



**Organization for Security and Co-operation in Europe
Mission in Kosovo**

Department of Human Rights and Rule of Law

Legal System Monitoring Section

Review of the Criminal Justice System in Kosovo

The protection of witnesses in the criminal justice system

The administration of justice in minor offences courts

Juveniles in criminal proceedings

(2006)

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GLOSSARY

DOJ	Department of Justice
CRC	Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
JJC	Juvenile Justice Code of Kosovo
KJC	Kosovo Judicial Council
KJI	Kosovo Judicial Institute
KPS	Kosovo Police Service
MOC	Minor Offences Court
LMO	Law on Minor Offences
LPPO	Law on Public Peace and Order
LSMS	Legal System Monitoring Section
OMiK	OSCE Mission in Kosovo
OSCE	Organization for Security and Co-operation in Europe
PCCK	Provisional Criminal Code of Kosovo
PCPCK	Provisional Criminal Procedure Code of Kosovo
SRSg	Special Representative of the Secretary-General
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
WPU	Witness Protection Unit

EXECUTIVE SUMMARY

Pursuant to its mandate the Legal System Monitoring Section (LSMS), part of the Department of Human Rights and Rule of Law of the Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE), monitors the justice system, assessing its compliance with domestic and international human rights standards and recommending sustainable solutions to ensure that these standards are respected.

In the exercise of its mandate, LSMS follows a three-step process: monitoring trials at the minor offences, municipal and district court level; reporting on areas of concern making specific recommendations to address the concerns; and following up on the implementation of the recommendations put forward in the reports, through meetings with relevant local and international counterparts.

This review is the eighth public Review on the criminal justice system in Kosovo prepared by the Legal System Monitoring Section. In this review, LSMS focuses on human rights issues arising in three areas of the criminal justice system: 1) witness protection, 2) Minor Offences Courts (MOCs), and 3) juvenile justice.

The first chapter of the review analyses the current witness protection system in Kosovo and highlights incidents of witness intimidation monitored by the OSCE. The OSCE has identified gaps in the witness protection legislation, especially related to the witness relocation programme for the most serious criminal cases. In addition, the authorities do not implement existing provisions of the Provisional Criminal Procedure Code related to protecting witnesses. Based on observed cases of witness intimidation, the OSCE is concerned that the failure of authorities to effectively protect witnesses prevents the effective prosecution of alleged criminals, impedes the establishment of the rule of law in Kosovo, and erodes public confidence in the justice system. The OSCE recommends that authorities give priority to further developing and implementing a witness protection system in Kosovo. In addition, the OSCE urges authorities to raise public awareness of the moral and legal duty of residents to co-operate as witnesses in criminal cases.

The second chapter of the review focuses on compliance of the MOCs with domestic law and international human rights standards. In the past, LSMS has primarily monitored the District and Municipal Courts while monitoring cases before the MOCs only on an *ad hoc* basis. In this chapter, the OSCE highlights procedural problems in the MOCs such as poor and incomplete reasoning in decisions, incorrect references to specific charges under the Law on Minor Offences, and issuing “collective” punishments that omit a determination of each individual’s level of responsibility. Finally, the OSCE analyses the problem that while many offences under the jurisdiction of the MOCs would be viewed as criminal by the European Court of Human Rights (ECtHR), procedural safeguards are missing and courts have violated the *ne bis in idem* principle (or prohibition against double jeopardy).

Finally, in the third chapter of the review, the OSCE focuses on violations of domestic law (the recently adopted Juvenile Justice Code) and international human rights standards related to juveniles in the criminal justice system. LSMS observed cases with procedural violations such as improper panels of judges, delays in criminal

proceedings involving juveniles, excessive and unlawful periods of detention of juvenile defendants, and illegal minor offences proceedings against juveniles younger than fourteen years old.

After identifying the problematic issues, the OSCE makes a number of recommendations in each chapter aimed at remedying the shortcomings. The relevant authorities are encouraged to implement these recommendations and take all necessary steps to correct the highlighted deficiencies.

BACKGROUND

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

Mandate of LSMS

United Nations Security Council Resolution 1244 authorised the UN Secretary-General to establish an international civil presence in Kosovo that would provide an interim administration. One of the main responsibilities of the international presence is “*protecting and promoting human rights.*”¹

Pursuant to the report of the UN Secretary-General to the UN Security Council of 12 July 1999, the role of institution-building within UNMIK was assigned to the OSCE, with one of the tasks of the Institution-building Pillar to be human rights monitoring. The report expressly instructed UNMIK to develop co-ordinated mechanisms to facilitate human rights monitoring and the due functioning of the judicial system.²

A Letter of Agreement, dated 19 July 1999, between the Under-Secretary-General for Peacekeeping Operations of the United Nations and the Representative of the Chairman-in-Office of the OSCE, stated that the OSCE should develop mechanisms to ensure that the courts, administrative tribunals and other judicial structures operate in accordance with international standards of criminal justice and human rights.³ Within the OSCE, the Department of Human Rights and Rule of Law has the responsibility to monitor and report upon the judicial system in terms of compliance with human rights and the rule of law. Within the Department of Human Rights and Rule of Law, LSMS is tasked with the role of monitoring cases in the justice system, assessing their compliance with international standards, and reporting on matters of concern.

Scope of the Report

This Review is theme-focused and concentrates mainly on three areas that have raised concerns on the side of the OSCE court monitors in criminal proceedings. The OSCE has decided to report on issues that represent recurring and unresolved concerns as

¹ United Nations Security Council Resolution 1244, 12 June 1999, para.11/j.

² Report of the UN Secretary-General to the UN Security Council, *On the United Nations Interim Administration in Kosovo*, S/1999/779, 12 July 1999, para.87.

³ Justice Circular 2001/15 *OSCE Monitors Access to Court Proceedings and Court Documents*, 6 June 2001, reaffirmed that the LSMS trial monitors have access to all criminal court proceedings and documents, with a few exceptions. This was amended by Justice Circular 2004/6, 30 September 2004, which asserted that LSMS also has access to civil and administrative proceedings and court documents in accordance with an agreement between Police and Justice Pillar of UNMIK and the OSCE. This Circular was intended to enhance the understanding of the judiciary with regard to the OSCE’s mandate, and to ensure that the trial monitors maintain complete coverage in criminal, civil and administrative proceedings.

those related to the protection of witnesses in the criminal justice system and on areas that were not previously closely monitored, such as proceedings before MOCs and proceedings involving juveniles either as defendants or as injured parties of specific crimes.

CHAPTER 1

PROTECTION OF WITNESSES IN THE CRIMINAL JUSTICE SYSTEM

Protecting witnesses⁴ to criminal acts from threats or intimidation has been, and remains, one of the greatest challenges for the judicial authorities in Kosovo. Despite domestic law with available procedures for protecting witnesses (such as anonymous and distance testimony, non-public hearings, physically separating the defendant from the witness), few witnesses are willing to provide court testimony. Incidents of witness intimidation are reported regularly.

Although the OSCE has previously reported about problems protecting witnesses in the criminal justice system in Kosovo,⁵ the failure to solve this problem requires its re-examination. Moreover, the OSCE has recently monitored cases where judicial and other relevant authorities (e.g. the police) did not respond adequately to witness intimidation. Also, the police have not properly provided testimony in criminal proceedings against individuals suspected of having threatened witnesses.

This chapter describes the international and domestic legal framework related to the protection of witnesses in Kosovo. It highlights gaps and problems of implementation of current witness protection legislation, and refers to examples of the most common types of witness intimidation.

In summary, Kosovo needs a complete witness protection law that provides for change of identity and relocation outside of Kosovo for eyewitnesses, victims, and cooperating witnesses in the most serious and complex criminal cases such as organised crime, trafficking, and war crimes. Next, judges and prosecutors must implement the existing witness protection methods in the Provisional Criminal Procedure Code of Kosovo⁶ (PCPCK). Finally, local and international authorities must raise public awareness of the moral and legal duty of residents of Kosovo to provide witness testimony and bring criminals to justice.

I. LEGAL FRAMEWORK

According to the case law of the European Court of Human Rights (ECtHR), the life, liberty or security of witnesses must not be “unjustifiably imperilled.”⁷ Thus, public

⁴ The term “witnesses” refers to both eyewitnesses and victims of crimes. Both types of “witnesses” can provide crucial testimony at trial.

⁵ See, e.g., OSCE Mission in Kosovo, *The Response of the Justice System to the March 2004 Riots*, 2 December 2005, pp. 8-21; *Review of the Criminal Justice System (April 2003-October 2004) Crime, Detention and Punishment*, 14 December 2004, pp. 74-77; *Review of the Criminal Justice System (March 2002 – April 2003) Protection of witnesses in the criminal justice system*, 20 May 2003.

⁶ UNMIK Regulation No. 2003/26 *On the Provisional Criminal Procedure Code of Kosovo*, 6 July 2003.

⁷ “It is true that Article 6 [...] does not explicitly require the interests of the witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention [...]. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise

authorities have a duty to protect witnesses and their close relatives against interference, threats and danger, prior, during and after the trial.⁸ Effective protection of witnesses is crucial for the legal system to function properly.⁹

To encourage witness testimony and support successful criminal prosecutions, Kosovo has introduced legislation aimed at protecting witnesses.

A. *Witness Protection Provisions of PCPCK*

The PCPCK allows for concealing the identity of witnesses, non-public hearings, temporary removal of the defendant from the court-room during witness testimony, distance testimony (e.g. through videoconferencing or closed circuit TV), or video-taped examination prior to the court hearing with the defence counsel present.¹⁰

Two leading ECtHRs cases have established that the use of anonymous testimony from an investigation, as long as the defendant or his/her attorney has the opportunity to question the witness, does not necessarily violate the defendant's Article 6 right to a fair hearing. However, a conviction should never be based solely or "to a decisive extent" on the basis of anonymous statements.¹¹ The PCPCK follows this guidance in providing that "[t]he court shall not find the accused guilty solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused."¹²

The use of anonymous testimony (especially without relocation) can be problematic. First of all, the defendant can often guess the true identity of the anonymous witness based on the nature or specifics of the testimony. In addition, as described above, a

their criminal proceedings in such way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." European Court of Human Rights, *Van Mechelen and Others v. the Netherlands*, 21363/93, 21364/93, 21427/93, 23 April 1997, para.53; See also *Doorson v. the Netherlands*, 20524/92, 26 March 1996, para.70; *P.S. v. Germany*, 33900/96, 20 December 2001, para.22.

