- failure to analyze or analyze in any depth relevant international law (most international panels).

International panels of the Supreme Court of Kosovo have not always provided effective guidance with respect to retrials.

However, before considering these problematic case examples, it is important to note that international prosecutors and international panels, primarily at the Supreme Court of Kosovo level, have in certain cases rectified some of the worst flaws and abuses in the local system. For example, although the intervention by the international prosecutor in the Trajković case was flawed in at least one respect (see below), he submitted a detailed memorandum in the Supreme Court on the scope of international criminal law. In addition, international panels at the District Court level have addressed such matters as flawed identification procedures (Grković, Jovanović),[207] It is also important to note that this report does not address the performance of international prosecutors and judges with regard to ordinary crimes, which constituted the overwhelming majority of the cases in which they were involved.

B. A brief review of selected cases

Idriz Balaj *case*

Idriz Balaj and four other accused were convicted in the District Court of Peć/Peja on 17 December 2002 of complicity in unlawful detention and complicity and joint criminal enterprise in unlawful detention resulting in death.[208] The Supreme Court of Kosovo rejected the international prosecutor's appeal on the ground that it was filed seven days after the 15-day deadline expired.

Veselin Bešović *case*

indictment as well as the identification of the people [who] allegedly lost their lives under the circumstances described in the indictment").

[206] *Bešović* case (Supreme Court), supra, note 196XXX, 5 (noting that the orally announced verdict found the accused guilty of murder and attempted murder, but the written verdict omitted these findings in violation of the requirements of Article 357 of the LCP).

[207] *Grković* case, Verdict, C. No. 45/2002, District Court of Prizen (international panel), 4 September 2002, 6 ("identification process was seriously flawed"), 6-8, 10 ; *Jovanović* case, Verdict, P. No. 10/2001, 2 November 2001, 6 (irrelevant identification, loss of photos used in identification making an assessment of the reliability by the court impossible, failure to describe accused before being shown photos and failure to show photos of different persons).

[208] *Balaj* case, Verdict, C.C. No. 190/02, District Court of Peć/Peja (international panel), 17 December 2002; rev'd, Verdict, AP. 95/2003. Supreme Court of Kosovo (international panel)

Veselin Bešović, a Kosovo Serb, was initially indicted in October 2000 for robbery and illegal possession of weapons. He was convicted by a local panel of judges in December 2000 but the conviction was overturned and the case sent back for re-trial before a Regulation 64 panel, which acquitted him of all charges.[209]

In November 2001 a second indictment was issued charging Bešović with war crimes. His second trial before a Regulation 64 panel commenced on 20 May 2002. However, one of the judges left the mission prior to the conclusion of the trial. This led to the trial being recommenced on 28 January 2003. Bešović was convicted of war crimes on 26 June 2003 by a majority international panel of the District Court of Peć/Peja in a 183-page opinion.[210] On appeal before a Regulation 64 panel of the Supreme Court on 27 May 2004, this verdict was overturned and the case was sent back for another re-trial. The international prosecutor decided that there was insufficient evidence for a retrial.[211]

The international panel of the Supreme Court of Kosovo was highly critical of the decision of the international panel of the District Court:

> *…the Supreme Court generally agrees with the defence counsel and the district public prosecutor that the verdict rendered is unclear and incomprehensible in that there are discrepancies between the allegations in verdict and the injured party's/witnesses' statements.*[212]

The Supreme Court also found that the written verdict differed from the oral verdict handed down and that there were contradictions within the District Court's decision.[213]

Miloš Jokić *case*

Apparently, there has been only one prosecution for sexual violence as a war crime or crimes against humanity in Kosovo, and that was initiated by a local prosecutor against a Montenegrin, Miloš Jokić. He was convicted of a number of war crimes charges, including a crime of sexual violence, but these charges were not discussed with any clarity. The judgment of conviction, which was simply a series of summaries of the prosecution witness statements, without any legal analysis of the element of the crime of rape or other crimes, was reversed on appeal by an international panel of the Supreme Court of Kosovo. It held that the

[209] *Bešović* case, Verdict, P. No. 56/2001 and P. No. 95/2000, District Court of Peja, 5 December 2001.
[210] *Bešović* case, Verdict, C/P 136/2001, District Court of Peć/Peja, 26 June 2003; *rev'd*, Verdict, AP-KZ No. 80/2004, Supreme Court of Kosovo (international panel), 7 September 2004.
[211] *Case against Veselin Bešović*, Order suspending criminal proceedings, Notice of eight (8) day deadline to injured party, C. No. 136/01, 21 July 2005 (no party objected, so the proceedings were terminated).
[212] *Bešović* case (Supreme Court), *supra*, note 196XXX, 5.
[213] *Ibid.*, at 5 (noting that the orally announced verdict found the accused guilty of murder and attempted murder, but the written verdict omitted these findings in violation of the requirements of Article 357 of the LCP).

District Court had failed to consider the evidence carefully and failed to call defence witnesses and, therefore, it ordered a retrial.[214] The international panel of the Supreme Court of Kosovo stated that the witness statements referred to by the District Court "insufficiently corroborate the criminal charges", the District Court "refused to hear witnesses named by the defence", as many as 34 other persons might have "essential information of the location and living conditions of the accused", the District Court "did not even take into consideration the statements given by the aforementioned Serbian witnesses", it failed to make an assessment of "the reliability of the contradictory statements of witnesses" and it convicted the accused of murder for which two other persons had been convicted.[215]

A prosecution by an international prosecutor in the retrial before an international panel led to an acquittal on all charges on the ground that the eye-witness identification was not credible.[216] The international panel carefully considered the testimony of the rape victim and other witnesses and concluded that she had been raped by a Serb paramilitary man, but conflicting statements by her and other witnesses identifying the accused as responsible were not credible.[217] However, despite this careful scrutiny of the evidence, these proceedings were seriously flawed because the international panel "without the presence of the defendant conducted an ocular inspection of the relevant part of the villages of Verban, Gushice, Smiraj and Gromovo", in violation of the accused's right to be tried in his presence, a right recognized in a number of international instruments, including Article 14 (3) (d) of the ICCPR and Article 6 (3) (c) of the European Convention of Human Rights.[218]

