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Mission in Kosovo

Department of Human Rights, Decentralization and Communities

Legal System Monitoring Section

REPORT ON DOMESTIC VIOLENCE CASES IN KOSOVO

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GLOSSARY

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CSW	Center for Social Work
DVR	UNMIK Regulation No. 2003/12 On Protection against Domestic Violence
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
LCP	Law on Contested Procedure
OSCE	Organization for Security and Co-operation in Europe
PCCK	Provisional Criminal Code of Kosovo
PCPCK	Provisional Criminal Procedure Code of Kosovo
UNMIK	United Nations Mission in Kosovo

I. INTRODUCTION

Domestic violence is usually defined as violence that occurs within a private dwelling between spouses or cohabitating individuals. Although in the majority of domestic violence cases the victims are women, violent acts perpetrated against children, men or elderly persons may also fall within the category of domestic violence cases. Due to the “private” nature of this violence, intervention may be difficult. Indeed, the reluctance to report domestic violence cases to the authorities and the patriarchal nature of some societies can negatively affect the response of governmental authorities to these practices. However, despite these obstacles, states still have a duty to effectively prevent and punish domestic violence.

In line with this duty, UNMIK Regulation No. 2003/12 On Protection Against Domestic Violence (DVR) was promulgated in Kosovo on 9 May 2003, which addresses the problem of violence within the home, particularly by giving victims of domestic violence the right to request a variety of protection measures against alleged perpetrators before the civil courts. This report addresses concerns identified by the OSCE with regard the DVR and its implementation by the justice system.

A major problem observed by the OSCE is unlawful delays in deciding on applications for protection orders and scheduling hearings. This frustrates the purpose of the DVR and can jeopardize the health and safety of the protected party.

A further problematic area involves domestic violence proceedings where alleged victims or witnesses are children. The OSCE has monitored cases where representatives of the Centre for Social Work (CSW) did not attend hearings involving children, although the best interest of the child would have so required.

Another concern is the lack of clear rules in the DVR regarding whether the hearing in domestic violence cases should be public or private. The OSCE has also noticed the improper composition of trial panels and insufficient reasoning of domestic violence decisions.

Moreover, the OSCE has identified concerns regarding the appellate procedure in domestic violence cases. In some cases, the court unlawfully noted in the decision that an appeal would stay the execution of a protection order. In addition, the deadline for submitting appeals pursuant to the DVR should be clarified.

Furthermore, the OSCE is concerned about the failure of the authorities to *ex officio* prosecute criminal offences that occur during domestic violence as required by law.

Finally, the OSCE makes a number of recommendations to the relevant authorities to remedy the highlighted shortcomings.

II. LEGAL FRAMEWORK

As the majority of domestic violence victims are women and children, international instruments covering the human rights of women and of children typically address the problem. In this context, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹ and the Convention on the Rights of the Child (CRC)² are directly applicable in Kosovo.³

The CEDAW urges states to “pursue by all appropriate means and without delay a policy of eliminating violence against women” and to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”⁴ In interpreting the CEDAW, the Committee on the Elimination of Discrimination against Women stated that violence against women constitutes a human rights violation and that “[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”⁵

The CRC stresses that all violence against children is prohibited, and requires that states enact “all appropriate legislation (...) to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.”⁶

Also, the European Convention on Human Rights (ECHR) requires states to take measures to combat domestic violence. The prohibition in Article 3 of the ECHR that no one shall be subject to torture or degrading treatment or punishment, in combination with Article 1, which obliges states to secure to everyone within their jurisdiction the enjoyment of the rights and freedoms defined in the ECHR, imposes

¹ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was adopted by UN General Assembly Resolution 34/180 of 18 December 1979.

² The Convention on the Rights of the Child (CRC), adopted by UN General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990.

³ See Sections 3(2) (c), (e), (f) and 3(3) of the Constitutional Framework for Provisional Self-Government in Kosovo, promulgated by UNMIK Regulation 2001/9, 15 May 2001, and amended by UNMIK Regulation 2002/9.

⁴ Article 4, CEDAW.

⁵ See General Recommendation 19 of the Committee on the Elimination of Discrimination against Women, (the treaty body overseeing states’ compliance with the CEDAW) adopted in 1992. The Committee further recommended that the following measures should be taken by states to provide effective protection of women against violence: “[e]ffective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence” and “[p]rotective measures, including refuges, counseling, rehabilitation action and support services for women who are the victims of violence or who are at risk of violence.” (Article 24(t) (i) and (iii)). See also the views of the Committee adopted on 26 January 2005 regarding the case *A.T. v Hungary*, *Communication No. 2/2003*, where the Committee decided that due to the lack of effective legal and other measures, Hungary failed to provide effective protection against domestic violence and thereby violated the rights provided under the CEDAW (see sections 9.1-9.6 of the January 2005 views). These views of the Committee were issued in accordance with the Optional Protocol to the CEDAW, adopted by General Assembly Resolution A/54/4 on 6 October 1999.

