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Department of Human Rights and Rule of Law

Legal System Monitoring Section

KOSOVO

REVIEW OF THE CRIMINAL JUSTICE SYSTEM (APRIL 2003-OCTOBER 2004)

CRIME, DETENTION, AND PUNISHMENT

GLOSSARY

ADOJ	Administrative Department of Justice
DJA	Department of Judicial Administration
DOJ	Department of Justice
CPT	The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention of the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
ICCPR	International Covenant on Civil and Political Rights
JAC	Joint Advisory Councils on Provisional Judicial Appointment
JIS	Judicial Integration Section
JJC	Juvenile Justice Code of Kosovo
KFOR	Kosovo Force
KJI	Kosovo Judicial Institute
KLA	Kosovo Liberation Army
KLC	Kosovo Law Centre
KPC	Kosovo Penal Code
KPS	Kosovo Police Service
LSMS	Legal System Monitoring Section
NATO	North Atlantic Treaty Organisation
OMiK	OSCE Mission in Kosovo
OSCE	Organization for Security and Co-operation in Europe
PCC	Provisional Criminal Code of Kosovo

PCPC	Provisional Criminal Procedure Code of Kosovo
SRSG	Special Representative of the Secretary-General
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
WPU	Witness Protection Unit

CHAPTER 1

EXECUTIVE SUMMARY

The criminal justice system in Kosovo has come a long way since its re-establishment in 1999. Efforts by local and international actors, including the recent introduction of the new criminal and criminal procedure codes, have transformed it into a functioning system. Nevertheless, the work is far from over.

The present Review analyses a selection of problematic issues relating to detention and punishment, which appear to be systemic within the judicial system. Court practices in pre-trial detention and sentencing, as well as institutional inadequacies may lead to breaches of the right to liberty and security of person and the right to a fair trial. These practices may serve to exacerbate the problem of prison overcrowding.

The OSCE has noted that, most commonly, decisions on pre-trial detention are improperly justified and regularly fail to consider the applicability of alternative measures. It would appear that on many occasions defendants are deprived of their liberty based on inadequately reasoned decisions, which not only hinder the right to appeal, but also impede public scrutiny of the administration of justice. Often, the competent authorities and agencies participating in criminal proceedings of detained persons do not act with the required special diligence, causing undue prolongation of pre-trial custody.

Important shortcomings have also been noticed in relation to sentencing: in particular, verdicts lack appropriate reasoning; courts make an excessive use of custodial measures without adequately considering alternative measures; and there is a lack of institutional capacity to apply certain alternative measures. The lack of institutional capacity is especially prominent in the area of sanctioning juvenile offenders.

Public focus on the Kosovo criminal justice system increased after the 17-19 March 2004 riots, which epitomised the fragility of inter-ethnic relations in Kosovo and put to the test the readiness and efficiency of the competent authorities to respond to widespread ethnically motivated violence. Following the events, the OSCE has closely monitored the response of the competent authorities in relation to criminal cases. Until present, one of the main areas of concern relates to obtaining witness testimony.

The present Review further looks into two recurring issues which have been addressed in previous reports. The OSCE continues to note troubling conduct by defence counsel, who frequently fail to effectively represent and act in the best interest of their clients. The last chapter addresses the present situation in the area of witness protection in the judicial system and outlines the developments that have taken place since the last Review of the criminal justice system.

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

CHAPTER 2

BACKGROUND

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

This chapter is intended to provide a brief background to the Review and to outline the institutional context of the LSMS and the Department.

I. THE MANDATE OF THE LEGAL SYSTEM MONITORING SECTION

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]

The UN Secretary-General, in his report to the UN Security Council of 12 July 1999, assigned the lead role of institution-building within UNMIK to the OSCE and indicated that one of the tasks of the Institution-building Pillar should include human rights monitoring and capacity building. He also instructed UNMIK to develop co-ordinated mechanisms to facilitate human rights monitoring and the due functioning of the judicial system:

> "UNMIK will have a core of human rights monitors and advisors who will have unhindered access to all parts of Kosovo to investigate human rights abuses and to ensure that human rights protection and promotion concerns are addressed through the overall activities of the mission. Human rights monitors will, through the Deputy Special Representative for Institution-building, report their findings to the Special Representative. The findings of the human rights monitors will be made public regularly and will be shared, as appropriate, with United Nations human rights mechanisms, in consultation with the Office of the United Nations High Commissioner for Human Rights. UNMIK will provide co-ordinated reporting and response capacity."[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 has the responsibility to monitor and report upon the judicial system in terms of human rights and the rule of law. As a section of the Department, LSMS is tasked with the role of monitoring cases in the justice system, assessing their compliance with international standards, and reporting on matters of concern.