Andjelko Kolašinac *case*

An international panel of the District Court of Prizen found Andjelko Kolašinac guilty of giving help to an offender by organizing the concealment of evidence of the war crime of expulsion of Kosovar Albanians by destroying and disposing of their property.[219] On appeal, an international panel found that it was not possible to determine from the judgment which acts of the accused formed the basis of the conviction, that the court had wrongly assessed the statements of certain witnesses and concluded that the evidence contradicted the findings regarding destruction of evidence and registration of civilians as part of the expulsion of

[214] *Jokić* case, Verdict, No. P. no. 27/2000, District Court of Gjilan (local panel), 20 September 2000, *rev'd*, Verdict, No. AP nr. 8/2001, Supreme Court of Kosovo (international panel), *acquittal*, Verdict, No. P. No. 45/2001, Verdict, District Court of Gjilan (international panel), 3 May 2002.
[215] *Ibid.*, at 2 (unnumbered page).
[216] *Jokić* case, Verdict, No. P. No. 45/2001, Verdict, District Court of Gjilan (international panel), 3 May 2002.
[217] *Ibid.*, at 14–19.
[218] *Ibid.*, at 3.
[219] *Kolašinac* case, Verdict, No. P Nr. 44/2000, District Court of Prizen (international panel), 2 July 2001 (*Kolašinac I*); *rev'd*, Verdict, No. 217/2001, Supreme Court of Kosovo (international panel), 2 November 2001 (*Kolašinac II*); *conviction*, No. 226/2003, District Court of Prizen (international panel), 31 January 2003 (*Kolašinac III*); *rev'd*, Verdict, No. AP-KZ 230/2003, Supreme Court of Kosovo (international panel), 5 August 2004 (*Kolašinac IV*).

civilians. It ordered a retrial and directed the District Court to consider, in particular, certain specific evidence.

On retrial before an international panel of the District Court of Prizen, the accused was found guilty a second time for war crimes on the basis of command responsibility in relation to forced displacement, forced labour, pillaging and looting and destroying property, but acquitted of aiding a perpetrator after the commission of a crime. On the second appeal, an international panel of the Supreme Court of Kosovo reversed on 22 October 2003 in a judgment that was not published until 5 August 2004, more than nine months later. It has not been possible to ascertain whether the retrial has taken place and, if so, what was the outcome. The international panel of the Supreme Court, in one of the longer and better reasoned judgments, which discussed in considerable detail relevant international law, noted numerous flaws in the retrial, including the ambiguous treatment of an OSCE report, a secondary source, as evidence; errors in citing the OSCE report; failure to discuss the accused's explanation of the registration as lawfully carried out; the absence of evidence for the charges of enslavement, inhumane treatment and failure to prevent looting and the destruction of property.[220]

Sava Matić *case*

Sava Matić, an ethnic Serb, was charged with war crimes in the territories of the Rahovec Municipality and the villages of Krusha e Madhe and Potoqan I Ulet during armed conflict in 1998 and 1999, including ordering and committing attacks against the unprotected civilian population, causing suffering, inhuman treatment, intimidation, torture, kidnappings, unlawful confinement, unlawful deportation to forced labour camps, extensive and unlawful destruction and appropriation of property not justified by military necessity, burning of houses, pulunder and murder. However, on 29 January 2001 an international panel of the District Court of Prizen dismissed the war crimes charges and convicted him solely for the criminal act of light bodily injury under Article 39 of the Criminal Code of Kosovo. On appeal by the District Public Prosecutor of Prizen, an international panel of the Supreme Court of Kosovo concluded that the court failed to conduct a proper review of the evidence and reversed. It ordered the District Court take the following steps on retrial:

> Investigate[] the scene of claimed crime of massacre, confront[] the witnesses as far [as] the contradictory witness statements are concerned, stud[y] and examine[] the elements and detail[] of the criminal offence in relation to the indictment as well as the identification of the people [who] allegedly lost their lives under the circumstances described in the indictment.[221]

Zoran Stanojević *case*

[220] *Kolašinac IV*, at 40-54.
[221] *Sava Matić* case, AP.Nr. 94/2001, Sup. Ct. Kosovo, 13 June 2001.

Although it is difficult to provide a detailed analysis of this case, as no copies of the indictment or judgments have been provided by the UNMIK Department of Justice, the conviction of Zoran Stanojević, a Serb former policeman, in June 2001 by a Regulation 64 panel was the source of some controversy. The defendant was convicted of murder and two counts of attempted murder for his alleged participation in the shooting of civilians in the village of Racek. He was sentenced to fifteen years' imprisonment. This decision was upheld on appeal in January 2002.

However, Amnesty International and UN legal advisers were highly critical of the decision due to procedural irregularities during the trial and a lack of evidence. It appears that the trial testimony of two witnesses was contradicted by forensic evidence. Other witnesses changed their evidence between the initial statements they gave to ICTY investigators and testifying in court. Attempts at a reconstruction of events had to be abandoned twice due to threats. When a reconstruction was finally conducted, it took place without either the defendant or his defence counsel present.

British newspaper, The Guardian *reported that*, "[a]ccording to one UN legal officer with knowledge of the case, the panel of two international judges and one Albanian judge had considered abandoning the trial for lack of evidence, 'but they didn't dare do it. Politically speaking it was not possible'." *Another "Senior UN Official" was quoted as stating;*

> *[T]he Stanojević trial reflected weaknesses throughout the Kosovo judicial process. 'The quality of the evidence is very very poor and relies on testimony for which there is very little supporting evidence. No one hesitates to make things up. International judges were meant to alleviate concerns over bias and set a standard for effective justice. It [the policy] does not seem to have worked.'*[222]

Amnesty International also expressed its concern at the time:

> *Despite the appointment of international prosecutors and judges to the Kosovo courts, the judicial system in Kosovo continues to be seriously flawed…From cases of unlawful pre-trial detention to procedural breaches in the conduct of trials, the administration of justice fails to be conducted in a manner consistent with international human rights standards.*[223]

Despite these concerns being raised over five years ago, it appears UNMIK Department of Justice has done little rectify the situation.