⁶ Article 19, CRC.

on states an affirmative duty to prevent torture or degrading conduct that occurs in the domestic context. According to case law of the European Court of Human Rights (ECtHR), Article 3 requires public authorities to take adequate measures to ensure that individuals are not subject to inhuman or degrading treatment (including domestic violence) by private persons.⁷ The legal framework must protect victims in such situations.⁸

These international treaties are supplemented by other instruments. While not legally binding, the instruments set standards and elaborate principles to combat domestic violence. For example, the Declaration of the Elimination of Violence adopted by the UN General Assembly in 1993 requests that member states pursue, by all appropriate means, a policy of eliminating violence against women.⁹ Also, the Parliamentary Assembly of the Council of Europe addressed the issue of domestic violence against women in several recommendations and resolutions.¹⁰ More specifically, in Recommendation 1582 (2002), the Assembly urges member states to recognize that they have an obligation to prevent, investigate and punish all acts of domestic violence and protect domestic violence victims.¹¹

In Kosovo, domestic violence does not constitute a distinct criminal offence. However, the DVR requires that the crimes of light bodily injury and property damage be “automatically prosecuted” when committed in the context of a domestic relationship.¹² In addition, according to the Provisional Criminal Code of Kosovo (PCKK),¹³ some criminal offences may be punished with a higher sentence when committed against a person with whom the perpetrator has a domestic relationship.¹⁴

⁷ *A. v. the United Kingdom*, European Court of Human Rights (ECtHR), judgment, 23 September 1998, para. 22; *Z. v. United Kingdom*, ECtHR, judgment, 10 May 2001, para. 73; see also Report of the Ombudsperson Institution in Kosovo: *Concerning the implementation of Section 7 and Section 9 of UNMIK Regulation No. 2003/12 On Protection against Domestic Violence*, 23 November 2006, paras. 21 to 31.

⁸ *A. v. the United Kingdom*, see *ibid.*, para. 24.

⁹ Article 4 of the Declaration on the Elimination of Violence against Women, adopted by General Assembly Resolution 48/104 on 20 December 1993.

¹⁰ *Inter alia*: Recommendation 1450 (2000), *Violence against women in Europe*; Recommendation 1523 (2001), *Domestic slavery*; Recommendation 1582 (2002), *Domestic violence against women*; Recommendation 1663 (2004), *Domestic slavery: servitude, au pairs and mail-order brides*; Recommendation 1681 (2004), *Campaign to combat domestic violence against women in Europe*.

¹¹ Parliamentary Assembly of the Council of Europe, Recommendation 1582 (2002), para. 4. Other examples of non-binding instruments: UN Security Council Resolution 1325 (2000) requires authorities to protect women and girls from gender based violence; the Economic and Social Council (ECOSOC) agreed on *Guidelines on justice matters involving child victims and witnesses of crimes* (ECOSOC Resolution 2005/20, 22 July 2005); the *Outcome of the 2005 UN Summit* includes agreements to strengthen national capacities to improve the situation for children who had been subject to domestic violence (see UN General Assembly Document A/60/L.1 dated 15 September 2005, para. 141).

¹² Sections 16(2) and 16(3), DVR.

¹³ Provisional Criminal Code of Kosovo (PCKK), promulgated by UNMIK Regulation 2003/25, 6 July 2003, as amended by UNMIK Regulation 2004/19.

¹⁴ This is the case with regard to the following criminal offences: light bodily harm (Article 153(4) PCKK), grievous bodily harm (Article 154(3), PCKK), threat (Article 161(3), PCKK), unlawful deprivation of liberty (Article 162(4), PCKK), rape (Article 193(3) 8), PCKK), sexual assault (Article 195(3) 8), PCKK), and degradation of sexual integrity (Article 196(3) 7), PCKK). For a definition of domestic relationship in the PCKK, see Article 107 (2)(24), PCKK.

The DVR, which entered into force in May 2003, establishes a new civil procedure by which a victim of domestic violence¹⁵ may file a petition for a protection order, an emergency protection order, or an interim emergency protection order.¹⁶

The DVR contains an exhaustive list of acts or omissions which may fall under the category of domestic violence, if committed against a person with whom the perpetrator is or has been in a domestic relationship.¹⁷ Domestic relationship is broadly defined under the DVR as a relationship between two individuals, who are engaged, married or cohabitating without marriage, who share a household and are related by blood, marriage, adoption, or are in a guardian relationship, including parents, grandparents, children, grandchildren, siblings, aunts, nieces, nephews or cousins or who are the parents of a common child.¹⁸

The DVR also contains a list of measures that can be employed in protection orders, emergency protection orders and interim protection orders.¹⁹ It states that a violation of such orders constitutes a criminal offence, prosecuted *ex officio*.²⁰

Finally, there is a right of appeal against a decision for a protection order or the confirmation of an emergency protection order. The appeal must be filed eight days from the issuance of the decision, even though the appeal does not stay the execution of the order.²¹

III. CONCERNS IDENTIFIED DURING MONITORING OF JUDICIAL PROCEEDINGS

Although the DVR sends a clear message of non-tolerance of domestic violence, only its effective implementation can reduce the problem of domestic violence in Kosovo. This section focuses on the concerns identified by the OSCE regarding the DVR and the handling of domestic violence cases by the courts in Kosovo.

¹⁵ Apart from the protected party, the DVR also allows other persons/institutions to file a petition for a protection order or an emergency protection order. See Sections 6 and 13, DVR.

¹⁶ A protection order can be requested from the competent court when the petitioner fears for the safety, health or well-being of the protected party. Section 6(3) (d) , DVR. To issue an emergency protection order the threat to the safety, health or well-being of the protected party must be imminent or immediate. See Section 10(1) b), DVR. Outside of court hours, interim emergency protection orders may be submitted to the law enforcement authorities. These interim orders expire on the end of the next working day of the court. Section 13, DVR.

¹⁷ Such acts or omissions include: inflicting bodily injury; non-consensual sexual acts or sexual exploitation; causing fear for physical, emotional or economic well-being; kidnapping; causing property damage; unlawfully limiting freedom of movement; forcibly entering the property of the other person; forcibly removing the other person from a common habitation; prohibiting the other person from entering or leaving a common residence; or engaging in a pattern of conduct to degrade the other person. Section 1(2), DVR.

¹⁸ Section 1(1), DVR.

¹⁹ Section 2, DVR. For the measures that can be ordered for a protection order, see Section 2(1) (a)-(p), for an emergency protection order see Section 2(1) (a)-(h), and for an interim protection order, see Section 2(1) (a)-(c), DVR.

²⁰ Sections 15 and 16, DVR.