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[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.

II. MONITORING THE JUSTICE SYSTEM

International human rights standards[4] are part of the applicable law in Kosovo through, *inter alia*, UNMIK Regulation 1999/24 - which obliges those holding public office in Kosovo to uphold internationally recognised human rights standards - as well as through the Constitutional Framework.[5] Thus, in assessing compliance with international standards, the OSCE uses as a basis for its analysis, international human rights conventions and jurisprudence.

This Review deals only with the *criminal* justice system. Criminal cases are monitored from the moment of arrest and/or detention, through the investigation stage, trial and appeal. The analysis and discussion in this Review are based on data and factual information collected during the reporting period by LSMS. The trial monitors predominantly cover criminal cases in the five district courts of Kosovo, and those cases on appeal in the Supreme Court of Kosovo (hereafter the Supreme Court). Certain cases before the municipal courts are also observed.

Information is gathered by attending court proceedings, reviewing court files and by conducting interviews with judges, justice officials, prosecutors, defence counsels, and law enforcement officers. During this reporting period, trial monitors observed over 400 cases, including pre-trial investigations and trials. The LSMS gave priority to the following cases:

- War crimes;
- organised crime;
- ethnically-motivated crime, including riot cases;
- gender based violence including victims of domestic violence and trafficking cases;
- detention;
- treatment of juveniles.

III. THE SCOPE OF THE REVIEW

In its first two reviews of the criminal justice system,[6] the OSCE presented a broad and comprehensive overview of the justice system from a human rights law perspective. The concerns expressed in these reviews referred to specific cases where the activities of the judiciary, the prosecutions, their administrators, and the law enforcement agencies, failed to comply with standards and guarantees of fair trial and due process. The third OSCE review[7] shifted its scope to identify concerns within the judicial system at a structural level. Specific areas of the criminal justice system, which were considered to raise the most pressing human rights issues, were addressed. Areas such as unlawful detention, inadequate defence representation, and trafficking cases were addressed to highlight non-conformity with international human rights standards. The fourth OSCE review[8] reported on concerns regarding the independence of the judiciary, the detention authority exercised by executive or military organs and the

[4] These international standards are detailed, *inter alia,* in Articles 9, 10, 14 of the International Convention on Civil and Political Rights (ICCPR) and Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or European Convention).
[5] UNMIK Regulation 2001/9 On the Constitutional Framework for Provisional Self-Government, adopted 15 May 2001, Chapter 3, Section 3.3, states that "the provisions of rights and freedoms set forth in these instruments [international human rights instruments] shall be directly applicable in Kosovo."
[6] Review of the Criminal Justice System, 1 February 2000 – 31 July 2000 (hereafter First Review); Review of the Criminal Justice System, 1 September 2000 – 28 February 2001 (hereafter Second Review).
[7] Review of the Criminal Justice System, October 2001 (hereafter Third Review).
[8] Review of the Criminal Justice System, September 2001-February 2002 (hereafter Fourth Review).

continuous arbitrary detention of the mentally ill in Kosovo, while the fifth review[9] examined the issue of witness protection.[10]

The present Review focuses on the detention and punishment of persons in the criminal justice system in Kosovo and looks at the judicial response to criminal cases related to the violent events of March 2004. It also addresses a number of issues that were raised in prior reviews namely, witness protection and access to effective defence counsel. In each chapter, the Review puts forward corresponding recommendations to assist the Police and Justice Pillar of UNMIK and other responsible authorities to develop their policies and practices.

Cases that support or illustrate the analysis and conclusions in this Review appear in separate indented paragraphs. This is to aid the reader in distinguishing case examples from the analytical paragraphs.

[9] Review of the Criminal Justice System, (March 2002 – April 2003) "Protection of Witnesses in the Criminal Justice System" (hereafter Fifth Review).

[10] See also the OSCE Human Rights and Rule of Law's special reports: the OSCE's Report 9 - "On the Administration of Justice" (March 2002) (hereafter OSCE HR/RoL Report 9); the OSCE's report on "Kosovo's War Crimes Trials: A Review" (July 2002); and the OSCE's report titled "The Administration of Justice in the Municipal Courts" (March 2004).