Momčilo Trajković *case*

[222] Nicholas Wood, *Amnesty and UN staff accused Kosovo war crimes tribunal of ethnic bias, The Guardian*, 20 June 2001.
[223] *Ibid.*

The accused was convicted of war crimes and crimes against humanity by a majority local panel of the District Court of Gjilan/Gnjilane, constituted under Regulation 2000/6, on 6 March 2001.[224] The trial panel's decision was poorly reasoned and cited limited legal authority for its verdict. These weaknesses were acknowledged by the Chief International Prosecutor, who requested the Supreme Court quash the verdict and send the matter back for re-trial. An international panel of the Supreme Court, although it followed the Chief International Prosecutor's recommendations, did so on 30 November 2001 in a judgment of only three pages. It made no reference to any legal principles, aside from one reference to the European Convention on Human Rights in relation to the period of pre-trial detention. Although the decision referred to the Chief International Prosecutor's opinion, it did not provide any detail. Nor did it provide any guidance as to the issue of whether it was possible for an accused to be charged and convicted of crimes against humanity under applicable law.

The all international trial panel of the District Court of Gjilan/Gnjilane constituted for the retrial did make reference in its decision dated 28 November 2003 to the highly detailed 74-page opinion submitted by Michael E. Hartman, the International Prosecutor for the Office of the Public Prosecutor of Kosovo, to the Supreme Court, which sets out his views concerning the relevant international and applicable law on war crimes. In a surprising and unfortunate section, the International Prosecutor contended that the court could not "*directly apply the customary international criminal law of crime", including crimes against humanity.*[225] It was unnecessary to advance this very restrictive interpretation in the light of the international prosecutor's arguments that the accused could not be held responsible for crimes against humanity in this case because there was "*[n]o convincing evidence*" to convict him on the basis of command responsibility and because the District Court's conclusion that the widespread or systematic threshold had been met on the ground that the *verdict failed "to properly articulate the facts upon which it relies"* and failed to "*analyze the individual witness testimony" so that it was "unsupported".* Moreover, the international prosecutor himself conceded that "*national courts have held both ways"* and that "*[l]egal commentators remain split on the issue".*[226] Of course, if the international prosecutor is correct, then UNMIK should have ensured that the necessary reforms were made in the law applicable in Kosovo.

The decision of the new District Court international panel after the retrial is one of the rare decisions which is detailed and generally well reasoned, citing relevant international law, commentaries on the applicable law and the jurisprudence of the ICTY and other courts of the former Yugoslavia. Since UNMIK failed to respond to numerous requests by Amnesty

[224] *Trajković*, Verdict, P Nr. 68/2000, District Court of Gjilan (local panel), 6 March 2001; *rev'd*, Verdict, AP. 145/2001, Supreme Court of Kosovo (international panel), 30 November 2001; *on retrial*, Verdict, P. No. 17/02, District Court of Gjilan (international panel), 28 November 2003.
[225] Office of the Public Prosecutor of Kosovo, PP.Nr.68/2001, PPP Nr. _/2001 and K. 31/99, Opinion on Appeals of Convictions of Momčilo Trajković, Supreme Court of Kosovo (international panel), filed 30 November 2001, 72
[226] *Ibid.*, at 72-73.

International, detailed in section three of this report, to make public a copy of the indictment that was before the panel at re-trial, it is not clear whether crimes against humanity were included in the indictment and simply ignored by the trial chamber, or never constituted part of the indictment and were simply introduced by the previous trial chamber (which seems likely to be the case, from a plain reading of the original trial panel's decision). The decision of the international panel of the District Court was upheld on appeal in another clear and well-reasoned judgment which, as far as it is possible to tell, seems to cover all the issues raised by the parties.

SECTION FIVE – AMNESTY INTERNATIONAL RECOMMENDATIONS

The following recommendations are made to any future EU mission or any other international body mandated to assist the government of Kosovo in ensuring the development of a fully functional prosecutorial and judicial system in Kosovo (irrespective of the form of any agreement on the final status of Kosovo)

Independence and Accountability

The Kosovo Judicial Council, if the recommendations below are implemented, and the soon-to-be-established Kosovo Prosecutorial Council, should be provided with the mandate to regulate both international and local members of the judiciary in a manner that will not adversely affect their independence and impartiality.

It should be ensured that every allegation of misconduct on the part of an international judge or prosecutor is promptly, thoroughly, independently and impartially investigated and, where necessary, the individual in question be disciplined in fair proceedings. This discipline could take the form of dismissal from office in Kosovo and a report to the individual's home bar association or judicial council. The procedure for waiving judicial or prosecutorial immunity should protect the independence of international judges and prosecutors.

Responsibility for awarding judicial contracts should be assigned to the Kosovo Judicial Council, provided the recommendations concerning the Council made below are implemented, or, pending implementation of those recommendations, to an independent and impartial body.

Membership of the Kosovo Judicial Council should be limited to members of the local and international judiciary, representatives of the Kosovo Chamber of Advocates who do not appear before the judges and legal scholars. No member of the executive should be directly involved in decision-making relating to judicial appointment, regulation or discipline. While there continue to be international judges and lawyers, the Kosovo Judicial Council

should be presided over by both the Chief International Judge and the President of the Supreme Court.

The Ombudsperson's Office should be invested with the power to investigate complaints about the Kosovo Judicial Council, the Judicial Disciplinary Committee and the Judicial Inspection Unit, regarding judicial appointments process and the handling of matters involving judicial discipline or conduct.

The Kosovo Judicial Council or another body which is independent and impartial should appoint international judges and prosecutors for a non-renewable term of not less than one year, except that it shall be extended automatically until the completion of deliberations in any proceedings pending before the judge or being prosecuted by the prosecutor and each holder of the post should agree when appointed to serve a full term, including any such extension.

The authority to allocate cases should be located with the Chief International Judge and Chief Judge of the Supreme Court and cases should be assigned on a random basis or on a workload basis only.

No international or government body should interfere or place inappropriate pressure on international or local judges and prosecutors in relation to individual cases and it should take effective steps to protect all judges and prosecutors from such pressure.

Recruitment

States, when nominating candidates, should make efforts to identify individuals with experience and expertise in dealing with crimes of sexual violence to ensure the investigation and prosecution of crimes of sexual violence committed both during the1998-9 conflict, and since that date.