⁸ "While respecting the rights of the defence, the protection of witnesses, collaborators of justice and people close to them should be organised, where necessary, before, during and after trial.", The Committee of Ministers to Member States of the Council of Europe, Recommendation (2005)9 *On the Protection of Witnesses and Collaborators of Justice*, 20 April 2005, Article II(2). For an overview over the general issues related to the protection of witnesses in the criminal justice system, please see United Nations Office on Drugs and Crime, Informal Working Group on *Witness Protection in the Justice System*, Vienna 22-24 September 2005.

⁹ "[...] it is unacceptable for the criminal justice system to fail to bring defendants to trial and obtain a judgement because witnesses have been effectively discouraged from testifying freely and truthfully." *Id.*, Preamble.

¹⁰ Articles 168 – 174, PCPCK. Prior to the enactment of the PCPCK, UNMIK Regulation No. 2001/20 *On Protection of Injured Parties and Witnesses in Criminal Proceeding* of 20 September 2001 (as amended by UNMIK Regulation No. 2002/1 of 24 January 2002) and Administrative Direction No. 2002/25 of 13 November 2002 provided for measures to conceal the identity of witnesses while providing testimony.

¹¹ See *Doorson v. Netherlands*, *supra* at 7, para.68-71 and *Kostovski v. Netherlands*, 11454/85, 20 November 1989, para.44.

¹² Article 157(3), PCPCK.

conviction which is based “solely” or “to a decisive extent” on anonymous testimony, can raise concerns regarding compliance with international fair trial standards.¹³

B. Witness Protection Programme and witness relocation

The Witness Protection Programme provides for the physical protection of witnesses before, during and after trial by a specialised police unit, known as the UNMIK Witness Protection Unit (WPU). Justice Circular No. 2003/5 *on the Witness Protection Programme* briefly describes the procedures for enrolment in the Witness Protection Programme. Either the prosecutor or judge recommends to the WPU that a witness be enrolled, and then the WPU performs a threat assessment. The witness also undergoes physical and psychological evaluation to determine whether he or she can tolerate the stress of the programme. If accepted, the witness and his or her immediate family are transferred to a secure site for the duration of the trial. After the trial concludes, an attempt is made to relocate the witness outside Kosovo.¹⁴

The Witness Protection Programme is aimed at protecting witnesses in the most serious criminal cases such as organised crime,¹⁵ trafficking in persons¹⁶ and war crimes.¹⁷ The provisions for protecting witnesses in the PCCK (such as anonymous testimony, separating the defendant from the witness and non-public hearings) should be used in the majority of cases where witnesses may be intimidated but are not enrolled in the Witness Protection Programme.

Of note, there is no detailed law or procedure in Kosovo for entering witnesses into the witness protection programme, changing their identities, and relocating them outside Kosovo after the trial. The Witness Protection Programme is based on a brief Justice Circular which is not sufficient. A draft Witness Protection Regulation has been circulated for comment, and UNMIK should make the enactment and implementation of this law a top priority.

II. PROBLEMS PROTECTING WITNESSES IN KOSOVO

Protecting witnesses and encouraging their co-operation in Kosovo is difficult for several reasons. First, due to the small size of Kosovo and close family ties, a relatively high number of witnesses are likely to be known by the alleged perpetrators and/or by the public, and thus are more likely to suffer intimidation and require protection. Second, in high profile cases, it is not practical to relocate witnesses internally because Kosovo is a close-knit society in a relatively small geographic region. Third, the history of discrimination and oppression by authorities against residents of Kosovo has made them distrustful of the government and judiciary, and

¹³ The Human Rights Committee has also raised concern whether the use of anonymous witnesses complies with fair trial principles as embodied in the ICCPR (See Human Rights Committee, Concluding Observations on The Netherlands (2001), UN doc. CCPR/CO/72/NET, para.12; see also Concluding Observations on Colombia (1997), UN doc. CCPR/C/79/Add. 75, para.21 and 40).

¹⁴ Justice Circular No. 2003/5 *on the Witness Protection Programme*.

¹⁵ UNMIK Regulation No. 2003/25, *On the Provisional Criminal Code of Kosovo* (PCCK), 6 July 2003, Articles 274 and 310.

¹⁶ Article 139, PCCK.

¹⁷ PCCK, see Chapter XIV: Criminal Offences Against International Law.

reluctant to serve as witnesses in criminal cases. Many residents do not believe they have a moral or legal duty to serve as witnesses in criminal cases.¹⁸

A. *Problems with the Witness Protection Unit (WPU) and Witness Relocation*

Due to the small size of Kosovo, it is virtually impossible to protect a witness in a high profile criminal case by changing the identity and relocating the witness within Kosovo. Relocation outside Kosovo is the only means of ensuring the safety of witnesses at high risk of revenge by defendants or their criminal co-conspirators.

The WPU strives to relocate witnesses through the assistance of heads of Country Liaison Offices in Kosovo.¹⁹ One problem is the lack of funds to transfer and support relocated witnesses. In addition, few countries are willing to accept a relocated witness from Kosovo. When successful, relocated witnesses have been accepted on quasi asylum grounds. Third, as mentioned above, Kosovo does not have a comprehensive witness protection law that specifies procedures for enrolment and responsibilities of the protected witness and witness protection programme. Finally, the WPU lacks specialised police with expertise in protecting witnesses.

According to an October 2006 interview by the OSCE with the Chief of the WPU, many administrative problems faced by the WPU arise because its budget is not separate from other international and local institutions in Kosovo. Most funds are channelled through the Kosovo Police Service (KPS) budget or other entities, causing bureaucratic delay and preventing an efficient allocation of resources. In addition, the need to provide receipts and other documents to justify expenditures to outside institutions compromises the confidentiality of WPU activities and endangers the safety of protected witnesses.

Another major problem is the lack of a clear system for filing, sharing, storing, and ultimately destroying sensitive information related to WPU activity and protected witnesses. Thus, confidential information may be leaked when circulated for bureaucratic/internal reasons. This can jeopardise the safety of protected witnesses.

There is also a failure to properly safeguard and maintain confidentiality when changing the identity of protected witnesses. According to OSCE research,²⁰ Civil Registry employees currently modify personal details of witnesses protected by the WPU. Kosovo does not have legislation that regulates this important activity and a civil servant could leak details when changing a person's identity.

Without an effective witness protection programme, Kosovo cannot hope to eradicate organised crime. The experience of the United States and Italy reveals that an

¹⁸ Article 158, PCPCK, states: "Any person summoned as a witness has a duty to respond to the summons and, unless otherwise provide for by the present Code [...] to testify." PCPCK, Article 167 provides for fine or imprisonment of witnesses who refuse to appear or testify without legal justification.

¹⁹ According to an interview by the OSCE with the Chief of the WPU, there have been unsuccessful attempts to persuade the United Nations High Commissioner on Refugees (UNHCR) and the International Organisation for Migration (IOM) to become involved in relocation of witnesses.

²⁰ Interview conducted by the OSCE with the Chief of the WPU in October 2006.

effective way to battle organised criminal gangs is where criminals co-operate and testify against co-conspirators. Without offering co-operating witnesses a benefit (such as a lower sentence) and protecting them, the witness will not co-operate.²¹

B. Implementation problems of PCPCK provisions for protecting witnesses

In the majority of cases where witnesses are not enrolled in the Witness Protection Programme, judges still have other methods available to protect witnesses. These include use of anonymous testimony, physically separating the defendant from the witness, distance testimony, and holding non-public hearings. OSCE research has revealed that courts often do not implement these measures.²² For example, most courts do not have separate entrances for witnesses that would help protect their privacy and shield them from public pressure or scrutiny. The situation is not helped by the irresponsible behaviour of some local newspapers that have revealed the identities of “anonymous” witnesses. Finally, there is little, if any, prosecution of individuals who threaten or assault witnesses.

In summary, the Witness Protection Programme is under funded, based on incomplete legislation, lacks specialised police to protect witnesses, and lacks support from countries unwilling to accept protected witnesses from Kosovo for relocation. In addition, judges do not adequately implement the witness protection procedures in the PCPCK. Consequently, threats and intimidation against witnesses are common in Kosovo and there are fewer convictions of alleged criminals due to the absence of witness testimony.

III. INCIDENTS OF INTIMIDATION

A. Intimidation in cases against high profile defendants

The OSCE is aware of several examples of attacks and intimidation of trial witnesses, both eyewitnesses and victims. The OSCE observed most witness intimidation problems in cases with high profile defendants, mainly former KLA²³ members. However, this does not mean that witness intimidation did not occur in less high profile cases, as witness intimidation can be difficult to prove.

The following examples show how threats and violence against witnesses (both victims and eyewitnesses) prevent the effective prosecution of people allegedly responsible for serious crimes and undermines the rule of law in Kosovo:

²¹ Opinion of joint OSCE/ U.S. Office Witness Protection Consultant Team (October 2006).

²² For, example, in November 2006, OSCE monitored a trial involving an attempted murder claim. In the hearing, the witnesses sat next to the defendant and in their testimony contradicted prior written statements made during the investigation and would not corroborate prior statements incriminating the accused. The witnesses had previously stated that the defendant intentionally fired a gun at them, which injured multiple people. It is unclear whether witness intimidation, a side agreement, or family interference/reconciliation led to this change in testimony. Of note, neither the judges nor prosecutor suggested that the witnesses give their testimony without the presence of the defendant as allowed under PCPCK, Article 170(1) item 7.

²³ Kosovo Liberation Army.