CHAPTER 3

A BRIEF HISTORICAL OVERVIEW OF THE JUDICIAL SYSTEM IN KOSOVO

I. INTRODUCTION

This historical overview of the judicial system is not intended to be an exhaustive list of all developments since 1999 – there have been far more. Nor is it intended to enumerate all the residual concerns. Rather, it is included to provide the reader, particularly the reader outside Kosovo, with a factual and legal context for the issues presented in the current Review.

As the UN entered Kosovo in 1999, the dust was still settling from an ethnic conflict which had followed decades of communist rule and ten years of active internal repression from Belgrade. Organised crime was rife and the police service was in ruins. No functioning judicial system existed and the rule of law was almost absent. Most of the judges and public prosecutors active before the start of the NATO bombing campaign had fled. The international military force, KFOR, was responsible for maintaining law and order.

II. THE RE-ESTABLISHMENT OF THE JUDICIAL SYSTEM

One of the first jobs for UNMIK was to re-establish the criminal justice system. As an emergency measure, on 28 June 1999, the newly appointed Special Representative of the Secretary General (SRSG) issued a decree establishing the Joint Advisory Council on Provisional Judicial Appointment (JAC). The JAC recommended the provisional appointment of judges and public prosecutors for a three-month renewable period, to an Emergency Judicial System; predominantly to conduct pre-trial hearings of those detained by KFOR. In response to the JAC's recommendations, between June and September 1999 the SRSG appointed a total of fifty-five judges and public prosecutors. Provisional district courts and public prosecutors' offices were established in Prishtinë/Priština, Prizren, Mitrovicë/Mitrovica and Pejë/Peć. Mobile units operated out of the Prishtinë/Priština District Court to cover those areas not served by the other courts.

At this stage, UNMIK had two major hurdles: Firstly, finding experienced Kosovo Albanian judges. Relatively few Kosovo Albanians had practiced law since 1989. And those Kosovo Albanians who had worked throughout the 1990's following the war were denounced as collaborators by the majority community. Secondly, creating an ethnically mixed judiciary - UNMIK made great efforts to recruit practitioners from all ethnicities, and the first round of hiring included seven Kosovo Serbs.[11] However, in July 1999 these Kosovo Serb judges started to resign from their posts and by October 1999 all the Kosovo Serb judges and prosecutors had resigned citing as reasons a lack of security, discrimination and insufficient remuneration.[12]

By 15 December 1999, hundreds of pre-trial detention hearings and 35 criminal trials had been completed. Over 200 cases were ready for trial. In addition to the new cases initiated since June 1999, thousands of criminal and civil cases initiated before the NATO intervention were pending, increasing the backlog of cases. However, the only court that had the lay judges necessary to hear criminal cases was the Prizren District Court. The lack of material resources (such as office supplies or furniture), low salaries and delays in payment of court staff increased the working frustrations.

[11] The initial ethnic breakdown of judges was as follows: 42 Kosovo Albanians, seven Kosovo Serbs, four Kosovo Bosniaks, one Kosovo Turk and one Kosovo Roma.
[12] First Review, *supra* footnote 6, p. 12.

III. THE INTRODUCTION OF INTERNATIONAL JUDGES AND PROSECUTORS

The resignation of the Kosovo Serb judges left an almost mono-ethnic judiciary. These judges and prosecutors were expected to deal with highly emotive, complex war crimes trials. Within a few months the judiciary was showing signs of ethnic bias; for example, Kosovo Serbs accused of relatively minor crimes were unjustifiably being kept in detention pending trial, whilst Kosovo Albanians who were caught red-handed committing violent acts against Kosovo Serbs were released pending trial. As a consequence, Kosovo Serbs lost faith in the judiciary, which further inflamed ethnic tensions.

In February 2000 ethnic violence exploded in the ethnically divided town of Mitrovicë/Mitrovica. In response, in order to deal with those arrested in the ethnic clashes, the SRSG appointed an international judge and an international prosecutor to Mitrovicë/Mitrovica.[13] A few months later, in May 2000, Serb detainees accused of war crimes went on hunger strike to protest against prolonged detention; many of them had been in custody for almost a year and some without an indictment. The strikers demanded that the two internationals immediately deal with their cases, apparently believing that only the internationals could provide them with a fair and impartial trial. But one judge and one prosecutor was clearly an insufficient number. As a consequence, on 29 May 2000, the SRSG passed UNMIK Regulation 2000/34[14] that extended the power to appoint international judges and prosecutors to the whole territory of Kosovo.[15] By the end of 2000 there were 10 international judges and three international prosecutors assigned to deal primarily with war crimes cases against Kosovo Serbs.