States, when nominating candidates, should make efforts to identify individuals with experience and expertise in civil law, criminal law and international humanitarian and human rights law, and should do so in a transparent process in close consultation with civil society at each stage of the process.[227]

[227] States should emulate the initiative of the Canadian Conseil de la Magistrature, which is in the process of compiling a list of suitable legal professionals who could be deployed in future missions and creating a training course for these individuals prior to their deployment. Such initiatives should be set up and coordinated by the UN Department of Peacekeeping Operations or other intergovernmental organizations with appropriate peacekeeping experience, working with national judicial councils and bar and law associations, to ensure consistency.
States should follow the recommendation of the UN Secretary-General in his Report on the rule of law and transitional justice in conflict and post-conflict societies, U.N. Doc. S/2004/616 (2004), immediately remove obstacles to service by their judges and prosecutors in international courts and, longer term, put in place career structures that facilitate the release of serving members of national

Appointed judges and prosecutors should be of the highest calibre, with extensive experience in criminal prosecutions (particularly in civil law jurisdictions), dealing with crimes of sexual violence and international human rights and humanitarian law.

Steps must be taken to implement the recommendation of the Parliamentary Assembly of the Council of Europe in Resolution 1417(2004), para. 4(iii)(f) and ensure that all international judges, as well as prosecutors, have a proper command of at least one of the official languages, along with sufficient experience of a relevant legal system and of the applicable international human rights instruments.

Responsibility for the recruitment of international judges should be transferred to the Kosovo Judicial Council, if it is reformed in accordance with the above recommendations, or by another body with effective guarantees of independence and impartiality pending implementation of those recommendations. The recruitment process should be objective, fair and transparent, using clear and appropriate judicial criteria. It should follow a selection process similar to that used to select judges of the European Court of Human Rights, in close consultation with civil society. The search should be a global search.

In consultation with other intergovernmental organizations and bodies, the relevant authorities should develop an international roster of individuals from countries throughout the world who have appropriate experience and skills to serve as judges, prosecutors, defence lawyers, representatives of victims and other criminal justice experts and who can be deployed on short notice.

Continuing legal education and familiarization with local society

The relevant authorities should develop and promulgate the strictest professional standards to govern basic mandatory initial and continuing legal education and familiarization with local society for all members of the international judiciary and international prosecutors, covering applicable law and the legal system in Kosovo and relevant bodies of international law, whether that legal education and familiarization is conducted by the EU, each state sending the judge or prosecutor or by others.

The legal education and familiarization should include an introduction to the criminal law and procedure, civil law and procedure, local constitutional law and other relevant law, basic language lessons in local languages and local culture and history.

Such continuing legal education and familiarization, regardless who carries it out, should satisfy international standards for training programmes, such as Amnesty

judiciaries for service in international courts and give full credit for periods of service with such institutions.

International's A 12-Point Guide for Good Practice in the Training and Education for Human Rights of Government Officials, AI Index: ACT 30/1/98, 1 February 1998.

The development and implementation of such standards and the continuing legal education and familiarization should be carried out in close consultation with local judges, prosecutors, defence lawyers, bar associations and non-governmental organizations.

The Kosovo Judicial Institute should be invited to conduct the legal education and familiarization of international judges and prosecutors personnel jointly with local judges and prosecutors.

International judicial judges and prosecutors should be required to attend training sessions conducted by the Kosovo Judicial Institute on relevant topics to ensure they are familiar with the local applicable law and developments in international criminal, humanitarian and human rights law, (see above).

The Kosovo Judicial Institute should ensure there are specific training programmes made available to international judicial personnel on topics relevant to the cases they deal with.

Effectiveness

The international and domestic authorities should ensure that applicable law is amended to incorporate all crimes under international law, principles of criminal responsibility and defences in accordance with the strictest requirements of international law.

It must be ensured that all crimes under international law that have been committed in Kosovo are promptly, thoroughly, independently and impartially investigated and, where there is sufficient admissible evidence, prosecuted.

The relevant police and judicial authorities, in close consultation with all sectors of civil society, should develop a long-term action plan to end impunity in Kosovo for all crimes under international law, including in particular rape and other crimes of sexual violence.

This long-term action plan to end impunity should include measure to ensure the prompt transfer of all functions to local judges, prosecutors, lawyers and other staff in accordance with clear schedule, subject to strict conditions to ensure that staffing is not ethnically unbalanced and that all proceedings are independent, impartial and fair in accordance with the strictest requirements of international law and standards..

Transparency

The UNMIK Department of Justice should without delay establish a publicly accessible database of the indictments, judgments and other public decisions of the Regulation 2000/64

panels in all the official languages and ensure that documents are placed on the database as soon as they are available in any one of the official languages.

The international and domestic authorities should ensure that local law and regulations effectively guarantee the right to a public trial, consistent with the rights of the accused and the rights of victims and witnesses.

International judges and prosecutors should ensure that all decisions are accompanied by reasons for the decision. These reasons should be sufficiently detailed and include reference to the facts and relevant legal principles on which the decision is made.

Rights of suspects and accused

All proceedings involving international judges and prosecutors must be properly, fully and simultaneously translated into all the official languages of Kosovo and that all parties, including defence counsel, the accused and the victims and their families receive copies of all court documents, translated into the relevant language, in a timely manner.

Within the structure of the newly proposed Special Internationalized Chamber of the Supreme Court, or any other similar body, should include an international defence office which can provide assistance to defence counsel in the preparation of their cases.

Rights of victims, witnesses and their families

The rights of victims and their families to protection, support, information about criminal and civil proceedings at all stages and participation in criminal and civil proceedings, as well as to full reparations, are effectively guaranteed.

Procedures for obtaining reparations should be prompt, independent, impartial and effective.

ANNEXES

ANNEXE ONE – UNMIK Regulation 2000/6, On the Appointment and Removal from Office of International Judges and International Prosecutors , 15 February 2000

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council Resolution 1244 (1999) of 10 June 1999,

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999. as amended, on the Authority of the Interim Administration in Kosovo,

For the purpose of assisting in the judicial process in Mitrovica,

Hereby promulgates the following:

Section 1 – **Appointment and Removal from Office of International Judges and International Prosecutors**

1.1. The Special Representative of the Secretary-General may appoint and remove from office international judges and international prosecutors, taking into account the criteria set forth under sections 2 and 4 of the present regulation. Such appointments shall be made to the District Court of Mitrovica, other courts within the territorial jurisdiction of the District Court of Mitrovica and offices of the prosecutor with corresponding jurisdiction.