²¹ Section 11, DVR.

A. Delays in scheduling hearings

A major problem identified by the OSCE is unlawful delays in deciding on applications for protection orders or scheduling hearings. These delays not only violate domestic law and international law, but also thwart the purpose of protection orders.

While the OSCE has reported on this problem in the past,²² the continued disregard by judges of the statutory deadline for ruling on petitions for protective orders merits stressing the problem again.

Under the DVR, a petition for a protection order must be decided within fifteen days from the date the petition is received by the court.²³ Petitions for emergency protection orders shall be decided within 24 hours from the date the petition is filed.²⁴ In practice, courts fail to comply with the deadlines established by the DVR. The cases described below serve as examples.

In a case before the Municipal Court in Prizren, the protected party²⁵ filed a petition for a protection order on 30 June 2005 because her husband allegedly had beaten her and caused her injuries.²⁶ However, the first hearing was not scheduled until 8 May 2006, ten months after the filing of the petition. Moreover, this initial hearing was postponed so that the plaintiff could submit additional evidence. It was ultimately held on 2 June 2006. The court dismissed the case on 2 June 2006.²⁷

In a case before the Municipal Court in Mitrovicë/Mitrovica, an injured party requested protection measures on 5 April 2006 for herself and her three children. Her husband had allegedly verbally mistreated her and threatened to expel her from the house if she notified the police. Although the defendant had allegedly broken the plaintiff's arm and physically assaulted her in previous incidents, the court only scheduled the first hearing almost one year later, on 22 March 2007.

In a second case before the Municipal Court in Mitrovicë/Mitrovica, while the protected party filed a petition for a protection order on 29 May 2006 because her husband allegedly attacked her several times at home and threatened to kill her, the court did not schedule the first hearing until 27 June 2006. The court postponed the hearing twice because of problems in delivering the

²² See Department of Human Rights and Rule of Law Monthly Reports, March 2005 and August 2005. As of 2007, the Department was renamed the Department of Human Rights, Decentralization and Communities.

²³ Section 7(1), DVR.

²⁴ Section 9(1), DVR.

²⁵ Section 1(6), DVR defines "protected party" as a person subject to domestic abuse and for whose benefit a protection order is sought.

²⁶ The protected party requested that the court issue the orders described in Section 2(1) (a) - (d) and (f), DVR.

²⁷ The plaintiff filed an appeal, which is still pending.

summons.²⁸ The hearing finally occurred on 21 July 2006. The court issued the protection order on 4 August 2006.

In a case before the Municipal Court in Gjilan/Gnjilane, the protected party requested on 7 February 2007 a protection order because her husband had allegedly abused her physically and psychologically, and threatened to kill her father and brothers. The court scheduled the first hearing only on 27 February 2007. The judge then postponed it until 19 March 2007 because of alleged difficulties in summoning the protected party.

These excessive delays in domestic violence cases raise serious concerns as the courts did not respect the required time limit for ruling on petitions for a protection order. While the deadline for ruling on a petition for a protection order is 15 days, in the above examples a decision was not made from six weeks to almost one year after the filing of the request.

The purpose of the short deadlines under the DVR for domestic violence proceedings is to protect those at risk from harm.²⁹ If the applications for protective orders are not handled immediately, the alleged victim of domestic violence suffers the risk of further aggression and physical or psychological harm from the time when the protected party files the petition until the court reaches a decision. As some municipal courts do not meet the deadline established in the DVR, courts in Kosovo fail to protect alleged victims of domestic violence. However, courts not only violate domestic law, but also international human rights standards which require effective measures to protect victims of domestic violence from inhuman or degrading treatment.

In addition to the excessive delays in scheduling hearings and deciding on requests for protection orders, the OSCE has also observed that judges fail to decide a request for a protection order when there is a simultaneous divorce proceeding involving the same parties. The following case serves as an example:

On 8 May 2006, the protected party filed before the Municipal Court in Prishtinë/Priština a request for a protection order allowing her to use the residence shared by the defendant (her husband), who had allegedly previously expelled her. On 26 May 2006, the court issued the requested protection order, which was overturned upon appeal on 31 July 2006. The appellate court returned the case to the court of first instance for re-trial. The first instance judge, however, did not immediately re-schedule the case on the protection order issue. The judge did not schedule the hearing, in part, to wait until the conclusion of the divorce case, which the husband submitted to the District Court in Prishtinë/Priština on 16 June 2006. The first session for re-trial on the protection order was finally scheduled for 7 December 2006, which was

²⁸ The case was postponed because the defendant was not properly summoned due to problems with delivery of summons in the northern part of Mitrovicë/Mitrovica.

²⁹ See Section 8(1) b) (The judge shall order a protection order if this is necessary to protect the safety, health or well-being of the protected party and/or a person with whom the protected party has a domestic relationship;), and Section 10(1) b) (The judge may order an emergency protection order if the respondent poses an immediate or imminent threat to the safety, health or well-being of the protected party) of the DVR.

postponed because the representatives of both parties proposed to wait for the decision in the pending divorce case. Finally, the retrial on the request for the protection order occurred on 6 February 2007, when the issue was moot because the relevant apartment had been sold on 20 October 2006.³⁰

The examples described above show that courts do not give adequate priority or apply relevant law in handling domestic violence cases. By not complying with the deadlines for deciding on requests for protective orders, courts thwart the purpose of the law and jeopardize the health and safety of the protected party.³¹

B. Legal representation and social protection of children during proceedings

The OSCE is also concerned about domestic violence proceedings where alleged victims or witnesses are children³². The CRC provides legal guidance in court proceedings involving children. The central message of the CRC is that in all decisions of public authorities – including courts – concerning children, the best interests of the child shall be a primary consideration.³³ In addition, Article 12 of the CRC requires that a child be provided with the opportunity to be heard in any judicial proceedings affecting the child, either directly or through a representative or an appropriate body.³⁴