In a case before the District Court of Prishtinë/Priština involving the alleged crimes of Obstructing Official Person in Performing Official Duties²⁴ and Extortion,²⁵ on 16 January 2006 an international prosecutor commenced an investigation involving a high profile Kosovo Albanian defendant who was a former KLA commander. Allegedly, on 14 November 2005 the defendant threatened two members of the Kosovo Serbian community and the Execution Judge during an eviction from a commercial building reportedly illegally occupied since June 1999. An international judge held the confirmation hearing on 12 September 2006 and confirmed the indictment for all charges.

The OSCE is aware that a few days before the confirmation hearing, the Execution Judge went to the Office of the Chief International Judge seeking the International Confirmation Judge assigned to the case. The Execution Judge appeared very frightened and reported that an unknown individual approached him and threatened him by saying that he should not give his testimony at the trial. Consequently, the Execution Judge stated that he did not want to appear at the court or participate at the proceeding. Indeed, although a victim in the case, the Execution Judge did not appear at the confirmation hearing. Before the Confirmation Judge, the defendant stated that the Execution Judge was responsible for the case and accused the Execution Judge of collaborating with the Serbian regime.

Unfortunately, despite clear evidence of intimidation of a judge and witness, neither the prosecutor nor the judge requested special protective measures for the Execution Judge prior to the confirmation hearing.

Arguably, many of the provisions in the PCPCK for protecting witnesses would not have been helpful in this case (such as anonymous testimony or non-public trials), since the witness/victim is well known as an execution judge in the Prishtinë/Priština Municipal Court. Also, it is unlikely that the judge would be enrolled in the Witness Protection Programme (WPP) because this is not an organised crime, trafficking, or war crimes case that typically falls within the scope of the WPP.

However, the police could have provided the Execution Judge with special protection, or under the PCPCK, the defendant could have been physically separated from the victim/witness during the hearing. The failure to protect a key prosecution witness led to his failure to appear or co-operate, and could ultimately prevent justice in this case.

In the same case, evidence suggests that other potential witnesses, namely members of the Kosovo Police Service (KPS), may have been intimidated:

During the attempted execution of the eviction, which occurred on 14 November 2005, the Execution Judge was accompanied by three KPS officers and two court clerks. Two members of the Kosovo Serbian community who requested the execution were also present. During the execution of the eviction the Execution Judge was allegedly assaulted by an individual who opposed the eviction. However, after the alleged assault occurred, the KPS officers and the

²⁴ Article 316(2), PCCK.

²⁵ Article 267(1), PCCK.

court clerks denied any use of force or violence by the alleged perpetrator, in contrast with the statements given by the Execution Judge and the members of the Kosovo Serbian community.

The International Prosecutor indicted the three KPS officers for the crimes of Failure to Report Criminal Offences,²⁶ Providing Assistance to Perpetrators²⁷ and False Statements.²⁸ During the session held on 12 September 2006, the International Confirmation Judge confirmed the indictment for all charges against all the defendants.

The statements by the KPS officers conflict with the statements of the Execution Judge and the two members of the Kosovo Serbian community present at the execution of the eviction. If the latter allegations of assault are true, it is possible that the KPS officers and clerk were intimidated.

The OSCE has also followed a troubling case involving the murder of a key prosecution witness and the attack against an anonymous witness in Prizren in a war crimes trial before a panel of international judges in Gjilan/Gnjilane:

During the daytime on 10 October 2005, in the market of Xërxë/Zerze, Prizren region, two individuals murdered a key prosecution witness and seriously injured an anonymous witness. Unknown individuals unearthed the buried body of the victim/former witness from the cemetery and set it ablaze. Leaflets were distributed on behalf of the Albanian National Army (ANA)²⁹ throughout the Rahovec/Orahovac region.

The leaflets stated: “Announcement – We inform the citizens of Kosovo that ANA claims responsibility for the murder of [...]”³⁰ on 10/10/2005, and it will not cease executing all collaborators such as the above mentioned person as well as those who do not fulfil our demands...”. The International Prosecutor took over the case, and although the identities of the leading suspects (one of them a former KLA member) were well known, as of September 2006 there had been no arrests or developments in the investigation.

According to a September 2006 interview conducted by the OSCE with a member of the investigative and legal team, the reluctance of the local population to co-operate (fear of revenge and admiration of the two main suspects) is a primary problem in the case. Even if willing to testify or co-operate, the public does not have confidence that the authorities could effectively protect them from revenge by the suspects. This creates difficulties in obtaining relevant evidence, as the public does not have confidence in a justice system which would not properly protect them.

²⁶ Article 304(2), PCCK.

²⁷ Article 305(1), PCCK.

²⁸ Article 307(1), PCCK.

²⁹ *Armata Kombetare Shqiptare (AKSH)*. See Administrative Direction No. 2003/9 *Implementing UNMIK Regulation No. 2001/12 On the Prohibition of Terrorism and Related Offences*, 17 April 2003 for reference to the categorisation of this organisation.

³⁰ OSCE intentionally omits the name of the victim.

Irresponsible journalism has also hampered witness protection, as the OSCE has observed instances where newspapers revealed the identity of “anonymous” witnesses. For example, in the above case in Xërxë/Zerze, a local newspaper,³¹ when reporting on the attacks of the two witnesses in the war crimes trial, revealed the identity of the anonymous witness. Consequently, in a 15 December 2005 session of the trial, the “anonymous” witness testified openly since the public already knew his identity.

B. Threats against victims of sexual offences

The OSCE has also noticed evidence of possible witness intimidation in cases involving alleged sexual and trafficking crimes. Typically, the victim/witness changes her statement from initially incriminating the suspect during investigation hearings, to then exculpating him at the trial. This change in statement provides evidence that the defendant may have threatened the victim/witness. A case before the district court in Prizren in 2005 serves as an example:

The prosecutor charged two persons with Sexual Abuse of Persons under the Age of Sixteen Years³² and Facilitating Prostitution.³³ Some of the victims/witnesses changed their testimony from accusing the defendants at the investigation stage to exonerating them at trial. During the trial, one of the victims/witnesses revealed that the defendants handcuffed and severely injured her, to force her not to testify or to change her testimony.

The OSCE learned that neither the prosecutor, nor others authorised to do so under the PCPCK, filed a petition for a protective measure as would have been appropriate in this case.³⁴ However, on a more positive note, the verdict found one of the defendants guilty of Obstruction of Evidence³⁵ (which also includes threatening a witness to give false testimony).

The OSCE followed another sexual crime case with possible intimidation of the victim/witness in the District Court of Pejë/Peć:

On 19 July 2006, the police arrested a man under suspicion of raping a girl. On 21 July 2006, upon request of the prosecutor, the pre-trial judge ordered the detention of the defendant for one month. During the investigation, on 1 August 2006, the prosecutor, in the presence of the defence counsel, heard the witness/injured party accuse the defendant of raping her.

In an appeal against the detention on remand, the defendant’s attorney proposed to release his client partly because the two families – of the victim and the defendant – had reached a “reconciliation”. A document entitled

³¹ *Lajm*.

³² Article 198, PCCK.

³³ Articles 201(3) and (4), PCCK. The charges in the indictment included also other crimes, such as Obstruction of Evidence (Article 309, PCCK) and Unlawful Exercise of Medical Activity (Article 221, PCCK).

³⁴ See Article 169(1), PCPCK.

³⁵ Article 309, PCCK.

“reconciliation document” in the case file signed by the witness/injured party, states that the victim had received 5000 Euros from the defendant.

The fact that the witness/victim accused the defendant of rape, a brutal crime, makes it unlikely that a true “reconciliation” occurred between the families. Rather, the exchange of money and agreement may reflect that the girl’s family or the defendant’s family pressured her to sign the agreement. Significantly, neither the public prosecutor, nor any other entitled party, requested special protection for the victim/witness.

The OSCE has also observed possible witness intimidation in an alleged trafficking case:

In October 2006, in an investigation led by the Prizren District Prosecution Office, for the crime of Trafficking in Human Beings,³⁶ two of the alleged victims from Moldova provided initial statements to the police admitting having engaged in sexual relations with clients of the bar owned by one of the defendants, who took a share of the profit. However, when the prosecutor interrogated them later, the victims/witnesses denied engaging in voluntary sexual services for money.

It is unclear whether witness intimidation or some other motive (e.g.. fear that they would be punished for engaging in prostitution)³⁷ led to the change in statement. Of note, the Prosecutor did not request any special protective measures for the alleged trafficked victims.

IV. RECOMMENDATIONS

To local and international authorities, such as UNMIK, the Ministry of Justice, the Kosovo Assembly, and the Kosovo Police Service:

- Establish a Witness Protection Liaison Office with the main function of finding countries willing to accept witnesses from Kosovo who must be relocated;
- For the most serious criminal cases, establish a formal and more detailed witness relocation programme with a separate budget whereby witnesses and their families are relocated outside Kosovo with changed identities after “threat” and “suitability for entry into the programme” assessments;
- Develop procedures in Kosovo to make a witness relocation programme financially independent and sustainable – e.g., using confiscated assets from criminal cases to fund witness relocation and maintenance;

³⁶ Article 139, PCCK.

³⁷ In Kosovo, prostitution is punished as a minor offence. See Law on Public Peace and Order (The Official Gazette of the Socialist Autonomous Province of Kosovo, No. 13/81), Article 18(1) item 6.

- Achieve the change of identities of witnesses in a way to prevent disclosure of their new identities within and outside of Kosovo. Legislative amendments may be necessary to ensure that data in the Civil Registry Office is not available to the public and unintended civil servants;
- Develop a system for filing, sharing, storing, safeguarding and ultimately destroying sensitive information related to WPU activity and protected witnesses;
- Amend legislation to require the police, prosecutor, or court to inform any witness of available witness protection measures;
- Impose stiff penalties on newspapers that disclose the identity of anonymous and protected witnesses;
- Raise public awareness, e.g. through billboards, television or radio advertisements, of the legal and moral duty of individuals to serve as witnesses in criminal and civil cases; and,
- Develop mechanisms to protect confidential witness information.