1.2. International judges shall have the authority and responsibility to perform the functions of their office, including the authority to select and take responsibility for new and pending criminal cases within the jurisdiction of the court to which he or she is appointed.

1.3. International prosecutors shall have the authority and responsibility to perform the functions of their office, including the authority and responsibility to conduct criminal investigations and to select and take responsibility for new and pending criminal investigations or proceedings within the jurisdiction of the office of the prosecutor to which he or she is appointed.

Section 2 – **Criteria for International Judges and International Prosecutors**

International judges and international prosecutors shall:

(a) have a university degree in law;

(b) have been appointed and have served, for a minimum of 5 years, as a judge or prosecutor in their respective home country;
(c) be of high moral integrity; and
(d) not have a criminal record.

Section 3 – **Oath or Solemn Declaration**

Upon appointment, each international judge and international prosecutor shall subscribe to the following oath or solemn declaration before the Special Representative of the Secretary-General:

"I,_____, do hereby solemnly swear (or solemnly declare) that:

In carrying out the functions of my office, I shall act in accordance with the highest standards of professionalism and with utmost respect for the dignity of my office and the duties with which I have been entrusted. I shall perform my duties and exercise my powers impartially, in accordance with my conscience and with the applicable law in Kosovo.

In carrying out the functions of my office, I shall uphold at all times the highest level of internationally recognized human rights, including those embodied in the principles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols.

In carrying out the functions of my office, I shall ensure at all times that the enjoyment of these human rights shall be secured to all persons in Kosovo without discrimination on any ground such as ethnicity, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Section 4 – **Removal from Office of International Judges and International Prosecutors**

4.1. The Special Representative of the Secretary-General may remove from office an international judge or an international prosecutor on any of the following grounds:
(a) physical or mental incapacity which is likely to be permanent or prolonged;
(b) serious misconduct;
(c) failure in the due execution of office; or
(d) having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office.

4.2. An international judge or international prosecutor shall not hold any other public or administrative office incompatible with his or her functions, or engage in any occupation of a professional nature, whether remunerative or not, or otherwise engage in any activity that is incompatible with his or her functions.

Section 5 – **Applicable Law**

The present regulation shall supersede any provision in the applicable law relating to the appointment and removal from office of judges and prosecutors which is inconsistent with it.

Section 6 – **Entry into Force**

The present regulation shall enter into force on 15 February 2000.

Bernard Kouchner
Special Representative of the Secretary-General

ANNEXE TWO – UNMIK Regulation 2000/64, On Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December 2000:

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council Resolution 1244 (1999) of 10 June 1999,

Recognizing the responsibility of the international civil presence to maintain civil law and order and protect and promote human rights,

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999. as amended, on the Authority of the Interim Administration in Kosovo and UNMIK Regulation No. 2000/6 of 15 February 2000, as amended, on the Appointment and Removal from Office of International Judges and International Prosecutors,

Recognizing that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo,

For the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice,

Hereby promulgates the following:

Section 1 – **Recommendation for Assignment of International Judges/Prosecutors and/or Change of Venue**

1.1. At any stage in the criminal proceedings, the competent prosecutor, the accused or the defence counsel may submit to the Department of Judicial Affairs a petition for an assignment of international judges/prosecutors and/or a change of venue where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.

1.2. At any stage in the criminal proceedings, the Department of Judicial Affairs, on the basis of the petition referred to in section 1.1 above or on its own motion, may submit a recommendation to the Special Representative of the Secretary-General for the assignment of international judges/prosecutors and/or change of venue if it determines that this is necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.

1.3. The Special Representative of the Secretary-General shall review a recommendation submitted by the Department of Judicial Affairs and signify his approval or rejection thereof. Such a review shall not stay the ongoing criminal proceedings.

Section 2 – **Designation of International Judges/Prosecutors and/or new Venue**
2.1. Upon approval of the Special Representative of the Secretary-General in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate:

(a) An international prosecutor;
(b) An international investigating judge; and/or
(c) A panel composed only of three (3) judges, including at least two international judges, of which one shall be the presiding judge,

As required by the particular stage at which the criminal proceedings has reached in a case.

2.2 Upon designation by the Department of Judicial Affairs, in accordance with the present regulation, international judges and international prosecutors shall have the authority to perform the functions of their office throughout Kosovo.
2.3 Upon approval of the Special Representative of the Secretary-General, in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate a new venue for the conduct of criminal proceedings.
2.4 A new venue or panel shall not be designated:

(a) For a trial, once a trial session has already commenced. This will not bar the designation of a new venue or panel, in accordance with the present regulation, during a subsequent review of an appeal or an extraordinary legal remedy, and
(b) For appellate review once an appellate panel session has already commenced. This will not bar the designation of a new venue or panel, in accordance with the present regulation, during a subsequent review of an extraordinary legal remedy.

2.5 A decision of the Department of Judicial Affairs regarding the designation of a new venue, an international judge, an international prosecutor and/or an international panel shall be communicated immediately to the president of the competent court, the prosecutor, the accused and the defence counsel.

Section 3 – **Applicable Law**
3.1 The present regulation shall supersede any other provision in the applicable law which is inconsistent with it.
3.2 Nothing in the present regulation shall affect the authority and responsibility of an international judge or an international prosecutor to perform the functions of his or her office, including to select and take responsibility for new and pending criminal cases, in accordance with UNMIK Regulation No 2000/6, as amended.

Section 4 – **Entry into Force**

The present regulation shall enter into force on 15 December 2000 and shall remain in force for an initial period of twelve (12) months. Upon review, this period may be extended by the Special Representative of the Secretary-General.