The DVR provides that both the alleged victim and the defendant may be assisted by legal counsel in all proceedings related to a protection order, an emergency protection order or an interim emergency protection order.³⁵ Furthermore, upon his or her consent, the victim shall have a victim advocate representing his or her interests in

³⁰ According to Section 5 of the DVR, the municipal courts are generally competent to review petitions for protection orders. Only if a claim pursuant to the “applicable law on marriage and family relationships” has been filed in a competent court is that court competent to review a petition for a protection order (Section 5(3), DVR). However, in the present case, the petitioner initially filed the request for protection order in the municipal court and subsequently the husband filed the divorce claim in the district court. Consequently, the municipal court had jurisdiction to decide about the protection order, while the district court had jurisdiction regarding the divorce. There was no legal justification to delay the hearing on the protection order until resolution of the divorce case.

³¹ The OSCE notes that after highlighting this problem in past reports, some courts have improved compliance with the DVR. For example, in a case before Mitrovicë/Mitrovica Municipal Court in which the petitioner requested a protection order on 11 September 2006, the court issued the protection order only four days later, on 15 September 2006. In further examples dated 12 September 2006, 12 January 2007 and 20 March 2007, Pejë/Peć Municipal Court decided about the respective requests for protection orders within the time-limit foreseen in the DVR.

³² “Child” means a person who has not reached the age of eighteen years. See Section 1.9, DVR.

³³ Article 3, CRC.

³⁴ Article 12, CRC. Moreover, the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provide that child victims should have access to effective assistance by professionals who have received relevant training. See ECOSOC Resolution 2005/20, 22 July 2005, para. 22 *et seq.*

³⁵ Section 4, DVR. This right to assistance by legal counsel is meaningless in cases where the alleged victim of domestic violence cannot afford to pay for legal counsel. UNMIK Regulation No. 2006/36 On Legal Aid, 7 June 2006 (Legal Aid Regulation), which sets up a legal aid system for Kosovo, foresees the provision of legal aid for children. Of concern, the regulation does not explicitly provide legal aid to alleged victims of domestic violence, but only for matters of separation, divorce and family law (see Section 9, Legal Aid Regulation). At present, the legal aid system is not fully operational.

emergency protection orders proceedings.³⁶ In cases where a protected party is a child or the alleged acts of domestic violence impact a child, the court shall hold a hearing where a representative from the CSW may also be heard. The court shall immediately summon the representative of the CSW and request that such person present a written opinion assessing the situation of the protected party.³⁷

Furthermore, since the procedure established by UNMIK Regulation is a civil procedure, provisions of the Law on Contested Procedure (LCP)³⁸ may also apply in domestic violence proceedings. For example, one potentially applicable provision of the LCP states that “[a] party that does not have the capacity to undertake the proceedings shall be represented by its legal representative.”³⁹

Generally, parents have the right and obligation to legally represent their children.⁴⁰ However, under certain circumstances, such as in judicial disputes where the child and the parents are opposing parties, it may not be in the best interest of the child for the parents to act as his or her representative. For example, Article 343 of the Family Law provides in disputes regarding the verification or refusal of paternity, if the child and parent who is the legal representative of the child have opposing interests in the suit as plaintiff and defendant, the custodian body - which is the CSW⁴¹ - shall assign a special custodian to the child.

However, the DVR is not clear whether there is a mandatory requirement for the CSW to be heard and represent the interests of the child in domestic violence cases. The DVR only provides in Section 7(2) that the court “shall hold a hearing” where a representative from the CSW “may be heard.” Although the plain language is ambiguous, the section should be interpreted in light of the CRC, so that there is a mandatory requirement to hear the CSW if the best interests of the child so require. This will be the case in the vast majority of domestic violence cases, especially when one of the parents allegedly commits violence. In these cases, typically opposing interests between parents and the child are at stake. Furthermore, the CSW has the responsibility to ensure child protection and the provision of social care or counselling if a child is suffering as a consequence of family conflict.⁴² Consequently, the CSW should also defend the interests of children in domestic violence proceedings. This

³⁶ Section 6(6), DVR.

³⁷ Section 7(2) (d) and 7.3, DVR.

³⁸ Law on Contested Procedure (LCP), Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, and 35/91.

³⁹ Article 80, LCP. Children and adults with specific disabilities are examples of person who lack capacity to represent themselves in court proceedings. See commentaries to Article 80 of the LCP by Tomislav Ralčić (judge of Supreme Court of Serbia) and Vitoje Tanasković (judge of the District Court Belgrade), published by Knjizevne Novine, Beograd 1980, page 162.

⁴⁰ Article 133, Kosovo Assembly Law No. 2004/32 on Family, promulgated by UNMIK Regulation No. 2006/7, 16 February 2006 (Family Law).

⁴¹ According to Article 6 of the Family Law, the custodian body is an administrative municipal body competent for social issues. This administrative municipal body is the CSW, as defined under Article 7 of the Kosovo Assembly Law No. 02/L-17 on Social and Family Services, promulgated by Regulation No. 2005/46, 14 October 2005 (Law on Social and Family Services).

⁴² Article 9 of the Law on Social and Family Services. The definition of a person in need to whom social and family services should be provided includes any person who is in need of social services because of disordered family relationships and domestic violence. See Article 1(3) (e) (4.) and (10.) of the Law on Social and Family Services.

may help to ensure that children can present their opinions and effectively participate in a legal process affecting them.