To judges and prosecutors:

- Implement existing witness protection methods under the PCPCK (e.g., use of anonymous and distance testimony, non-public hearings, physical separation of witness from defendant);
- Prosecute and punish individuals who threaten or intimidate witnesses; and,
- Develop mechanisms to protect confidential witness information.

To the police:

- Protect witnesses prior, during and after the trial;
- Co-ordinate with prosecutors to inform potential witnesses about witness protection methods available in Kosovo and jointly assist in applying for and implementing witness protection methods.

To the prison authorities:

- Keep protected witnesses (who are also co-defendants) in separate detention facilities from the rest of the prison population.

To newspapers and media:

- Refrain from disclosing the identity of anonymous and protected witnesses, or publicising sensitive information related to witnesses.

To the Kosovo Judicial Institute (KJI) and other training institutions:

- Organise training for police, prosecutors, and judges on methods to protect witnesses.

CHAPTER 2

THE ADMINISTRATION OF JUSTICE IN MINOR OFFENCES COURTS

In Kosovo, there are currently 25 Minor Offences Courts (MOCs) in the judicial system.³⁸ The jurisdiction of the MOCs covers several areas, such as public peace and order, traffic security, movement of persons, economy and finances, education, science, culture and information, environment, health and social protection.³⁹ The broad scope of the jurisdiction of the MOCs makes it an important part of the judicial system in Kosovo.

However, in monitoring the activity of these courts, the OSCE has observed violations of domestic law and international human rights standards. For example, requests for initiation of proceedings (often drafted by the police) to the MOCs frequently lack necessary information, contain unreadable handwriting, and include incorrect or no reference to the specific charge under the Law on Minor Offences.⁴⁰

The OSCE has also noticed that many decisions of the MOCs suffer from poor or incomplete reasoning and organisation. Frequently, MOCs' decisions involving several defendants include collective punishment that do not specify the level of responsibility for each defendant. The OSCE has also monitored cases in which municipal and district courts in Kosovo prosecute individuals for conduct arising from the same alleged facts after a MOC has issued a final decision against the defendant. This violates the *ne bis in idem* principle (also known as the prohibition against double jeopardy).

I. LEGAL FRAMEWORK

A. *Law on Minor Offences in Kosovo*

According to the current legislation applicable in Kosovo, “[Minor] [o]ffences are violations of public order defined by law or other regulations for which offence

³⁸ Kosovo Judicial Council, Report on the Work of the Minor Offence, Second Quarter 2006.

³⁹ Apart from the Law on Public Peace and Order (The Official Gazette of the SAP of Kosovo, No. 13/81 hereinafter LPPO), laws which create minor offences are, *e.g.*, Law on Realization of Equality of Languages and Alphabets in the Socialist Autonomous Province of Kosovo (Official Gazette of the SAP of Kosovo, No. 48/77, see Art. 44), the Law on Basis for Traffic Safety on Roads of Socialist Federal Republic of Yugoslavia (The Official Gazette of the SFR of Yugoslavia, No. 50/88 and 63/88), the Law on Traffic Safety on Roads of Socialist Autonomous Province of Kosovo (The Official Gazette of the SAP of Kosovo, No. 5/84 and 7/86), the Law on Forestry of Kosovo (Law No. 2003/3 promulgated by UNMIK Regulation No. 2003/6, 20 March 2003), UNMIK Regulation No. 2005/16 on the Movement of Persons into and out of Kosovo, 8 April 2005.

⁴⁰ See Law on Minor Offences of the Socialist Republic of Serbia (hereinafter LMOS - The Official Herald of the SR of Serbia, No. 6/79), Law on Minor Offences of Kosovo (hereinafter LMOK The Official Gazette of SAP Kosovo, No. 23/79), Law on Amendments to the Law on Minor Offences (The Official Gazette of SAP Kosovo, No. 44/84, 18/87, 9/88 and 21/88). Some articles of the LMOS apply in Kosovo (See Art. 1-21; 29-30; 289-293).

sentences and protective measures are prescribed”.⁴¹ Minor offences can be “prescribed by law, regulation and decision of the municipal assembly”.⁴²

Several laws, which regulate different aspects of society, define what conduct constitutes a minor offence in Kosovo.⁴³ Minor offences penalties may result in imprisonment for up to 60 days or in monetary penalty.⁴⁴

While Kosovo law describes procedural requirements for proceedings in the MOCs, ECtHR case law imposes additional procedural requirements depending on whether the offence is criminal under ECtHR case law.

B. Classifying minor offences as criminal under ECtHR case law

While public authorities may classify cases under domestic law as criminal, disciplinary or administrative, under ECtHR case law, three factors will determine whether a matter is criminal and whether the defendant must receive the fair trial protections under Article 6(1) of the ECHR. These factors include the classification of the offence in domestic legislation, the nature of the offence and the degree and severity of the possible punishment.⁴⁵

i) The classification of the offence

If the charge is classified as criminal under domestic law, Article 6 of the ECHR will apply. However, even if an offence is not categorised as criminal under domestic legislation, the classification is “only a starting point,”⁴⁶ and if the other two criteria indicate in substance that the offence is a criminal charge,⁴⁷ the fair trial requirements of the ECHR must still be respected.

ii) The nature of the offence

In determining whether the nature of the offence is criminal, rather than disciplinary or administrative, the ECtHR case law considers to whom the law applies, and the purpose of the penalty. In general, if the law only applies to a restricted group of people, such as those belonging to a professional group, the offence is more likely to

⁴¹ Article 1, Law on Minor Offences of Serbia (LMOS).

⁴² Article 3, LMOS.

⁴³ See *supra* at 39.

⁴⁴ See Articles 2 and 3, LMOK.

⁴⁵ *Engel and others v. The Netherlands*, 5100/71 et al., judgment, 8 June 1976, para.82; *Ozturk v. Germany*, 8544/79, judgment, 21 February 1984, para.50.

⁴⁶ *Engel and others v. The Netherlands*, id.

⁴⁷ *Engel and others v. The Netherlands*, id., para. 81-82 (“If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a ‘mixed’ offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.”); *Ozturk v. Germany*, id., para. 53 (“[i]t would be contrary to the object and purpose of Article 6, which guarantees to ‘everyone charged with criminal offence’, the right to a court and to a fair trial, if the State were allowed to remove from the scope of this article (article 6), a whole category of offences merely on the ground of regarding them as petty.”).

be disciplinary rather than criminal. However, if the law has a general applicability, it is more likely to be criminal for the purpose of Article 6.⁴⁸

If the penalty is both a deterrent and punitive, it is more likely to be criminal than administrative or disciplinary.⁴⁹ For example, in *Ozturk v. Germany*, the ECtHR maintained that the offence of negligent driving, which had been decriminalised in Germany, was criminal under Article 6 in part, because the penalty was a sanction (fine) of a punitive and deterrent nature.⁵⁰

iii) *The nature and severity of the penalty*

The third factor considered by the ECtHR in determining whether Article 6 of the ECHR applies to an offence, is the nature and severity of the punishment.

Deprivation of liberty as a penalty generally makes an offence criminal rather than disciplinary or administrative.⁵¹ The threat of imprisonment, whether or not imposed, can itself make Article 6 of ECHR applicable.⁵²

When the potential penalty is not imprisonment but a fine, the ECtHR considers whether the fine is compensation for damage or a punishment to deter future criminal conduct. Only in the latter case is the offence considered criminal.⁵³

Consequently, in light of ECtHR case law, many minor offences in Kosovo should be classified as criminal offences under international human rights standards because they are criminal in nature (e.g., apply generally to the public) and have penalties which serve as a deterrent against future criminal conduct and are often a deprivation of liberty (e.g. imprisonment). This would include all minor offences under the

⁴⁸ See *Ozturk v. Germany*, id., para. 53 (classifying traffic offence as criminal in part because it is directed “towards all citizens in their capacity as road-users”); See *Weber v. Switzerland*, 11034/84, judgment, 22 May 1990, para. 33 (“Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct [...] As Article 185, however, potentially affects the whole population, the offence it defines, and to which it attaches a punitive sanction, is a criminal one for the purposes of the second criterion.”).

⁴⁹ *Ozturk v. Germany*, id., para.53.

⁵⁰ In *Ozturk v. Germany*, id., the ECtHR stated that “according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.”

⁵¹ *Engel and others v. The Netherlands*, *supra* at 45, para.82 (“In a society subscribing to the rule of law, there belong to the ‘criminal’ sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so [...]”). However, according to the case law of the ECtHR, not every deprivation of liberty makes Article 6 of the ECHR applicable. The Court, indeed, in para.85 of the same decision held that the duration of a prison sentence of two days was insufficient to be regarded as criminal sentence.

⁵² In *Engel and others v. The Netherlands*, id., para.85, the fact that one of the defendants received a penalty which is not a deprivation of liberty did not make the offence non-criminal because the outcome could not “diminish the importance of what was initially at stake.”

⁵³ *Bendenoun v. France*, 12547/86, judgment, 24 February 1994, para.47.

LPPO⁵⁴ which can result in imprisonment, and many offences related to traffic and safety on roads.⁵⁵

Therefore, whenever proceedings before the MOCs are conducted for offences that would be defined as criminal under ECtHR case law, judges should apply international fair trial standards for criminal proceedings as required in international and regional human rights conventions,⁵⁶ applicable in Kosovo.⁵⁷

In addition, for offences that would be classified as criminal according to ECtHR case law, the laws on minor offences should be amended so that procedures comply with internationally recognized human rights standards.⁵⁸

II. OBSERVED VIOLATIONS OF DOMESTIC LAW AND INTERNATIONAL HUMAN RIGHTS STANDARDS

A. *Absence of or incorrect definition of the charges in the request for initiation of an offence proceeding*

According to international human rights standards, a person charged with a criminal offence must be informed promptly, in a language which he/she understands, and in detail, of the nature and cause of the accusation against him/her.⁵⁹ The Human Rights Committee has stated that information provided to a person charged with a criminal offence must indicate “both the law and the alleged facts on which [the charge] is based.”⁶⁰

The “nature” of the accusation refers to the legal character or classification of the facts, while the “cause of the accusation” refers to the facts which form the basis of the accusation.⁶¹ In addition, the right to be promptly informed of the nature and the cause of the charges is intended to provide the interested person with the information

⁵⁴ Articles 18-23, LPPO.