Bernard Kouchner

Special Representative of the Secretary-General

ANNEXE THREE – Table of War Crimes/Crimes against Humanity/Genocide Cases[228]

This table sets out details of the 23 cases involving crimes under international law that Amnesty International knows to have been conducted in Kosovo:

CASE NAME	BACKGROUND	INDICTMENT	TRIAL COURT VERDICT	SUPREME COURT VERDICT
Lulzim ADEMI	Defendant - Kosovo Albanian.	Charged with war crimes, murder and illegal weapons possession.	Convicted by local panel of war crimes and illegal weapons possession. Acquitted of murder. No re-trial held as yet as defendant has not been arrested.	Decision over-turned on basis of UNMIK Regulation 2001/1[229]. Re-trial ordered.
Agim AJETI & Božidar STOJANOVIĆ	Defendant Ajeti – Kosovo Roma Defendant Stojanović – Kosovo Serb.	Charged with murder.	1st trial - Convicted of murder by majority local panel.	Conviction against Ajeti overturned on basis of UNMIK Regulation 2001/1 (see above).

[228] The shaded columns represent indictments or judgments of which Amnesty International has obtained copies. All other information contained within this chart has been obtained through the Legal Systems Monitoring Section reports or their correspondence with Amnesty International.
[229] This regulation prohibits trials *in absentia* for serious violations of international humanitarian law.

			Re-trial of Stojanović began 30 May 2002. Outcome not known.	Conviction against Stojanović overturned and case sent back for re-trial.

CASE NAME	BACKGROUND	INDICTMENT	TRIAL COURT VERDICT	SUPREME COURT VERDICT
Radovan APOSTOLOVIĆ, Božur BIŠEVAC, Micka KRAGOVIĆ, Bogoljub JEVTIĆ & Ljubiša SIMIĆ	Defendants – all Kosovo Serb.	Charged with war crimes. Indictment subsequently amended to charge Apostolović with "causing general danger by burning", "damaging another person's object" and aggravated theft.	All defendants aside from Apostolović escaped from detention and not tried. Apostolović aquitted by Regulation 64 panel.	
Veselin BEŠOVIĆ	Defendant – Kosovo Serb.	25 October 2001 Charged with robbery & illegal weapons possession. 12 November 2001 New indictment issued - charged with war crimes.	1st trial – December 2000 Convicted by local panel. 1st re-trial – 5 December 2001 Acquitted of weapons and robbery charges by Regulation 64 panel.	1st appeal 20 April 2001 Conviction overturned by Regulation 64 panel. Case sent back for re-trial. 2nd appeal 27 May 2004 Conviction overturned. Case sent back for re-trial.
			2nd re-trial – 26 June 2003 Convicted of war crimes by Regulation 64 panel.	

			Status of re-trial not known.	

CASE NAME	BACKGROUND	INDICTMENT	TRIAL COURT VERDICT	SUPREME COURT VERDICT
Zarija CVETANOVIĆ & Others	Defendants – Kosovo Serb.	Charged with war crimes.	At investigation stage – LSMS, May 2006.	
Latif GASHI, Rrustem MUSTAFA, Nazif MEHMETI, Naim KADRIU	Defendants – all Kosovo Albanian.	Charged with war crimes.	1st trial – convicted of war crimes by Regulation 64 panel. Case currently awaiting re-trial – LSMS, May 2006.	Conviction overturned. Case sent back for re-trial.
Saša GRKOVIĆ	Defendant – Kosovo Serb.	Charged with war crimes.	Acquitted of all charges by Regulation 64 panel.	
Miloš JOKIĆ	Defendant – Kosovo Serb.	Charged with genocide. For re-trial indictment amended to charge war crimes.	1st trial – convicted of war crimes by before majority local panel. 2nd trial – acquitted of all counts.	Conviction overturned. Case sent back for re-trial.
Juvenile Z	Defendant – a minor. Kosovo Serb.	Charged with genocide.	Convicted by all local panel.	Conviction upheld by all local panel.

CASE NAME	BACKGROUND	INDICTMENT	TRIAL COURT VERDICT	SUPREME COURT VERDICT
Andjelko KOLAŠINAC & Cedomir JOVANOVIĆ	Both defendants – Kosovo Serb.	Charged with war crimes.	1st trial – 14 June 2001 Regulation 64 panel. Jovanović convicted of war crimes. Kolašinac convicted of "giving help to the offender after the commission of the criminal act".	1st appeal – 2 November 2001. Conviction against Jovanović upheld. Conviction against Kolašinac overturned and case sent back for re-trial.
			2nd trial – 31 January 2003 Regulation 64 panel. Kolašinac convicted of war crimes.	2nd appeal - Oral decision handed down on 22 October 2003 overturning the conviction and ordering case be sent back for re-trial. Written decision issued 5 August 2004.
			Current status of re-trial unknown.	
Agron KRASNIQI	Defendant - Kosovo Albanian	Charged with war crimes, unlawful detention, unlawful detention resulting in death, kidnapping, kidnapping resulting in death, joint criminal enterprise.	Extradited from Switzerland in December 2005 to stand trial.	

CASE NAME	BACKGROUND	INDICTMENT	TRIAL COURT VERDICT	SUPREME COURT VERDICT
Selim KRASNIQI, Bedri ZYMBERI, Milaim LATIFI, Xhavit ELSHANI, Xhemajl, Isuf Sherifi and Islam GASHI, Ruzhdi Qazim KRASNIQI	All defendants - Kosovo Albanian	Charged with war crimes, unlawful detention, kidnapping. Indictment confirmed 30 March 2006.	Case at trial in May 2006. No decision as yet.	
Živorad, Slobodan and Milovan MAKSIMOVIĆ, Ljubiša PERIĆ	All defendants – Kosovo Serb.		Trial yet to begin.	
Sava MATIĆ	Defendant – Kosovo Serb.	Charged with war crimes.	1st trial – convicted by Regulation 64 panel of "light bodily injury". 2nd trial – defendant acquitted.	Conviction overturned by Regulation 64 panel and case sent back for re-trial on the original war crimes charge.
Bogoljub MIŠIĆ, Stojan JOVANOVIĆ	Both defendants – Kosovo Serb.	Charged with "participating in a gathering that commits violence", unlawful detention, grave bodily injury.	Acquitted by Regulation 64 panel.	
Aleksandar MLADENOVIĆ	Defendant – Kosovo Serb.	Charged with "causing general danger", damage to property and aggravated theft.	Acquitted by Regulation 64 panel.	