Of note, according to Section 7(3) of the DVR, the court must “immediately summon” a representative and request a written report. In such cases, the CSW typically must provide an expert assessment of the social circumstances of the relevant person and make recommendations for their future well-being within twenty one days of the request.⁴³

However, the OSCE has monitored cases involving children where the courts failed to summon a representative from the CSW, or a properly summoned CSW representative failed to appear at a hearing and the court nonetheless continued with the proceedings:

In a domestic violence case before the Municipal Court in Gjilan/Gnjilane, a mother requested a protection order on 29 September 2006 for herself and her infant son because of alleged psychological and physical injury caused by the defendant.⁴⁴ She also asked that she be allowed to return to the same apartment building as the defendant. Although the court summoned the representative of the CSW to attend a 13 October 2006 session, a representative of the CSW failed to appear at the hearing. The court nevertheless continued with the session and issued the requested protection order.⁴⁵

In another domestic violence case before the Municipal Court in Gjilan/Gnjilane, on 1 February 2006 the plaintiff/wife left with her two children from a shared residence because her husband allegedly attacked her. Under the proposed protective order, the plaintiff requested that she and her sons be allowed to use one floor of their common house and the husband be prohibited from approaching and threatening her, or committing any act of domestic violence against her or their children. Because the court failed to summon a representative of the CSW for the proceedings, in which the 15 year old son testified as a witness to the alleged attack,⁴⁶ a representative of the CSW was not present. Moreover, the court did not ask the child whether he wished to continue living in the residence.

In a case before the Municipal Court in Leposavić/Leposaviq on 13 April 2006, the court summoned the CSW for the session on 27 April 2006 to represent one of the protected parties who was also a child, and to deliver a written opinion on how to proceed in this case. The CSW in writing recommended that the defendant vacate the common house, but failed to attend the court hearing. However, that day the court decided on the request of

⁴³ Article 14 of the Law on Social and Family Services.

⁴⁴ The defendant was sentenced to five months imprisonment, which was suspended for one year, by the Gjilan/Gnjilane Municipal Court for the criminal act of threat according to Articles 161(1) and 161(4) of the PCCK. The court held the main public session on 29 September 2006.

⁴⁵ The victim advocate who was present at the hearing was passive.

⁴⁶ The child was shaking and crying during the testimony and was clearly uncomfortable sitting next to his father.

protection order which differed from the recommendation of the written report of the CSW.⁴⁷

In the examples described above, the mothers of the children victims represented them. It is questionable whether this served the best interests of the child and respected the rights of the children to be heard. For example, in the first case from Gjilan/Gnjilane the mother desired to return to her husband's apartment although he had mistreated her and the baby. Since the potential for further violence existed, arguably returning home was not in the best interest of the child. Similarly, in the second case (also from Gjilan/Gnjilane), the mother requested to return to the husband's house with the children although the husband had allegedly committed acts of physical violence against them. Finally, in the latter two cases, neither the child nor his representative presented the child's views regarding the appropriate decision on the request for the protection order.

By conducting hearings without the presence of a representative from the CSW, the court may have acted contrary to the best interests of the child under Articles 3 and 12 of the CRC. The OSCE recommends that courts notify the Ministry of Labour and Social Welfare when the CSW fails to ensure the attendance of its employees at hearings when properly summoned, and that disciplinary proceedings are initiated if necessary against them.⁴⁸

C. The right to public proceedings

The OSCE is also concerned about the lack of clear rules regarding whether the hearing in domestic violence cases should be public. Article 3 of the CRC provides that the best interest of the child must be accounted for in court proceedings involving children. In the context of publicity of proceedings, the Committee on the Rights of the Child⁴⁹ urges states to ensure that the needs and concerns of child victims who have suffered physical violence are considered during court proceedings. Therefore, the identity of the victim should be confidential, and the public and media at times should be excluded from the courtroom during the proceedings.⁵⁰ Furthermore, according to Recommendation 1582 (2002) of the Council of Europe on *Domestic Violence against Women*, hearings in domestic violence cases should preferably be non-public.⁵¹

⁴⁷ In the protection order dated 27 April 2006, the court prohibited the defendant from committing or threatening to commit any act of domestic violence against the protected parties, and allowed the plaintiffs to use all of the premises of the house and to watch TV.

⁴⁸ The Ministry of Labour and Social Welfare shall direct and supervise the labour and social welfare administration institutions, and, in cooperation with the municipalities, the social welfare offices and other institutions involved in the implementation of labour and social welfare policies, see Annex VII (vi) of UNMIK Regulation No. 2005/15 Amending UNMIK Regulation No. 2001/19 On the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, 16 March 2005.

⁴⁹ The UN treaty-body overseeing the implementation of the CRC.

⁵⁰ Committee on the Rights of the Child, Day of General Discussion on the Rights of the Child to be Heard, Recommendations, 29 September 2006, para. 50.

⁵¹ Parliamentary Assembly of the Council of Europe, Recommendation 1582 (2002), *Legal measures to be taken*, para. v.

Of note, the exclusion of the public from some court hearings does not violate Article 6 of the ECHR which provides for a right to a public hearing. This right is subject to restrictions, under Article 6 of the ECHR. For example, according to Article 6 of the ECHR, the public may be excluded from all or part of the trial, where the interests of juveniles or the protection of the private life of the parties so require.⁵²

Consistent with international legal standards, Kosovo laws allow for the exclusion of the public in specific court proceedings, such as marital disputes, lawsuits concerning the verification of paternity, disputes regarding custody of a child,⁵³ and in criminal proceedings in which a criminal offence had been committed against a child.⁵⁴ The justifications for the exclusion of the public in these cases under the ECHR, such as the protection of the private life and the interests of juveniles, arguably also apply in domestic violence cases.

However the DVR does not address the issue of whether or under which conditions, the public may be excluded from domestic violence proceedings. Also, the LCP, which applies in domestic violence proceedings where the DVR does not regulate the same issue,⁵⁵ does not permit the exclusion of the public from court proceedings in the interests of juveniles and for the protection of private life.⁵⁶ In summary, by holding domestic violence proceedings in public, courts may violate the principle of the best interest of the child, fail to adequately protect the confidentiality of private life, and ignore the Council of Europe recommendation on *Domestic Violence against Women*.