Despite the appointment of international judges and prosecutors it soon became clear that the problem of ethnic bias in the judiciary was still not resolved. In many cases involving ethnic violence, international judges were being outvoted by the Kosovo Albanian judges, as there was only one international judge on each five member panel. This resulted in notably questionable verdicts against a number of Kosovo Serb accused. Finally, UNMIK enacted Regulation 2000/64,[16] which enabled either the public prosecutor or defence counsel to petition the then Administrative Department of Justice (ADoJ) for the assignment of international judges and prosecutors where this was "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice."[17] Effectively, this gave UNMIK the power to assign to a case a panel of three professional judges (rather than two professional and three lay judges), with a minimum of two internationals. This assured that international judges could not be outvoted by the local judges. In addition, international prosecutors were given the power to resurrect cases that had been dropped by their local counterparts. This procedure is still in place in Kosovo today.

IV. MINORITIES AND THE COURTS

One of the major obstacles to an all-inclusive judicial system is the physical access to the courts for minority groups. Since the ninth assessment of the situation of ethnic minorities in Kosovo,[18] the situation has been improving, but it still varies significantly from region to region. Transportation services are

[13] UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors, 15 February 2000.
[14] UNMIK Regulation 2000/34 Amending UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors, 27 May 2000.
[15] First Review, *supra* footnote 6, p. 69.
[16] UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December 2000. For a further discussion regarding Regulation 2000/64, see the Second Review, *supra* footnote 6, pp. 75 ff (hereinafter "ff").
[17] In the absence of a petition, ADoJ may also act by its own motion. See UNMIK Regulation 2000/64, Section 1(2).
[18] UNHCR-OSCE Ninth Assessment of the Situation of Ethnic Minorities in Kosovo (September 2001-April 2002), p. 16.

sometimes provided, but the facilities remain nominal and the general anxiety of Kosovo Serb citizens prevails. The difficultly in accessing regular courts, perpetuates the existence of parallel court structures.[19]

The OSCE has recommended a comprehensive and co-ordinated effort to create a multi-ethnic judiciary in Kosovo, and also to ensure equal and effective access to justice for members of minority communities.[20] In response to these needs, at the beginning of 2002 UNMIK created the Judicial Integration Section (JIS) as part of the UNMIK Department of Justice. The mandate of the JIS is to promote the ethnic integration of judges and prosecutors in the Kosovo justice system, address access to justice problems affecting minorities, monitor the treatment of minorities in the justice system and address instances of discrimination. The JIS also works with the Department of Judicial Administration (DJA)[21] to facilitate the ethnic integration of court support staff.

Since 1999 a parallel structure of courts, answerable to Belgrade and not UNMIK, developed in Kosovo and continues to exist in predominantly Serb-enclaves. The parallel courts developed due to a lack of recognition of the UNMIK structures by the Kosovo Serbs who remained in Kosovo after the conflict. Parallel Serbian courts operate in Mitrovicë/Mitrovica region, Prishtinë/Priština, and in Gjilan/Gnjilane region. A parallel municipal court operates in Mitrovicë/Mitrovica. The District Court in Kraljevo (Serbia proper) has, within the parallel system, jurisdiction in Mitrovicë/Mitrovica region. In Prishtinë/Priština region, the parallel court in Lepina/Lepinë in Lipjan/Lipljan municipality has jurisdiction in Lipjan/Lipljan. Appeals from the court in Lepina/Lepinë are filed with the District Court in Niš (Serbia proper). In Gjilan/Gnjilane region, the parallel Municipal Court in Gjilan/Gnjilane has been relocated to Vranje (Serbia proper), and the Municipal Court in Štrpce/Shtërpcë operates from Leskovac (Serbia proper), with an administrative office in Štrpce/Shtërpcë. No known parallel courts are located in Pejë/Peć or Prizren. However, the parallel municipal courts for Pejë/Peć and Prizren operate from Leskovac and Kruševac (Serbia proper), respectively. It appears that in Serbia proper there are courts, which assume jurisdiction over every district and municipality of Kosovo.