⁵⁵ See, e.g., Articles 226-227, Law on Basis for Traffic Safety on Roads of Socialist Federal Republic of Yugoslavia (The Official Gazette of the SFR of Yugoslavia, No. 50/88 and 63/88); Articles 200-201, Law on Traffic Safety on Roads of Socialist Autonomous Province of Kosovo (The Official Gazette of the SAP of Kosovo, No. 5/84 and 7/86).

⁵⁶ For international conventions, see, e.g., International Covenant on Civil and Political Rights (ICCPR), UN General Assembly resolution 2200A (XXI), 16 December 1966, Article 14. At the regional level, see European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted at Rome on 4 November 1950, Article 6.

⁵⁷ UNMIK Regulation No. 1999/24 *On the Law Applicable in Kosovo*, 12 December 1999 (As amended by UNMIK Regulation No. 2000/59 of 27 October 2000), Section 1.3; UNMIK Regulation No. 2001/9 *On a Constitutional Framework for Provisional Self-Government in Kosovo*, 15 May 2001, Section 3.2.

⁵⁸ The Secretary General of the United Nations echoed this recommendation in his 1999 Report on the Interim Administration Mission in Kosovo. “UNMIK will initiate a process to amend current legislation in Kosovo, as necessary, including [...] the law on public peace and order, in a way consistent with the objectives of Security Council resolution 1244 (1999) and internationally recognized human rights standards.” *Report Of The Secretary-General On The United Nations Interim Administration Mission in Kosovo*, UN Doc. S/1999/779, 12 July 1999, para.75.

⁵⁹ Art. 14(1)(a) of ICCPR, Article 6(3)(a) of ECHR.

⁶⁰ Human Rights Committee, General Comment No. 13, para. 8.

⁶¹ See *X v. Belgium*, Commission’s Decision on Application No. 7628/76, 9 May 1977, pg. 169; see also *Offner v. Austria*, Commission’s Decision on Application No. 524/59, 19 December 1960.

necessary to prepare his/or her defence.⁶² Therefore, there is a connection between the right to be promptly informed of any charges and the right to have adequate time and facilities for the preparation of a defence.⁶³ Compliance with the former is a necessary condition for compliance with the latter.⁶⁴

The Law on Minor Offences requires that “[A] request for initiation of an offence proceeding shall be submitted in written form and it should contain information such as the name of the accused, factual allegations, proposed evidence [...]”⁶⁵ and the “legal qualification of the offence”.⁶⁶ Interviews with Presidents of MOCs throughout Kosovo indicate that, on occasion, police and the MOCs do not co-operate and this can negatively affect the proceedings of the MOCs. For example, often the police do not correct deficiencies in the request for the commencement of an offence proceeding when the MOC returns it. In addition, sometimes police officers do not respond to court summonses or do not execute court orders.

The domestic legislation requires that if the request for initiation of an offence proceeding does not contain the required data “it shall be returned to the submitter to remove the shortages within determined time limit” which “cannot be longer than 15 days”.⁶⁷ Additionally, the law states that “[i]f the request submitter does not remove the shortages within determined time limit, it shall be considered that he/she has waived the request, so that such a request shall be denied by a decision.”⁶⁸

Despite these domestic legal requirements, the OSCE has monitored cases in which requests for initiation of proceedings before the MOC (often drafted by the police) did not properly describe the factual allegations or legal qualifications as required by the Law on Minor Offences.

For example, on 8 June 2006, the Kosovo Police Service (KPS) in Mitrovicë/Mitrovica South filed a request to initiate an offence procedure with the MOC against an individual who allegedly attacked a police officer during a sporting event. Although the request of the police was based on a nonexistent provision of the law,⁶⁹ the court found the defendant guilty and by applying the appropriate provision of the law omitted by the police, sentenced him to sixty days of imprisonment. In doing so, the judge modified *ex officio* the content of the original request filed by the KPS.

In a second case, on 3 May 2006, the KPS requested an initiation of procedures against two persons in the MOC in Istog/Istok because they allegedly disturbed the public peace and order by fighting. The request did not allege what crime the defendants committed. Nevertheless, the judge

⁶² See *Bricmont v. Belgium*, Commission’s Decision on Application No. 10857/84, 48 DR 106, 15 July 1986.

⁶³ Article 14(1)(b) ICCPR, Article 6(3)(b) ECHR.

⁶⁴ See *Offner v. Austria*, Commission’s Decision on Application No. 524/59, 3 YB 322, 19 December 1960, at 344.

⁶⁵ Article 135 para.1, LMOK.

⁶⁶ Article 135 para.1 point 3, LMOK.

⁶⁷ Article 135 para.2 and 3, LMOK.

⁶⁸ Article 135 para.2, LMOK.

⁶⁹ The police report referred to Article 18(5) and (10), while it should have cited Art. 18(1) point 5 of the LPPO.

heard the defendants during the session of 16 May 2006, found them guilty,⁷⁰ and punished them by a fine of 50 Euros each.⁷¹

In a third case, on 30 July 2005, the KPS submitted to the MOC in Vushtrri/Vučitrn a request to bring proceedings against several people, who on 29 July 2005, allegedly defaced privately and socially owned buildings by writing graffiti on the walls. On 31 August 2005, the Vushtrri/Vučitrn MOC requested court assistance against some of the defendants from other MOCs of Kosovo⁷² (Mitrovicë/Mitrovica, Prishtinë/Priština, Lipjan/Lipljan, and Suharekë/Suva Reka). In this example, the request to commence the procedure did not mention the alleged offences.

These examples demonstrate the failure of the police to properly qualify the alleged legal offence when requesting to begin legal proceedings in the MOCs. In addition, judges did not comply with the applicable procedural rules which require that the incorrect document be returned to the police who must include all of the required information.

The OSCE believes that in the above stated examples, courts violated the rights of the defendant to be promptly informed in detail of the nature of the factual and legal allegations, and to have adequate time to prepare a defence.

B. Lack of reasoned decisions

According to international human rights standards,⁷³ the requirement of a fair hearing assumes that a court will give reasons for its judgment. The case law of the ECtHR states that while national courts have wide discretion regarding the structure and content of decisions, courts must “indicate with sufficient clarity the grounds on which they based their decision”⁷⁴ because “[...] a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.”⁷⁵

Therefore, a reasoned judgment is important in that it allows a defendant to exercise his right to appeal, and it is connected to the right to a public trial under international and regional human rights instruments.⁷⁶ Following international standards, Kosovo law requires that the written decision on an offence procedure should contain the “essential reasons on ascertained factual situation, with brief quotation of evidence

⁷⁰ Pursuant to Article 18(1) point 5 of LPPO.

⁷¹ Pursuant to Article 9 of the LMOK.

⁷² The locally competent municipal court for minor offences can transfer a case to the municipal court where the offender resides if it will be more efficient and alleged conduct constitutes an offence in the transferred jurisdiction. Article 79(1), LMOK.

⁷³ Article 10 of UDHR, Article 14(1) of ICCPR and Article 6(1) of ECHR.

⁷⁴ *Hadjianastassiou v. Greece*, 12945/87, judgment, 16 December 1992, para.33.

⁷⁵ *Suominen v. Finland*, 37801/97, judgment, 24 July 2003, para.37.

⁷⁶ Article 14(5), ICCPR. See also Article 2, Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms, adopted at Strasbourg on 22 November 1984.

based on which some facts are considered proven, as well as prescriptions on which the saying of the decision is based.”⁷⁷

The OSCE has monitored cases where the MOCs did not properly reason their judgments in violation of domestic law and international fair trial standards.

For example, on 17 March 2006, the MOC in Pejë/Peć issued a decision against a defendant and punished him by a fine of 80 Euros because it found him responsible for several minor traffic offences.⁷⁸ However, apparently the judge copied the reasoning from another judgment as it refers to different facts, a different person, and different legal claims than those in the enacting clause of the same judgment.

In another case, on 28 April 2006, the MOC in Prizren found a defendant responsible for a traffic violation and punished him with a fine. The reasoning of the judgment states: “[s]ince the initiation of minor offences procedure is rendered by an authorised organ, and the report is based on direct observation of the authorised person, it is undoubtedly confirmed that the defendant has committed the minor offence [...]”

These cases show unclear, complete absence of, or inadequate reasoning of judgments.⁷⁹ This violates not only domestic law, but also international fair trial standards related to the rights to a reasoned decision, an appeal and public trial under Article 6 of the ECHR. Insufficiently reasoned decisions also undermines the credibility of the courts and weakens public confidence in the judiciary.

C. *Absence of individual punishments*

When deciding punishments, courts should ensure that sentences are individualised and account for each particular defendant’s mitigating and aggravating circumstances. Crafting individualised sentences tailored to each defendant assists judges in drafting a properly reasoned decision.⁸⁰

According to domestic law, when deciding on a punishment, the MOC shall consider “[a]ll circumstances which have influence on higher or lower penalty, and especially severe character of the offence committed, circumstances under which it is committed, degree of responsibility, personal circumstances of an offender, as well as his/her behaviour after the offence committed.”⁸¹ Moreover, the law requires detailed

⁷⁷ Article 204(5), LMOK.

⁷⁸ Articles 228(1), item 21, 230(1), item 23 and 26 of the Law on the Basis of Traffic Safety in Roads (Official Gazette of SFRY, no. 50/88 and 63/88).

⁷⁹ OSCE has observed problems with judicial reasoning in decisions of the MOCs throughout Kosovo.

⁸⁰ “[C]ourts should, in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed [...] What counts as a ‘reason’ is a motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing.” The Committee of Ministers to Member States of the Council of Europe, Recommendation No. R (92) 17 *Concerning Consistency in Sentencing*, 19 October 1992, Section E.