D. Improper composition of the trial panels

According to Section 5(4) of the DVR, the review of a petition for a protection order or an emergency protection order shall be conducted by a single judge. However, the OSCE has monitored domestic violence proceedings where lay judges served as members of a trial panel:

In a case before the Municipal Court of Prishtinë/Priština, two lay judges served on a trial panel during the hearing on 17 November 2006.

In another case before the Municipal Court of Prishtinë/Priština, two lay judges were present at a hearing on 4 December 2006.

⁵² For example, the ECtHR found in the case of *P. and B. v. United Kingdom* that child custody proceedings were “prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interest of justice. To enable the deciding judge to gain as full and accurate a picture as possible [...] and contact opinions open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment (see *P. and B. v. United Kingdom*, ECtHR, judgment, 24 April 2001, para. 38).

⁵³ Articles 75 and 345, Family Law.

⁵⁴ See Articles 143(5) and 47, Juvenile Justice Code of Kosovo, promulgated by UNMIK Regulation 2004/8, 20 April 2004.

⁵⁵ See 18.2, DVR.

⁵⁶ Article 307 of the LCP only provides for the exclusion of the public during the trial if this is necessary for “preservation of an official, business or personal secret, interest of public order, and reasons of morality.”

The presence of lay judges as members of the trial panel contradicts the DVR and prevents a uniform practice of all courts to adjudicate domestic violence petitions by a single judge. Furthermore, this may violate the right to a tribunal established by law under Article 6 ECHR. 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.⁵⁷

E. Insufficient reasoning of decisions

Another concern identified by the OSCE is the insufficient reasoning in decisions on protection orders in domestic violence cases. This breaches applicable law and may affect the right of parties to a fair trial.

According to the ECtHR case law, the requirement of a reasoned decision in both civil and criminal cases is implied by the right to a fair trial under Article 6 of the ECHR. The requirement of a reasoned judgment is particularly important so the party can exercise the right to appeal, because without reasons justifying a court decision the appealing party cannot properly challenge the decision of the lower court.⁵⁸

The DVR requires that “[t]he court shall issue a protection order [...] if it determines that: there are grounds to believe that the respondent has committed or threatened to commit an act of domestic violence; and the issuance of the protection order is necessary to protect the safety, health or well being of the protected party.”⁵⁹ The DVR lists essential elements that the protection order must contain (such as specific protection measures, duration, violation constitutes a criminal offence, and right of appeal).⁶⁰ Furthermore, the LCP also states that a final judgment must contain an explanation including the facts and evidence upon which it is grounded.⁶¹

Despite these provisions of domestic law and international standards, the OSCE has monitored cases where court decisions on protection orders were not reasoned.

In a domestic violence case before the Gjilan/Gnjilane Municipal Court in which the protected party requested a protection order on 29 September 2006, the court issued a protection order on 13 October 2006 in which it stated the ordered measures without any explanation or reasoning.

In a second example before the Municipal Court of Pejë/Peć, the judge issued a protection order dated 24 November 2006 without any explanation or reasoning.⁶²

⁵⁷ See *Zand v. Italy*, Commission Report No. 7360/76, 1978 and *Rossi v. France*, Commission Report No. 11879/85, 1989.

⁵⁸ See *Suominen v. Finland*, ECtHR, judgment, 24 July 2003, paras. 34-38.

⁵⁹ Section 8(1) (a) (b), DVR.

⁶⁰ Section 8(3), DVR.

⁶¹ See Article 338(1), LCP. Pursuant to Section 18(2), DVR, “[t]he provisions of the Law on Contested Procedure shall be applicable when not specified in [the] Regulation as a special contested procedure.”

⁶² Besides hearing the petitioner and victim advocate, the court had no other source of evidence. Moreover, the defendant was not present at the hearing and could not defend himself (raising other fair trial issues). The court had no evidence other than the testimony of the plaintiff and victim advocate to

In another domestic violence case before the Municipal Court of Pejë/Peć, the court issued a protection order on 4 September 2006. It stated that the protection order is grounded according to the UNMIK-Regulation,⁶³ without reference to the facts of the case or further explanation.

In another example before the Municipal Court of Prishtinë/Priština, the court in the emergency protection order dated 20 November 2006 stated that the order is necessary to protect the safety, health or well-being of the protected party. The court noted that there is reason to believe that the respondent committed an act of domestic violence, without referring to the facts or explaining the reasons for this decision.

In several domestic violence cases before the Municipal Court in Mitrovicë/Mitrovica, the judge issued protection orders⁶⁴ that only stated that the orders are necessary to protect the well-being and health of the protected parties. The decisions did not refer to the facts of the case or other evidence to base its conclusions.

These cases violate domestic and international legal requirements for a reasoned decision. The right of a fair trial includes the right to receive a reasoned decision. Moreover, the lack of a reasoned decision hampers the ability to appeal such a decision and may infringe the right to an effective remedy.

F. Problems with appeals: The failure to execute protection orders and unclear filing deadlines

One of the most important elements of a fair justice system is the existence of an effective procedure for the execution of final judgments. The right to a fair trial is incomplete if judgments are not enforced.⁶⁵

In general, the execution of court decisions is regulated by the Law on Execution.⁶⁶ In addition, the DVR stipulates that a person who violates a protection order should be fined between 200 and 2000 Euro or imprisoned up to six months.⁶⁷ According to the DVR, the filing of an appeal does not stay the execution of a protection order.⁶⁸

reach the conclusion of reasonable suspicion that the respondent committed an act of domestic violence.

⁶³ The court referred to Section 8(3) (b), DVR.

⁶⁴ Dated 11 April 2006, 21 July 2006, 15 September 2006, and 27 September 2006.