UNMIK has been working towards dismantling the parallel courts through the concomitant opening of UNMIK courts in the northern municipalities. In this context, on 9 July 2002 a Joint Declaration was signed between the Minister of Justice of the Republic of Serbia and the UNMIK Deputy SRSG for Police and Justice to further facilitate the recruitment of Kosovo Serb prosecutors and judges into the UNMIK courts.[22] Following the application process, UNMIK opened municipal and minor offences courts in the predominately Serb populated municipalities of Leposavic/Leposaviq and Zubin Potok. Four municipal court judges and three minor offences court judges of Kosovo Serb ethnicity were sworn into office by the SRSG, with the effective date of appointment of 13 January 2003. The majority of judges, as well as their support staff had previously worked in the parallel system and the newly established courts were opened in the buildings of the parallel courts, with the understanding that the parallel courts were to be dismantled.

At the time of writing this Review, there were 313 judges, 86 prosecutors and 543 lay judges currently serving in Kosovo.[23] There are 16 Kosovo Serb judges and three Kosovo Serb prosecutors, 16 other minority judges and six other minority prosecutors, engaged in the UNMIK judicial system.[24] Although

[19] See further the OSCE Report on Parallel Court Activity in Northern Kosovo (November 2001), the OSCE and UNHCR Tenth Assessment of the Situation of Ethnic Minorities in Kosovo (March 2003), the OSCE report entitled Parallel Structures in Kosovo (October 2003).
[20] See the OSCE HR/RoL Report 9, *supra* footnote 10.
[21] The DJA is a Department of the Ministry of Public Services.
[22] "Joint Declaration on Recruitment of Judges and Prosecutors of Serb Ethnicity into the Multi-ethnic Justice System in Kosovo."
[23] DOJ Weekly Report (5-11 October 2004).
[24] DOJ Weekly Report, ibid.

matters have improved since 2000 and enormous efforts have been made to facilitate an ethnically mixed judiciary, the participation of minorities in the court system remains a challenge for UNMIK.

V. REFORM OF CRIMINAL LEGISLATION

Prior to 6 April 2004, the applicable law was a confusing combination of former Yugoslav Federal law, Republic laws, Kosovo codes, UNMIK Regulations, and various enumerated human rights instruments. Both local and international practitioners alike struggled to achieve consistency in the application of the sometimes contradictory laws, and regularly failed.

After years of drafting and re-drafting, a completely revised set of criminal codes entered into force on 6 April 2004.[25] The codes have their own problems in terms of drafting style, inconsistencies, and *lacunae*, but are nonetheless a very welcome development. Certainly the codes' emphasis on the applicability of international human rights standards sends an important message. With the help of bold judicial decisions interpreting and applying the law, it is hoped that the new codes will develop into a more refined judicial instrument.

The main change under the new criminal procedure code is the enhanced role of the public prosecutor who takes over many of the former responsibilities of the investigating judge. This change pitches the prosecution and defence in a more adversarial role so that evidence may be tested to the full. The introduction of a confirmation procedure for the indictment - which enables the judge to return flawed indictments prior to trial, and allows the accused to enter a plea - is also significant. Such innovations are intended to assist in the expedition of trials by enabling courts to avoid wasting time on weak cases or on trying cases in which the accused wishes to plead guilty.

VI. THE LEGAL SYSTEM TODAY

Four years ago the judicial system was in ruins. It has since been transformed into a functioning system, which incorporates many modern and progressive legal provisions and instruments. These improvements are the product of tremendous effort by both local and international actors, including judges, prosecutors, defence counsel and those within various judicial organs. However, major human rights and rule of law concerns persistently trouble the criminal justice system: Both local and international judges and prosecutors regularly breach applicable law, including human rights provisions; defence counsel fail to properly represent their clients; the Chamber of Advocates lacks control over its members; payments to *ex officio* defence counsel and experts are notably slow; the process of hiring court support staff is in urgent need of review;[26] appropriate facilities are lacking for juvenile and mentally ill offenders; witness intimidation is rife and courts lack the equipment to apply protective measures; and, perhaps most worryingly of all, UNMIK has only just started to implement its transition strategy in which competences for judicial matters are handed over to local actors and institutions.

[25] UNMIK Regulation 2003/25 On the Provisional Criminal Code of Kosovo (PCC) and UNMIK Regulation 2003/26 On the Provisional Criminal Procedure Code of Kosovo (PCPC).

[26] In May 2004, the OSCE was informed by a majority of the presidents and chief prosecutors of municipal courts that the method of hiring the court support staff is problematic. Support staff are hired by the Department of Judicial Administration (DJA) that operates under the auspices of the Ministry of Public Services (MPS). Reportedly, the staff are selected and hired without effective consultation with the presidents/chief prosecutors (although a judge often sits on the selection board, he or she is consistently outvoted by members from the DJA and MPS) resulting in the hiring of unsuitable persons. Apparently, nepotism and political affiliation has played a significant role in the selection and appointment of the court staff by DJA.