		Indictment amended during trial by new international prosecutor to charge war crimes.		

CASE NAME	BACKGROUND	INDICTMENT	TRIAL COURT VERDICT	SUPREME COURT VERDICT
Dragan NIKOLIĆ	Defendant - Kosovo Serb.	Charged with murder.	1st trial - Convicted of murder by all local panel.	Conviction overturned by Regulation 64 panel. Case sent back for re-trial.
			1st re-trial – 18 April 2002 Acquitted by Regulation 64 panel.	2nd appeal – 5 May 2003 Prosecutor's appeal allowed. Case sent back for re-trial.
			2nd re-trial – 17 December 2003 Acquitted by Regulation 64 panel.	
Ejup RUNJEVA, Nuhi PROVOLIU, Rrustem DEMA, Bujar TAFILI, Enver AXHAMI	All defendants – Kosovo Albanian.	Charged with war crimes.	Runjeva, Axhami and Dema convicted by Regulation 64 panel on 12 May 2005. Tafili and Provoliu acquitted.	Defence counsel appealed convictions in September 2005. Appeal not heard as yet (LSMS, May 2006).

Zoran STANOJEVIĆ	Defendant – Kosovo Serb.	Charged with murder and attempted murder.	Convicted by Regulation 64 panel.	Conviction upheld by Regulation 64 panel.
Igor SIMIĆ, Dragan JOVANOVIĆ, Srdjan and Vlastimir ALEKSIĆ, Tomislav VUČKOVIĆ, Branislav POPOVIĆ	All defendants – Kosovo Serb.	Charged with genocide. Five of the defendants escaped detention. Only Igor Simić stood trial.	Prosecution abandoned by international prosecutor during trial.[230]	

[230] In April 2001, following the withdrawal of charges by the international prosecutor, the District Court of Mitrovica/ë dismissed the case. It was subsequently pursued as a private prosecution. . On 17 April 2007, a trial panel composed of an international presiding judge, a local professional judge and three local lay judges was convened in the District Court of Mitrovicë/a. The trial was adjourned due to the absence of the defendant and defence counsel. On 20 April 2007, the presiding judge issued a Request for International Legal Assistance to deliver the court summons to the accused through the appropriate Serbian authorities, *KFOR Weekly CIMIC Report # 1211*, 25 April 2007.

CASE NAME	BACKGROUND	INDICTMENT	TRIAL COURT VERDICT	SUPREME COURT VERDICT
Zvezdan SIMIĆ	Defendant - Kosovo Serb.	Charged with murder and illegal weapons possession.	Convicted of both charges by majority local panel.	Conviction affirmed by Regulation 64 panel.
Momčilo TRAJKOVIĆ	Defendant – Kosovo Serb.	Charged with attempted murder, illegal weapons possession. Indictment amended to include war crimes chares.	1st trial – 6 March 2001 Defendant convicted of crimes against humanity by majority local panel.	1st appeal – 30 November 2001 Conviction overturned by Regulation 64 panel and case sent back for re-trial.
			Re-trial – 28 November 2003 Regulation 64 panel. Defendant convicted of attempted murder and illegal weapons possession.	2nd appeal – 7 February 2006 Conviction upheld.
Miroslav VUKOVIĆ, Božur BIŠEVAC	Both defendants - Kosovo Serbs.	Initially indicted for genocide. For re-trial indicted for war crimes.	1st trial – 18 January 2001. Convicted by majority local panel of genocide.	1st appeal – 31 August 2001 - Regulation 64 panel overturned the conviction and sent the case back for re-trial.

			Re-trial – 25 October 2002. Convicted by Regulation 64 panel of war crimes. Status of 2nd re-trial not known.	2nd Appeal - 14 July 2004 - appeal allowed. Case sent back for re-trial.

Amnesty International has information suggesting the following case also involved war crimes:

CASE NAME	**BACKGROUND**	**INDICTMENT**	**TRIAL COURT VERDICT**	**SUPREME COURT VERDICT**
Nenad PAVIČEVIĆ and Lazar GLIGIROVSKI	Both defendants – Kosovo Serb.	Murder. Gligirovski was also indicted for illegal weapons possession	Pavičević convicted *in absentia* of murder on 16 November 2000 by a majority local panel. Gligirovski acquitted of murder. Convicted of illegal weapons possession.	Pavičević's appeal granted on basis that he was tried for murder as a war crime and therefore entitled to the protection provided by UNMIK Regulation 1/2001 (see above).

			No information available.	

ANNEXE FOUR - Organizations and government departments concerned with justice in Kosovo

INTERNATIONAL GOVERNING INSTITUTIONS

United Nations Interim Administration Mission in Kosovo (UNMIK) - This peacekeeping operation was established in 1999 pursuant to Security Council Resolution 1244 and given the mandate of establishing a civil administration in Kosovo.

Special Representative of the UN Secretary-General (SRSG) - This official is also the head of UNMIK. The current Special Representative, since 1 September 2006, is Joachim Rücker. His predecessors were Bernard Kouchner (15 July 1999 through 12 January 2001); Hans Haekkerup (2001); Michael Steiner (2002);Harri Hermani Holkeri (2003-2004);Søren Jessen-Petersen (16 June 2004 until 30 August 2006).

UNMIK Department of Judicial Affairs - This body was established in July 1999 to establish and administer the penal and judicial systems in Kosovo. Originally part of UNMIK Pillar II (Civil Administration), it was moved to the newly created Police and Justice Pillar in May 2000 and subsumed the UNMIK Administrative Department of Justice. It was replaced in 2002 by the UNMIK Department of Justice.

UNMIK Administrative Department of Justice - This body was established on 21 March 2000 by UNMIK Regulation 2000/15 to manage the judicial system and correctional services. It is not clear how this office's functions differed from the UNMIK Department of Judicial Affairs but in any event it ceased to exist in May 2000.

UNMIK Department of Justice - This body was formerly called the Department of Judicial Affairs from 1999 to 2002. It serves as the Department of Justice for Kosovo and is made up of five divisions; the judicial development division, the international judicial support division, the criminal division, the penal management division and the office of missing persons and forensics.