⁸¹ Article 7, LMOK.

reasoning in the judgment, including a description of the proven facts that meet the required legal elements of the offence.⁸²

Despite these legal requirements, the OSCE has monitored cases in which the courts have issued collective punishments and failed to explain each defendant's level of responsibility.

For example, on 9 June 2006, the KPS in Prishtinë/Priština submitted a request to the MOC to initiate an offence procedure⁸³ against nine persons, all members of the "Self-Determination" movement. This was due to the defendants blocking the main entrance of the UN HQ building during a protest that took place the same day. This allegedly impeded the free movement of employees working in the compound. At the end of the trial, the court found all the defendants guilty and sentenced each to 10 days of imprisonment. However, in its explanation of the punishment, the court discussed the conduct of the defendants collectively, without any reference to the actions and level of responsibility for each defendant.⁸⁴

In three similar cases arising from the same 9 June 2006 protest before the MOC in Prishtinë/Priština, the court sentenced a total of 26 persons each to 10 days of imprisonment. As in the case described above, the court improperly sentenced the defendants collectively without any discussion of individual responsibility.

In summary, the cases monitored by the OSCE show that the MOCs have improperly imposed collective punishments against defendants without distinguishing individual levels of responsibility, in violation of domestic law and international fair trial standards.

D. Violation of the ne bis in idem principle in connection with prior judgments by MOCs

For minor offences (such as those in the LPPO and some in the Law on Traffic Safety on Roads) which should be classified as criminal under the ECHR, courts must respect the *ne bis in idem* principle under international human rights conventions and domestic law.

According to international human rights law directly applicable in Kosovo, in criminal cases "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."⁸⁵

⁸² Articles 205-206, LMOK.

⁸³ Pursuant to article 20(1) item 3 of LPPO.

⁸⁴ The decision states: "[t]he judge ascertains that all above mentioned defendants committed the minor offence [...] therefore they are sentenced to 10 days of imprisonment each of them."

⁸⁵ Article 14(7) of ICCPR. See also Article 4(1) Protocol No. 7 to the European Convention on Human Rights which states that "[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

The same principle, where the offence is criminal under ECtHR case law, is also incorporated into the criminal procedure code of Kosovo,⁸⁶ when a person has been tried and convicted or acquitted in a case before the MOC, and should be respected by the Kosovo courts.

In some provisions, the Law on Minor Offences incorporates aspects of the *ne bis in idem* principle. For example, the law states that “[a] person who is by legally valid decision pronounced guilty in the criminal procedure or in the procedure for economic offences for an act that has characteristics of a crime, shall not be punished for the minor offence.”⁸⁷ Also, if during a minor offence proceeding “[t]he accused is pronounced guilty in a criminal procedure [...] for the same act which has characteristics of an offence”,⁸⁸ the procedure should be terminated.

Similarly, although not clearly articulated in current Kosovo law, the *ne bis in idem* principle should prohibit municipal and district courts from prosecuting defendants who have been tried and convicted or acquitted for the same facts in cases in a MOC where the offence is criminal under the ECtHR case law.⁸⁹

Despite these legal requirements of domestic law and international human rights standards, the OSCE has monitored cases where courts have violated the *ne bis in idem* principle.

In a case before the Municipal Court in Pejë/Peć, the court tried five defendants on 13 June 2006 for allegedly Attacking Official Persons Performing Official Duties⁹⁰ and participating in a group that obstructed official persons from performing official duties.⁹¹ The offences were allegedly committed by members of the “Self-Determination” movement in a protest in front of the local Police Station at the end of August 2005. All of the defendants pleaded guilty and the court sentenced them to six months imprisonment, suspended for a period of two years. However, on 7 September 2005 the MOC in Pejë/Peć had previously sentenced the same persons for the facts related to the same August 2005 protest⁹² to periods of imprisonment varying from 15 to 20 days.

In another case, the same Municipal Court tried two defendants on 15 September 2005 for allegedly Attacking Official Persons Performing Official Duties.⁹³ The defendants pleaded guilty and each received sentences of four months imprisonment, suspended for one year. However, on 19

⁸⁶ Article 4(1), PCPCK states that “[n]o one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, if criminal proceedings against him or her were terminated by a final decision of a court or if the indictment against him or her was dismissed by a final decision of a court.”

⁸⁷ Article 14(2), LMOS.

⁸⁸ Article 198(1) item 5, LMOK. See also Articles 228(1) item 3 and 269 of the same law.

⁸⁹ See *supra* at 86, for the *ne bis in idem* principle as expressed by the PCPCK.

⁹⁰ Article 317(2), PCCK.

⁹¹ Article 318, PCCK.

⁹² Pursuant to Article 18 (1), item 11 of LPPO.

⁹³ Article 317(1), PCCK.

November 2004, the Pejë/Peć MOC had tried the same defendants on the same set of alleged facts and sentenced them with a fine.⁹⁴

In the examples described above, the minor offences are likely to be viewed as criminal under ECtHR case law.⁹⁵ Consequently, the *ne bis in idem* principle applies, and a defendant should not be prosecuted and convicted twice by two different courts for the same set of facts. Here, the Municipal Court violated this principle by trying and sentencing the defendants twice for the same set of facts.⁹⁶

III. RECOMMENDATIONS

To legislative bodies such as the Kosovo Assembly, Minister of Justice, and other relevant local and international authorities:

- Amend current legislation on minor offences to comply with international human rights standards and include fair trial guarantees for criminal cases when a minor offence qualifies as criminal under ECtHR case law; and,
- Consider amending current legislation to remove imprisonment as a potential punishment for individuals who violate minor offences law.

To the police and other individuals authorized to initiate offence proceedings:

- Clearly draft requests for initiation of offence proceedings to the MOCs and include all information required by law, especially a description of the alleged facts and legal qualification of the offence.

To the judges of the MOCs:

- If the request for initiation of the offence proceeding does not contain all of the required data, return the request to the submitter to correct the deficiencies within the time limit required by law – no longer than 15 days. Where the submitter does not correct the deficiencies within the time limit, deny the request;
- Issue well-reasoned judgments to protect the rights of appeal and to a public trial as required by domestic law and international human rights standards; and,

⁹⁴ One of the accused filed an appeal against this decision with the High Court for Minor Offences in Prishtinë/Priština, which affirmed the decision of the Pejë/Peć Minor Offences Court on 4 February 2005.

⁹⁵ See *Oliveria v Switzerland*, 25711/94, judgment of 30 July 1998, para.26.

⁹⁶ In this context, the different legal qualification of the criminal offence should not be considered relevant since both offences were based on the same facts. See *Gradinger v. Austria*, 15963/90, judgment, 23 October 1995, para.55.

- When hearing cases involving multiple defendants who are found responsible for the alleged offence, sentence defendants individually and explain the punishment according to each defendant's level of responsibility.

To judges and prosecutors at the municipal and district courts:

- Observe the principle of *ne bis in idem* and avoid prosecuting individuals who have been acquitted or held responsible in a prior proceeding in a MOC where the offence is criminal under the ECtHR case law.

To the KJI:

- Organise trainings on drafting of judicial decisions that focus on issuing well-reasoned decisions and the principle of *ne bis in idem*.

To the Kosovo Chambers of Advocates:

- Organise trainings for defence counsel about classifying an offence as criminal rather than disciplinary or administrative under the ECHR and the required procedural guarantees in minor offence proceedings under ECtHR case law.

CHAPTER 3

JUVENILES IN CRIMINAL PROCEEDINGS

International fair trial standards under the ICCPR⁹⁷ and ECHR⁹⁸ also apply to criminal proceedings against juveniles. The Convention on the Rights of the Child of 1989 (CRC) contains rules⁹⁹ similar to those in the ICCPR and ECHR for proceedings involving children accused of committing crimes.

The CRC further states as a general principle that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.¹⁰⁰ The Committee on the Rights of the Child stressed that “[...] every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions [...]”.¹⁰¹ Consequently, it is the obligation of public authorities to account for and protect the best interests of the child in all cases.¹⁰²

This chapter briefly describes the juvenile justice system in Kosovo and highlights violations of domestic law (the recently adopted Juvenile Justice Code) and international human rights standards related to juveniles in the criminal justice system. The OSCE has observed cases involving juveniles with procedural violations such as improper panels of judges, delays in criminal proceedings involving juveniles, excessive and unlawful periods of detention of juvenile defendants, and illegal minor offences proceedings against juveniles younger than fourteen years.

I. THE LEGAL FRAMEWORK

The goal of the juvenile justice system according to international human rights law should be the child’s rehabilitation and social reintegration.¹⁰³ To comply with the international standards and obligations regarding juvenile justice, public authorities must enact specific laws at the national level.¹⁰⁴

On 20 April 2004, in Kosovo, the Juvenile Justice Code of Kosovo (JJC) was promulgated by UNMIK Regulation 2004/8. The JJC contains guiding principles, substantive and procedural requirements for juvenile justice, and provisions on appropriate juvenile punishments. The goal of the new code is to bring Kosovo’s

⁹⁷ See, e.g., Articles 9 and 14 of ICCPR.

⁹⁸ See, e.g., Article 5 and 6 of ECHR.

⁹⁹ See, e.g., Article 40 of CRC.

¹⁰⁰ Article 3(1), CRC.

¹⁰¹ *Committee on the Rights of the Child, General Comment No. 5 (2003)* on “General Measures of Implementation of the Convention on the Rights of the Child ” (UN Document CRC/GC/2003/5, 27 November 2003) paragraph 12, articles 4, 42 and 44, para. 6.

¹⁰² For an overview of the principles of the CRC, please see RACHEL HODGKIN and PETER NEWELL, *Implementation Handbook for the Convention on the Rights of the Child - Fully Revised Edition*, (UNICEF, 2002) pp. 784.

¹⁰³ Article 40(1), CRC.