CHAPTER 4

PRE-TRIAL DETENTION

I. INTRODUCTION

According to international human rights standards, there is a presumption in favour of releasing a defendant pending trial. Pre-trial detention is a measure of last resort for ensuring the successful conduct of the criminal proceedings.[27] This standard forms part of the fundamental principle of the presumption of innocence[28] and the right to liberty and security of persons.[29] The International Covenant on Civil and Political Rights (ICCPR) states that the deprivation of liberty must be carried out based on such grounds and in accordance with such procedure as established by domestic law (principle of legality).[30] Similarly, the European Convention on Human Rights (ECHR) demands that the deprivation of liberty be in accordance with the law, for the exclusive purposes enumerated therein.[31] Moreover, the deprivation of liberty must not be arbitrary, in the sense that pre-trial custody must be reasonable and necessary in the circumstances.[32] In view of the exceptional nature of detention on remand, international standards foresee that release may be conditioned by guarantees to appear for trial.[33]

Consistent with international human rights standards, both the old and the new codes regard pre-trial detention as the most severe measure of ensuring the presence of an accused and the successful conduct of criminal proceedings, not to be invoked when a less severe measure would achieve the same purpose.[34] Accordingly, pre-trial detention must be kept to the shortest time necessary, while all agencies participating in criminal proceedings have a duty to proceed with special urgency if the defendant is being held in detention.[35]

The old code foresaw the possibility of ordering pre-trial detention, provided that there was a grounded suspicion that the suspect committed the criminal act, if there was a strong possibility of flight or a founded fear of interfering with the investigation or a fear of continued criminality or, for certain types of serious crimes, the possibility of disturbing the citizens.[36]

The old code also listed other measures as alternatives to custody.[37] However, these measures only pertained to guaranteeing the presence of the accused at trial and were not foreseen to cover the other grounds for which pre-trial detention could be ordered.[38] Most probably due to the fact that non-custodial

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[27] Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures ("Tokyo Rules"), which prescribes that "pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and the protection of society and the victim." Also see ***B. Hill. v. Spain***, Human Rights Committee, (2 April 1997), UN doc. GAOR, A/52/40 (Vol. II), p. 17, para. 12.3.
[28] Article 6(2) ECHR Article 14(2) ICCPR.
[29] Article 5(1) ECHR and Article 9(1) ICCPR.
[30] Article 9(1) ICCPR.
[31] Article 5(1) ECHR.
[32] Article 9(1) ICCPR. Also see ***A.W. Mukong v. Cameroon***, Human Rights Committee (21 July 1994), in UN doc. *GAOR*, A/49/40 (Vol. II), p. 181, para. 9.8, and ***Steel and others v. the United Kingdom***, European Court of Human Rights (hereinafter also "European Court"), 23 September 1998, para. 54.
[33] Article 5(3) ECHR and Article 9(3) ICCPR.
[34] Article 182(2) of the Federal Republic of Yugoslavia Criminal Procedural Code, Official Gazette SFRY, No. 26/86 (FRY CPC) and Article 268(1-2) PCPC.
[35] Article 190(2) FRY CPC and Articles 5(3) and 279(2) PCPC.
[36] Article 191(2) FRY CPC.
[37] Namely the summons, compulsion to appear, pledge not to conceal oneself and not to leave one's place of residence, and bail, as enumerated in Article 182(1) FRY CPC.
[38] Articles 183(1), 184(1), 185(1), and 186 FRY CPC.

measures had a rather limited scope of application, pre-trial custody became the rule, rather than the exception.

Detention on remand, according to the new code, may be ordered on the following cumulative conditions:

- Firstly, that there is a grounded suspicion that a person has committed a criminal offence;
- secondly, that there is a fear of flight, of interfering with evidence, or of repeated criminality; and,
- thirdly, that the alternative measures provided in the new code are insufficient to ensure the presence of the accused, the successful conduct of the proceedings and prevent re-offending.[39]

In order to minimise the use of detention on remand, the new procedural code introduces additional alternative measures. The applicable procedure also allows the court to prohibit the defendant from approaching a specific place or person, oblige him or her to report to a police station, or have him or her placed under house detention. Moreover, the new code prescribes the possibility of granting bail to thwart the risk of continued criminality, as well as to minimise the risk of flight.[40] The OSCE has observed that international, as well as local judges are increasingly using these measures, although their wider use should be further encouraged, as this chapter demonstrates.[41] Despite the fact that certain "teething" problems have already been noted in the application of alternative measures,[42] there have not been many examples, so as to qualify these problems as widespread at the present stage, and are thus not mentioned in this Review.