⁶⁵ The right to have a claim relating to civil rights and obligations brought before a court would be illusory if a final judicial decision could remain inoperative to the detriment of one party. See the judgment of the ECtHR in the case of *Hornsby v. Greece*, where the Court stated that “[i]t would be inconceivable that Article 6(1) [of the ECHR] should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions.” See *Hornsby v. Greece*, ECtHR, judgment, 19 March 1997, para. 40.

⁶⁶ See Article 1(1) of the Law on Execution, Official Gazette of SFRY, No. 29/78 (LEP).

⁶⁷ Section 15, DVR.

⁶⁸ Section 11(2), DVR.

However, the OSCE has monitored cases, where the court wrongly indicated in the protection order that an appeal would stay the execution of a protection order.

In a case before the Gjilan/Gnjilane Municipal Court, the court issued a protection order on 13 October 2006 stating that an appeal would stay the execution. After the court issued the protection order on 24 October 2006, the defendant appealed the decision on 31 October 2006. On appeal, the Gjilan/Gnjilane District Court upheld the protection order on 6 December 2006. Although on that date the lower court decision was finally executable, by that time the house which was the subject of the protection order had been sold to a third party.⁶⁹

In a second case before the Gjilan/Gnjilane Municipal Court, the judge issued a protection order on 26 February 2006 stating that an appeal stays its execution.

The unlawful decision to stay a protection order on appeal violates the DVR and possibly international law, and jeopardizes the health and safety of the protected party.

In addition to the problem of delays in executing judgments, the OSCE has noticed that the DVR arguably contains inconsistent provisions regarding the deadline to file an appeal from a decision on a petition for a protection order.

According to Section 8(3) d) of the DVR, the protection order shall state, “[a] notification of the right to appeal the protection order within eight days from receipt of such an order.” In contrast, Section 11(1) of the DVR states that an appeal against a decision on a petition for a protection order shall be filed within eight days from the issuance of such decision. Thus, it is unclear if the eight-day deadline should start from receipt of the protection order or from the date of its issuance. Although the protection order should be immediately served to the defendant upon its issuance, these events may not occur simultaneously. In light of the ambiguity regarding the deadline for filing an appeal to the issuance of a protection order, the DVR should be amended by the legislative authorities.

G. Failure of the authorities to prosecute criminal offences arising from domestic violence

The Provisional Criminal Procedure Code of Kosovo (PCPCK), requires that “[t]he public prosecutor shall initiate an investigation [...] if there is a reasonable suspicion that a person has committed a criminal offence which is prosecuted *ex officio*.”⁷⁰ Moreover, authorities may violate international human rights standards if they do not

⁶⁹ The defendant was then fined 200 EUR by Gjilan/Gnjilane Municipal Court for violation of the protection order on 16 February 2007. On the same date, the protected party filed a request for modification of the protection order which was denied by the court on 13 March 2007. This decision is still under appeal.

⁷⁰ See Article 6(3) and 220(1), PCPCK.

demonstrate due diligence in investigating, protecting, and punishing criminal violations.⁷¹

Since the entry into force of the DVR, the crime of light bodily harm committed in the context of a domestic relationship must be automatically prosecuted, i.e. whether or not the injured party so requests.⁷² The *rationale* of the law is twofold. First, to ensure that public authorities, including the prosecutor, do not leave unpunished violent crimes committed in the context of a domestic relationship. Second, to free the victim from the additional burden of deciding whether or not to initiate a prosecution.⁷³

Despite the clear legal requirements of the DVR and the PCPCK, the OSCE has monitored several cases where persons who had likely committed the crime of light bodily harm during a domestic relationship did not face prosecution.⁷⁴

In a case in Ferizaj/Uroševac, on 20 November 2006 the Municipal Public Prosecutor dismissed a police criminal report⁷⁵ dated 3 November 2006 that indicated a man had physically assaulted his wife and caused her injuries, thus committing a crime that should be prosecuted *ex officio*. According to the police investigation, there had been violence between the couple prior to the current incident.⁷⁶ In the decision of dismissal, the prosecutor wrongly interpreted the current applicable legislation and affirmed that both parties committed “domestic violence”, a criminal offence that does not exist. In addition, the

⁷¹ General Comment No. 31, UN Human Rights Committee, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004 (CCPR/C/21/Rev.1/Add.13), para. 8. In its concluding observations on the state report of the Republic of Moldova, the Committee on the Elimination of Discrimination against Women emphasized that violence against women, “including domestic violence, constitutes a violation of the human rights of women under the Convention”. It called on the Government “to ensure that such violence constitutes a crime punishable under criminal law, that it is prosecuted and punished with the required severity and speed” (*Report of the Committee on the Elimination of Discrimination against Women*, 22nd session and 23rd session, UN doc. A/55/38, 17 August 2000, para. 102). The Committee also urged Uzbekistan to ensure that women and girls who are victims of violence, including domestic violence, “have immediate means of redress and protection” (*Report of the Committee*, 24th session, UN doc. A/56/38, 20 April 2001, para. 177).

⁷² The DVR requires the automatic prosecution of the crime of light bodily harm (Section 16(2)), thus amending the then applicable law, according to which this crime could only be prosecuted if the injured party so requested. Under the PCCK, a motion by the injured party is no longer required for the crime of light bodily harm (see Article 153, PCCK). In short, since the entry into force of the DVR, the prosecutor must prosecute *ex officio* the crime of light bodily harm. Of note, the PCCK reintroduced the requirement of a motion for the prosecution of the crime of “damage to moveable property” (see Articles 260 and 275 PCCK), thus superseding the opposite provision of the DVR (Section 16(3)).

⁷³ Also, the injured party should not be vulnerable to pressure and intimidation by the perpetrator and/or the family.