¹⁰⁴ Article 40(3), CRC.

juvenile justice system into compliance with international human rights standards in criminal cases where juveniles are either defendants or victims.¹⁰⁵

The JJC should be viewed as *lex specialis* (special law) when compared to the PCPCK and other laws that may also apply to minors in criminal proceedings.¹⁰⁶ Accordingly, when there is a conflict between the JJC and other laws, the JJC should prevail. However, the JJC should also be implemented by accounting for other relevant interpretation techniques required by law (e.g. interpreting ambiguous facts or unclear criminal provisions in the defendant's favour).¹⁰⁷

The OSCE has monitored cases where the authorities incorrectly applied provisions of the JJC in violation of domestic law and international human rights standards regarding juveniles in criminal proceedings. In some cases, courts had difficulty understanding the relationship between the JJC and PCPCK and applying the correct rule.

II. OBSERVED VIOLATIONS OF DOMESTIC LAW AND INTERNATIONAL HUMAN RIGHTS STANDARDS

A. *Tribunal not established according to law*

The OSCE has monitored cases involving juvenile defendants or victims in which the composition of the panel did not comply with domestic law or international fair trial standards.

The right to a fair trial includes the right to be tried by a tribunal established by law.¹⁰⁸ In interpreting this right, the ECtHR held that a court should be properly composed “in accordance with law” and noted that a violation occurs when a tribunal does not function according to applicable procedural law.¹⁰⁹

The relevance of the best interests of the child principle has led the Committee on the Rights of the Child to affirm that authorities “[...] need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.”¹¹⁰

Current Kosovo law requires that the juvenile panel try cases against juveniles¹¹¹ and that a juvenile panel and juvenile judge try adults for specific criminal offences allegedly committed against a child.¹¹² Other provisions of the JJC require that the

¹⁰⁵ See, e.g., Articles 1-5 and 141-149, JJC.

¹⁰⁶ See Article 4, JJC.

¹⁰⁷ See Article 3(2), PCPCK.

¹⁰⁸ Article 14(1), ICCPR and Article 6(1), ECHR.

¹⁰⁹ *Zand v. Italy*, Commission Report No. 7360/76, 1978 and *Rossi v. France*, Commission Report No. 11879/85, 1989.

¹¹⁰ Committee on the Rights of the Child, General Comment No. 5 (2003), *supra* at 101, para.24.

¹¹¹ Articles 2(10) and (11) and Chapter XI, JJC.

¹¹² Article 141 JJC enumerates the criminal offences.

juvenile panel be composed of lay judges of different genders¹¹³ and that the juvenile judge decide on requests for detention on remand against a minor.¹¹⁴

The juvenile judge is defined under the JJC as “a professional judge who has expertise in criminal matters involving children.”¹¹⁵ The creation of a juvenile panel, along with the rules regulating its composition, aim to ensure that the best interests of the child are accounted for in criminal proceedings. The best interests of the child principle, already generally expressed by the CRC, is further elaborated by The Beijing Rules¹¹⁶ that stress that “[t]he [criminal] proceedings shall be conducive to the best interests of the juvenile.”¹¹⁷

The provisions in the new JJC related to the competence and responsibility of the juvenile judge and the juvenile panel aim to provide juvenile defendants or victims of serious criminal offences with special protection within the criminal justice system as required by applicable international standards.

Despite these provisions of domestic law and international human rights standards, the OSCE has observed violations of the rules regarding the composition of the juvenile panel.

For example, an ordinary judicial panel presided over a trial on 18 May 2006 in the District Court of Mitrovicë/Mitrovica involving an accused charged with the criminal offence of Sexual Assault¹¹⁸ against a 12-year-old girl although the JJC requires that a juvenile judge and juvenile panel hear the case.¹¹⁹

In a second case before the District Court of Gjilan/Gnjilane against a defendant accused of the crime of Sexual Abuse of Persons Under the Age of Sixteen Years,¹²⁰ an ordinary panel presided over a trial on 15 August 2005. Although the court convicted the defendant, the Supreme Court reversed the verdict and sent the case for retrial¹²¹ due to the wrong composition of the panel of judges. In spite of this, an ordinary panel (that did not meet the requirements of the JJC) again tried the case on 6 April 2006.

¹¹³ Article 49(4), JJC. Article 147, JJC, applies this rule regarding juvenile panels to criminal cases involving child victims under Article 141.

¹¹⁴ Article 64(1), JJC.

¹¹⁵ Article 2(10), JJC.

¹¹⁶ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), adopted by UN General Assembly resolution No. 40/33 of 29 November 1985.

¹¹⁷ Rule 14.2, The Beijing Rules. The Commentary to the same Rule states that “[c]ompetent authority is meant to include those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates [...] The procedure for dealing with juvenile offenders shall in any case follow the minimum standards that are applied almost universally for any criminal defendant under the procedure known as ‘due process of law’. In accordance with due process, a ‘fair and just trial’ includes such basic safeguards as the presumption of innocence, the presentation and examination of witnesses, the common legal defences, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc.”

¹¹⁸ Article 195 (4), PCCK.

¹¹⁹ Article 141(3), JJC.

¹²⁰ Article 198(1), PCCK.

¹²¹ See Articles 403(1) item 1, 415(1) item 1 and 424, PCCK.

In another case before the Municipal Court of Pejë/Peç, on 13 April 2006 two lay judges of the same gender presided over a trial against two juveniles who allegedly committed the crimes of Light Bodily Injuries,¹²² Aggravated Theft¹²³ and Theft.¹²⁴ The fact that the lay judges were not of different genders violated the JJC requirement.

The OSCE also observed a case in which detention on remand of a child was not ordered by a juvenile judge, as required by the JJC.

In a case before the District Court of Prishtinë/Priština, the prosecutor investigated a female minor for allegedly Attempting Murder¹²⁵ of a male who allegedly previously raped her. On 9 December 2004, in violation of Article 64(1) of the JJC, the pre-trial judge – who was not a juvenile judge – ordered one month detention on remand.

The above examples show violations of domestic procedural law related to the competence and composition of the juvenile panel and of the juvenile judge. In addition, these cases violate international legal standards regarding the rights to a tribunal and to a fair trial as established by law. Finally, the courts have failed to protect the best interests of the child principle in violation of the CRC.

B. Delays in criminal proceedings against juveniles

International fair trial standards guarantee that everyone charged with a criminal offence has the right to a hearing within a reasonable time.¹²⁶ The ECtHR has stated that the purpose of this guarantee is to protect “all parties to court proceedings [...] against excessive procedural delays”¹²⁷ and, in criminal cases, it is specifically “designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.”¹²⁸ Under established ECtHR case law, the reasonableness of the length of the proceeding depends on the particular circumstances of the case and consequently there is no absolute time limit.¹²⁹

While domestic law often establishes time limits for court proceedings, a violation of domestic procedural requirements will not necessarily result in a violation under article 6(1) of the ECHR.¹³⁰

¹²² Article 153(2), PCCK.

¹²³ Article 253(1) item 1, PCCK.

¹²⁴ Article 252(1), PCCK.

¹²⁵ Articles 146 and 20, PCCK.

¹²⁶ Article 6(1) ECHR. See also Article 14(1), ICCPR.

¹²⁷ *Stögmüller v. Austria*, 1602/62, judgment, 10 November 1969, para.5 (Section “As to the law”).

¹²⁸ *Id.*

¹²⁹ *König v. FRG*, 6232/73, judgment, 28 June 1978, para.99. The ECtHR considers factors such as the complexity of the case, the conduct of the applicant and of the judicial and administrative authorities of the State, and what is at stake for the applicant. See, e.g., *König v. FRG*, *id.*, and *Buchholz v. FRG*, 7759/77, judgment, 6 May 1991, para.49.

¹³⁰ The ECtHR will analyse each case independently. However, the fact that domestic time limits have been disregarded may indicate that the length of the proceedings was unreasonable. For example, in *B. v. Austria*, 11968/86, judgment, 28 March 1990, the Austrian Code of Criminal Procedure specified that the written judgment should be delivered within fourteen days. However, it took the judge thirty-

Arguably, for children, the international standard for the right to a hearing within a reasonable time is stricter. The CRC states that in all actions undertaken by courts of law concerning children, “the best interests of the child shall be a primary consideration.”¹³¹ More specifically, under the CRC every child allegedly guilty of a criminal offence has the right “to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.”¹³² In addition, The Beijing Rules¹³³ stress that “each case [against a juvenile] shall from the outset be handled expeditiously, without unnecessary delay.”¹³⁴

The rules and principles described above show that “[t]he speedy conduct of formal procedures in juvenile cases is of a paramount concern. As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically.”¹³⁵ Therefore, the best interests of the child require that courts comply with these obligations and avoid unnecessary delays in criminal proceedings involving juveniles.

With regard to domestic law, the JJC generally requires that “the authorities or institutions that participate in proceedings involving minors [...] are obliged to proceed expeditiously and without unnecessary delay.”¹³⁶ More specifically, the JJC imposes strict time limits when a juvenile panel receives a motion of the public prosecutor after completing the preparatory proceeding.¹³⁷ “If the juvenile judge does not issue a ruling to dismiss the motion or to transfer the matter to another court, he or she shall schedule the main trial *within eight days* of the receipt of the motion.”¹³⁸ (emphasis added) The short time limit to schedule the main trial after the motion of the prosecutor reduces legal uncertainty and psychological trauma for juveniles in a criminal case. This furthers the best interests of the child.

Despite these domestic legal requirements and international standards and principles related to juvenile justice, the OSCE has monitored cases in which the courts did not follow the deadline for scheduling the main trial:

In a case before the Municipal Court of Pejë/Peć, on 17 March 2006, the Prosecutor filed a motion for imposition of an educational measure¹³⁹ against two juveniles who, allegedly committed the crimes of Light Bodily Injuries,¹⁴⁰ Aggravated Theft and Theft.¹⁴¹ While the main trial should have been scheduled within 8 days of the motion, it only began on 13 April 2006.

three months to complete this task, and the ECtHR found a violation of the right to a trial within a reasonable time under Article 6(1) of the ECHR. *id.*, para.54-55.