This chapter addresses several problematic practices that have been observed Kosovo-wide as regards pre-trial detention both before and after 6 April 2004. The issues raised comprise of the following:

- Firstly, the courts' failure to adequately justify the initial orders on pre-trial detention and to consider the applicability of alternative measures;
- secondly, certain issues relating to extension of detention orders, namely the lack of uniformity in the starting time of these extensions, the lack of justification of these orders, and the failure to explain the inapplicability of alternative measures;
- thirdly, matters regarding the decisions on appeals of detention orders; namely, the failure of the appellate courts to properly justify their decisions, the fact that their decisions are issued with considerable delays and the observation that the appellate procedure may not be truly adversarial. Moreover, it appears that the courts may not be adequately aware of how to address *habeas corpus* petitions; and,
- lastly, the failure of the competent authorities to show special diligence in various cases of detained persons and to promptly execute release orders.

As regards the issue of inadequate justification of detention orders, it may be noted that there is a line of available jurisprudence in which decisions are properly reasoned and in accordance with international standards. These decisions have been issued mostly by international judges or panels on which international judges have been sitting, at both the District and Supreme Court levels. However, the majority of detention orders by courts in Kosovo do not meet the requirement of proper justification. This chapter is concerned with the latter category of decisions and rulings.

[39] Article 281(1) subparas. (1-3) PCPC.
[40] See Articles 272, 273, 278 PCPC and 274(1 and 2), respectively.
[41] It may be of interest that on 8 February 2004, of the total 1.092 inmates in the correctional facilities in Kosovo, 441 were in pre-trial detention (37%). On 31 October 2004, of the total 1.193 inmates, 425 were in detention on remand (35,6%). Statistics are courtesy of Penal Management Division of the DOJ.
[42] For instance, there appears to be confusion in supervising the implementation of house detention.

II. INADEQUATE JUSTIFICATION OF INITIAL ORDERS ON DETENTION

Under both the old and the new codes, pre-trial detention is ordered by a judge after hearing the parties.[43] International standards and case-law require courts to give reasons for their decisions and judgments.[44] A reasoned decision demonstrates to the parties that they have been heard and allows public scrutiny of the administration of justice.[45]

Both the old and the new criminal procedure codes require that decisions on detention be fully reasoned.[46] In particular, the new code requires that all material facts dictating detention should be explained, which would also include an explanation of the reasons why the measures alternative to custody do not suffice.[47] Furthermore, Justice Circular 27/2000[48] states that all decisions on detention must be made on the basis of a fully reasoned written decision detailing the grounds for detention and any evidence relied upon in support of those grounds. The absence of justification in a detention decision or the mere paraphrasing of the law as justification constitute an essential violation of the criminal procedure and, consequently, form a ground for appeal.[49]

In the majority of the cases monitored, the OSCE has noted with concern that, contrary to the legal requirements, there was a lack of proper justification in the initial detention orders. As a general pattern, the order simply stated that, based on the case-file (essentially the documentation from the Police) and the statement of the suspect, there was a well-grounded suspicion that the suspect committed the criminal act.[50] Instead of providing an explanation on how the specific circumstances warranted the suspect's deprivation of liberty, the investigating judge would merely paraphrase the procedural provisions and/or use standard phrases. The arguments put forward by suspects and defence counsel during the preliminary hearings were rarely mentioned. The following are selected examples of the relevant practice observed at municipal and district courts, which was typical Kosovo-wide:

> In a case under the old code before the Prishtinë/Priština District Court, pre-trial detention was ordered on 21 January 2004 in relation to two suspects, charged with aggravated theft and unlawful possession of weapons, with the following justification: "Detention is ordered based on