Judicial Development Division - This division's mandate is limited to the local judiciary. It contains four specialised units; the Judicial Integration Section, the Professional Development Section, the Judicial Inspection Unit and the Victims Advocacy and Assistance Unit. It also previously provided administrative support to the Kosovo Judicial and Prosecutorial Council.

International Judicial Support Division – this office within the UNMIK Department of Justice was established in mid 2000 to administer the international judges and prosecutors programme. Following the creation of the Criminal Division, the International Judicial Support Division is now only responsible for the international judges.

Criminal Division – this office within the UNMIK Department of Justice was established in March 2003 and is responsible for the international prosecutors.

Victims Advocacy and Assistance Unit – this is a specialised unit within the UNMIK Department of Justice. Its role is to provide information, assistance and support to victims of crime.

Joint Advisory Council on Judicial Appointments - UNMIK established this body, composed of local and international legal experts, on 28 June 1999 to assist with the appointment of judges and prosecutors. It was later replaced by the Advisory Judicial Commission on 6 October 2000.

Advisory Judicial Commission - This body replaced the Joint Advisory Council on Judicial Appointments. It was established on 6 October 2000 by UNMIK Regulation 2000/57 and charged with advising the UN Special Representative on issues relating to the appointment of judges and prosecutors and complaints against judges and prosecutors.

Technical Advisory Commission on Judiciary and Prosecution Service - This body was established on 7 September 1999 by UNMIK Regulation 1999/6 to advise the UN Special Representative on the structure and administration of the judiciary and prosecution service in Kosovo. It was given thirty days within which to prepare a report assessing the present and long term requirements of Kosovo for judicial bodies and prosecution service and the re-establishment of the Supreme Court.

Organization for Security and Co-operation in Europe (OSCE) – this organisation was given responsibility for Pillar III of the UNMIK civil administration. Its mandate in Kosovo is institution and democracy building and promoting human rights and the rule of law.

Legal Systems Monitoring Section - This body was established in 2000 as part of the OSCE Human Rights and Rule of Law Department, UNMIK Pillar III. Its mandate is to monitor the justice system in Kosovo towards promoting its compliance with domestic and international human rights standards and to provide recommendations for possible improvements. It has produced regular reports on various aspects of the justice system, its most recent being the seventh review of Kosovo's criminal justice system issued in March 2006 and the first review of the Kosovo's civil justice system in June 2006.

JUDICIAL BODIES/LEGAL INSTITUTIONS

Ad Hoc Court of Final Appeal - A short-lived body established in September 1999 to serve as the Supreme Court within the Emergency Judicial System. It was composed solely of ethnic Albanians.

Emergency Judicial System - This was the system created by UNMIK upon arrival in June 1999 to address the complete lack of a functioning court system in Kosovo. 55 judges and prosecutors were recruited on 3 month contracts.

Kosovo Chamber of Advocates - This is the local bar association of Kosovo.

Kosovo Interim Judiciary - This was the name given to the local judges and prosecutors appointed by the Joint Advisory Council in July and August 1999 as part of the Emergency Judicial System.

Kosovo Judicial and Prosecutorial Council - This body was established in April 2001 to appoint, regulate and, where necessary, discipline members of the local judiciary. It has been succeeded by two new bodies: the Kosovo Judicial Council and the soon to be established Kosovo Prosecutorial Council.

Kosovo Judicial Council - This is one of two new bodies succeeding the Kosovo Judicial and Prosecutorial Council. Its members were sworn in, in April 2006.

Kosovo Prosecutorial Council - One of two new bodies succeeding the Kosovo Judicial and Prosecutorial Council.

Kosovo War and Ethnic Crimes Court (KWECC) - A proposed internationalized court within the Kosovo court system with international and local judges, prosecutors and staff. Preparations for the creation of this court were abandoned sometime in late 2000.

International Judges and Prosecutors Programme (IJPP) - This programme was established pursuant to UNMIK Regulation 2000/6 in February 2000 by the UNMIK Department of Judicial Affairs.

Ombudsperson Institution – This body was set up in 2000. The first ombudsperson was an international; Marek Antoni Nowicki, a Polish human rights lawyer. Since the beginning of 2006 there have been two local acting ombudspersons, a Kosovo Albanian ombudsperson (Hilmi Jashari) and a Kosovo Serb deputy ombudsperson (Ljubinko Todorović).

Special Chamber of the Supreme Court - A proposed new chamber with mixed international/national panels to hear the cases dealt with by the proposed Special Prosecutor's Office.

Special Prosecutor's Office - This is a proposed new office within the Department of Justice with 10 local and 10 international prosecutors who will jointly prosecute organised crime, trafficking in human beings, inter-ethnic crimes, terrorism and corruption.

NON-GOVERNMENTAL ORGANIZATIONS CONCERNED WITH THE JUSTICE SYSTEM IN KOSOVO

Criminal Defence Resource Centre (CDRC) - A non-governmental organization set up by the OSCE in 2000 to provide assistance to defence lawyers.

Humanitarian Law Centre (HLC) - This regional organization, based in Belgrade with an office in Kosovo, has documented human rights violations and abuses in Kosovo since it was established in 1992

Kosovo Judicial Institute (KJI) - This centre was established by the OSCE in February 2000 to provide training for local judges and prosecutors. It runs a continuous legal education programme and administers the Judicial Entry Examination which local lawyers must pass to be admitted to practice as a judge or prosecutor in Kosovo.

Kosovo Law Centre (KLC) - This centre was established in June 2000 by the OSCE Department of Human Rights and Rule of Law to assist local lawyers to develop their knowledge and to provide legal information to the broader community in Kosovo. It produces a law journal, the Kosovo Legal Studies Journal, compilations of the laws of Kosovo and is currently compiling a bulletin of Supreme Court decisions.

LOCAL GOVERNING INSTITUTIONS

Provisional Institutions of Self-Government (PISG) – This is the local government established in May 2001 by UNMIK. It is made up of locally elected representative and will remain as the provisional government of Kosovo until the final status of Kosovo is determined.

Ministry of Justice - This department is part of the Provisional Institutions of Self-Government. It currently has very limited involvement in the administration of the judicial system in Kosovo and has no mandate over the International Judges and Prosecutors Programme.