¹³¹ Article 3(1), CRC.

¹³² Article 40(2)(b)(iii), CRC.

¹³³ *Supra* at 116.

¹³⁴ *Id.*, Rule 20.1. See also Rules 7.1, 14.1 and 14.2.

¹³⁵ *Id.*, Commentary to Rule 20.1.

¹³⁶ Article 37(1), JJC.

¹³⁷ Article 61(1), JJC.

¹³⁸ Article 67(1) and (2), JJC.

¹³⁹ Articles 6 and 16-26, JJC.

¹⁴⁰ Article 153(2), PCCK.

¹⁴¹ Article 253(1) item 1 and Article 252(1), PCCK.

In a second case, on 14 March 2005 the Public Prosecutor at the District Court of Mitrovicë/Mitrovica brought a motion for punishment against a juvenile girl for Attempted Murder¹⁴² committed against a person who allegedly raped her. However, the main trial started only on 8 May 2006, more than 13 months after the Prosecutor originally filed the motion.

In summary, the cases described above show that courts in Kosovo have violated domestic law, international fair trial standards, and child specific protections foreseen by the CRC by not adhering to deadlines for scheduling trials in criminal cases involving juveniles.

C. *Duration of the detention*

Deprivation of the liberty of a child poses a special problem in that the child, who is still at an early stage of development, may suffer serious and even irreversible adverse psychological effects if removed from his or her family for purposes of detention. Consequently, international human rights law seeks to limit situations where children are imprisoned or otherwise detained.¹⁴³

The CRC states that “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”¹⁴⁴ Echoing the CRC, the JJC of Kosovo states “Deprivation of liberty shall only be as a last resort and shall be limited to the shortest possible period of time.”¹⁴⁵ It further states that “[a]s an exception, a juvenile judge may order detention on remand if [certain grounds in the PCPCK] are present and if alternatives to detention on remand would be insufficient to ensure the presence of the minor, to prevent re-offending and to ensure the successful conduct of the proceedings.”¹⁴⁶

Regarding specific detention periods, the JJC provides that “[a] minor may be held in detention on remand on the initial ruling for a maximum of one month from the day he or she was arrested. The detention on remand of a minor may only be extended by a juvenile panel of the competent court for an additional period of up to two months.”¹⁴⁷ Therefore, a juvenile can be held in detention on remand for no more than three months in total, regardless of the stage of the proceeding. The JJC also states that “[a]rticles 279–297 of the Provisional Criminal Procedure Code shall apply *mutatis mutandis* to the detention on remand of minors.”¹⁴⁸

¹⁴² Articles 146 and 20(1) PCKK.

¹⁴³ In general, detention refers to imprisonment before, during, or after any resulting criminal trial. Under the PCPCK (Article 279-297), “detention on remand” refers to imprisonment prior to any final judgment in a case.

¹⁴⁴ Article 37(b), CRC. *See also* the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by UN General Assembly resolution No. 45/113 of 14 December 1990, which highlight principles which the authorities should respect in cases of juveniles under detention.

¹⁴⁵ Article 1(3), JJC.

¹⁴⁶ Article 64(1), JJC.

¹⁴⁷ Article 64(2), JJC.

¹⁴⁸ Article 66(1), JJC.

Confusion about Article 66(1), and its reference to Articles 279-297 of the PCPCK of the JJC, has led judges and prosecutors to incorrectly conclude that the JJC allows for detention on remand of minors for more than three months. However, the JJC should be interpreted as *lex specialis* in relation to the PCPCK, and the more specific provisions of the JJC override the PCPCK.¹⁴⁹ Moreover, the principles of the best interests of the child and *favor rei*¹⁵⁰ (most favourable legal interpretation for the defendant) suggest that any confusion regarding the period of detention should be construed in the juvenile defendant's favour. Thus, a juvenile defendant cannot be detained on remand in Kosovo for more than three months under the JJC, international human rights standards, and general principle of interpreting legislation.

Despite these legal requirements, the OSCE has monitored cases where the court ordered detention on remand of juveniles for more than three months.

In a case before the District Court of Prishtinë/Priština, on 28 November 2005, the judge ordered the detention on remand of a fifteen-year-old boy suspected of committing the crimes of Murder¹⁵¹ and Unauthorised Ownership, Possession or Use of Weapons.¹⁵² On 24 October 2006 (after remaining unlawfully detained for almost one year), the court extended the detention for two additional months until 24 December 2006.

In another case before the same court, the juvenile defendant was accused of the crime of Sexual Abuse of Persons Under the Age of Sixteen Years for allegedly committing sexual acts against a nine-year-old child.¹⁵³ On 20 May 2006, the pre-trial judge ordered detention on remand of the defendant which continued until 20 September 2006 (four months of detention in total). On that date, the court found him guilty and sentenced him to one year and six months (which will include time already spent in detention).

In the cases described above, the OSCE observed that defence counsel did not file a *habeas corpus* petition available under the PCPCK to challenge the lawfulness of the detention. Nor did the lawyers complain about procedural violations.¹⁵⁴ More generally, the OSCE has noticed that defence counsel and prosecutors often do not object when violations of domestic law or international human rights standards occur. Defence counsel and prosecutors can help to improve compliance with the law and international human rights standards by increasing their knowledge of domestic law and international human rights standards, and more actively objecting to observed violations.

¹⁴⁹ See Article 4, JJC.

¹⁵⁰ See Article 3(2), PCPCK.

¹⁵¹ Article 146, PCCK.

¹⁵² Article 328(2), PCCK.

¹⁵³ Article 198(1), PCCK.

¹⁵⁴ “[A]t any time, the detainee or his or her defence counsel may petition any pre-trial judge or presiding judge to determine the lawfulness of detention.” Article 286(2), PCPCK.

D. Unlawful proceedings against juveniles in Minor Offences Courts

According to applicable law, juveniles may face criminal proceedings in the Municipal Courts, District Courts, and MOCs. As discussed in the second chapter which focused on the MOCs, under ECtHR case law many minor offences in Kosovo should be classified as criminal and defendants are entitled to the international fair trial standards required for criminal proceedings.

Of particular relevance for juvenile criminal defendants, the CRC states that “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”¹⁵⁵ must be foreseen in the law. The domestic legislation on minor offences states that “[a] juvenile who in the time of commission of an offence has not reached fourteen years of age (a child) shall not be held responsible for the offence”.¹⁵⁶ In addition, the CRC also recognises the *nullum crimen sine lege* principle. Under this principle, “[n]o child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed.”¹⁵⁷

Domestic law and the best interests of the child principle require that juveniles under fourteen years old at the time of the alleged criminal offence should not be subject to proceedings before the MOC. Juveniles under 14 should not be subject to the emotional and mental trauma of court proceedings. Moreover, juveniles should not be subject to criminal proceedings when the law allegedly violated has been repealed.

Despite these legal requirements, the OSCE has monitored cases involving juvenile defendants in the MOCs for alleged offences committed when they were under 14 years old or based on laws no longer applicable.

For example, on 19 June 2006, the MOC in Prizren tried a juvenile defendant for an offence punishable by imprisonment up to two months¹⁵⁸ that he committed on 30 November 2005 when he was 13 years old.¹⁵⁹

In another case before the same court on the same date, the court tried a juvenile defendant for a minor offence he allegedly committed on 20 September 2005, when he was under fourteen years old.¹⁶⁰ Of further concern, the request to initiate the minor offence proceeding referred to a law that had been repealed in 2003.¹⁶¹

¹⁵⁵ Article 40(3)(a), CRC.

¹⁵⁶ Article 19(1), LMOS, *supra* at 40.

¹⁵⁷ Article 40(2)(a), CRC.

¹⁵⁸ Article 18(1) item 5, Law on Public Peace and Order (The Official Gazette of the SAP of Kosovo, No. 13/81).

¹⁵⁹ The defendant was born on 4 April 1992.

¹⁶⁰ The defendant was born on 8 July 1992.

¹⁶¹ The request to start the minor offence procedure referred to Article 111(1) item 24 of the Law on Forest of 1987 (The Official Gazette of the SAP of Kosovo, No. 10/87). However, Article 39 of Law No. 2003/3 On Forests in Kosovo, promulgated by UNMIK Regulation No. 2003/6 (20 March 2003) repealed the Law on Forest of 1987.

The cases described above illustrate how the MOCs have violated domestic law and international human rights standards (particularly the “best interests of the child” principle under the CRC) by trying juveniles for alleged criminal offences which they committed under the age of 14 or under laws no longer applicable in Kosovo.

III. RECOMMENDATIONS

To judges, prosecutors and other relevant authorities:

- Follow the “best interest of the child” principle in criminal proceedings involving juveniles;
- Ensure that the detention on remand imposed on juveniles does not exceed three months; and,
- Release all juveniles held in detention on remand for longer than three months, in violation of current legislation and international legal standards (such as the CRC).

To judges:

- Strictly comply with the procedural rules under the JJC related to the role of the juvenile judge and composition of the panel of judges in criminal proceedings involving juveniles;
- Lay judges in juvenile panels should be of different genders as required by law;
- A juvenile panel and juvenile judge should try adults who allegedly commit criminal offences listed in Article 141 of the JJC against children;
- Proceed expeditiously and avoid unnecessary delays in criminal proceedings involving juveniles; and,
- As soon as the juvenile panel receives a motion by the public prosecutor for the imposition of an educational measure or a punishment at the end of the preparatory proceedings, unless there is a decision to dismiss the motion or to transfer the matter to another court, immediately, and no later than eight days, schedule the main trial.

To lawyers representing juvenile defendants:

- File a *habeas corpus* petition for the release of juveniles who are currently in detention on remand for a period longer than three months.¹⁶²

¹⁶² Article 286(2), PCPCK.

To all MOCs:

- Dismiss cases against juveniles for offences allegedly committed under the age of fourteen years old or based on laws no longer applicable.

To the Kosovo Chamber of Advocates:

- Organise trainings for defence counsel on the JJC, its relationship to the PCPCK, and international human rights standards related to juvenile justice.