⁷⁴ Police officers interviewed by the OSCE suggested that one of the reasons for the failure to prosecute is that the parties reconcile and no charges are brought by the public prosecutor. However, under the PCPCK, the prosecutor does not have discretion not to prosecute. The prosecutor may dismiss a criminal report or terminate investigations only when specific legal conditions occur (see Articles 208 and 224, PCPCK). In cases of domestic violence, the PCPCK does not give the prosecutor the option not to initiate or to abandon criminal prosecution, since the crime of light bodily harm, when committed in the context of a domestic relationship, is punishable by imprisonment of six months to three years, well beyond the one year limit foreseen by Article 227. Similarly, the public prosecutor cannot suspend investigations pursuant to Article 226, since para. 5 expressly states that this mechanism does not apply to domestic violence. Finally, the mediation procedure under Article 228 of the PCPCK may apply, but must be implemented by an independent mediator, not by the public prosecutor.

⁷⁵ See Article 208, PCPCK.

⁷⁶ The case file does not contain a medical certificate, or any request for such a document.

decision on dismissal stated that “[t]he criminal offence [of domestic violence] is not among the criminal offences prosecuted *ex officio*.”⁷⁷

In another case, before the Mitrović/Mitrovica Municipal Court, on 23 March 2007 the prosecutor dismissed a police report related to the alleged beating of a child by her father with a stick.⁷⁸ In the decision dismissing the police report, the prosecutor incorrectly noted that there are no elements of any criminal offences which are prosecuted *ex officio* in the actions of the defendant.

In the above described cases, the lack of a medical report makes it difficult to determine whether enough evidence indicated the commission of the crime of light bodily harm. The police thus failed to timely provide the prosecutor with all the evidence needed for the prosecution of a possible crime. However, the prosecutor also did not exercise due diligence in the preparatory investigative activities by failing to collect all the necessary evidence. Consequently, a person who likely engaged in criminal conduct never faced justice.

The OSCE has also monitored cases where authorities issued protection orders pursuant to the DVR, rather than investigating and, if appropriate, prosecuting the crime of bodily harm.

In a case before the Pejë/Peć authorities, in February 2007 the police provided the prosecution with a case file related to domestic violence incidents where a female victim sustained noticeable bodily injuries. The public prosecutor’s office could not locate the case in its registry. Consequently, a prosecutor never investigated or prosecuted a likely crime.⁷⁹ Rather, the Municipal Court issued a protection order against the husband.

In a case from 2004 handled by the Leposavić/Leposaviq authorities, involving domestic violence that resulted in visible injuries on the wife’s face, the police case file was sent to the prosecution. Again, the prosecution never initiated an investigation as the case does not appear in the registry of the prosecution.

A protection order is not a substitute for a criminal prosecution, which remains an obligation of the prosecutor. Therefore, the failure to prosecute certain crimes (including light bodily harm), committed in the context of a domestic relationship, violates domestic law and international legal standards.

⁷⁷ Unofficial OSCE translation of the relevant part of the decision of the prosecutor of 20 November 2006.

⁷⁸ Again, however, no medical report was attached to the file.

⁷⁹ In several cases dealt with in 2003 and 2004 by the Pejë/Peć authorities, the police sent files related to domestic violence directly to the competent Municipal Court. However, there is no indication in the prosecution’s office of an investigation or decision to terminate any investigation. In one case the medical report indicates that the victim sustained severe injuries in the left hand and nose. Prosecution of these crimes is now statute-barred, according to the applicable law (see Article 90, PCKK in conjunction with Article 153, PCKK).

IV. CONCLUSION

Following international law, the DVR establishes a civil procedure by which a victim of domestic violence may request a protection order in court. However, the DVR is not clear in certain areas, and at times judges do not respect the provisions of the DVR.

The OSCE noted unlawful delays in deciding on applications for protection orders or scheduling hearings, shortcomings where alleged victims or witnesses are children, and a lack of clear rules in the DVR regarding whether the hearings should be public. Other observed shortcomings included the improper composition of trial panels, insufficient reasoning of court decisions, and problems with the appellate proceedings. Finally, the OSCE is deeply concerned about the failure of prosecutors to prosecute certain criminal offences that occur in the context of a domestic relationship. These shortcomings are troubling, especially when they jeopardize the health and safety of the protected party.

V. RECOMMENDATIONS

To the Legislator:

- The DVR should be amended to clarify that a representative of the CSW must be heard in domestic violence proceedings involving children.
- The deadline for submitting appeals should be clarified in the DVR.

To the Judges, Prosecutors, and Police:

- When deciding on requests for protection orders, judges should comply with relevant law and decide applications within the established deadlines.
- Judges should properly justify decisions in domestic violence cases through clear, reasoned decisions with reference to the facts of the case.
- Judges should ensure the presence of a representative of the CSW in domestic violence proceedings when one of the protected parties is a juvenile.
- Prosecutors should promptly investigate and, if appropriate, prosecute, with the required due diligence, persons who may have committed crimes, such as light bodily harm, in the context of domestic violence.
- Prosecutors and police should ensure that any medical reports indicating that a victim of domestic violence sustained physical injuries are ordered and included in the police report forwarded to the prosecution.
- Regardless of whether a protection order has been issued, police and prosecutors must ensure prosecution whenever it appears that a crime that is

prosecuted *ex officio* has been committed in the context of a domestic relationship.

To the Kosovo Judicial Institute:

- The Kosovo Judicial Institute should train judges and prosecutors on the applicable law in domestic violence cases, including the DVR, the CEDAW and the CRC.

To the Centre for Social Work:

- The CSW should respond to court summons and attend domestic violence proceedings to provide their expertise, and provide expert opinions and reports.

To the Ministry of Labour and Social Welfare

- The Ministry of Labour and Social Welfare should ensure that the CSW responds to court summons in domestic violence cases and provide training for CSWs on the CRC.