[43] Articles 192(2) and 193(4) FRY CPC, and 282 PCPC.
[44] For instance see *Hood v. The United Kingdom*, European Court of Human Rights, 18 February 1999, para. 60, and *Smirnova v. Russia*, European Court of Human Rights, 24 October 2003, para. 71.
[45] See *Suominen v. Finland*, European Court of Human Rights, 1 July 2003, paras. 34-37.
[46] Article 192(2) FRY CPC provided that pre-trial custody shall be ordered in a written decision containing, among others, "the legal basis for custody …[and] a brief substantiation, in which the legal basis for ordering custody shall be specifically explained." Article 283 (1) PCPC foresees that detention on remand must be ordered by a written ruling, which should include, among others, "the legal grounds for detention on remand… [and] an explanation of all material facts which dictated detention on remand, including the reasons for the grounded suspicion that the person committed a criminal offence and the material facts under Article 281 (1) subparagraph (2) [PCPC]."
[47] Article 281(1) subpara. (3) PCPC. Although the new code does not explicitly mention that this condition should be justified in the ruling for detention on remand, it is nevertheless clear from the wording of Article 283(1) PCPC that the ruling should specifically explain all material facts, based on which the court deemed that the non-custodial measures were not sufficient in a specific case. The old law did not specifically require this explained in the detention decision, although its commentary stated that a decision on detention should also consist of the reasons explaining why more lenient measures would not have been sufficient; see Branko Petric, *Commentary on the Law on Criminal Procedure* (Belgrade, 2nd edition, Official Gazette of the SFRY, 1986), for Article 192(II), (hereinafter "*Commentary*").
[48] See Justice Circular 2000/27 Decisions on Detention, 19 December 2000.
[49] See Article 435 PCPC as read with Articles 401(1) subpara. (2) and 402 PCPC. For the old code, see Branko Petric, *Commentary*, *supra* footnote 47, and Article 398(1) as read with Articles 362(1) item (2) and 363 FRY CPC.
[50] In practice, the initial order on detention filed according to Article 191(2) FRY CPC did not examine if a grounded suspicion existed against the accused, since, in general, this was already established by a decision to conduct an investigation, which immediately preceded the detention order.

> Article 191 (2), items 1 and 2 FRY CPC since there are circumstances that indicate that if the suspects would be released they would flee and also influence the witnesses…" (unofficial translation). No specifics were given as to these circumstances.
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> The investigating judge at the Gjilan/Gnjilane Municipal Court ordered on 21 March 2004 the detention of a person suspected of having committed the crime of causing general danger on the following grounds: "there is a grounded fear that if the accused is in liberty, he might flee and hinder the investigation by influencing witnesses, and repeat the criminal act" (unofficial translation). The assertions were not related to the specific facts of the case.

To a great extent, the lack of justification of initial detention on remand rulings persists after the introduction of the new codes. Furthermore, despite the fact that the new code specifically requires that detention on remand be ordered only when the other measures do not suffice, the majority of rulings do not discuss (or even mention) the reason why these measures are inadequate. The following are examples indicative of this widespread phenomenon:

> In a case before the Prishtinë/Priština Municipal Court, two defendants were charged with attempted theft, following a summary indictment on 6 August 2004. In his 6 August 2004 initial ruling ordering detention on remand, the pre-trial judge found that: "if the defendants were released they could flee, hinder the conduct of the criminal proceedings and because there is a risk they could repeat similar criminal acts" (unofficial translation). Apart from not giving any reasons for believing that these grounds for detention on remand existed, the pre-trial judge did not consider any alternatives to pre-trial custody and did not demonstrate that these were insufficient in this case.
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> In a case before the District Court in Prizren, the two defendants were charged with unlawful purchase, possession, distribution and sale of dangerous narcotics, as well as unlawful possession of weapons. After a hearing on 4 July 2004, the pre-trial judge issued a ruling ordering detention on remand because: "there is a suspicion that the defendant may flee and would hinder the normal conduct of the criminal proceedings by influencing witnesses, destroying material evidence of the criminal offence and considering the weight of the criminal offence, therefore the imposition of detention is reasonable and necessary" (unofficial translation). The ruling did not explain the particular circumstances of each accused, which supported this decision. Additionally, it lacked any reference to non-custodial measures and an explanation of why these were inadequate.

These examples illustrate the trend that the grounds for detention rulings are not supported by evidence and specific circumstances. Moreover, the majority of initial rulings do not explain the reasons for which the court considered that the measures alternative to detention on remand did not suffice. Even when the decisions on detention may be substantially correct, the lack of proper justification violates the applicable law and, since the reasons for ordering detention are hard to ascertain, it hinders the right to appeal.

III. ISSUES ON EXTENSION OF DETENTION ORDERS

According to international standards, the persistence of a reasonable suspicion that the defendant has committed an offence is a condition *sine qua non* for the validity of the continued detention.[51] The judicial authorities must also cite relevant and sufficient grounds, which continue to justify the deprivation of liberty, and must display special diligence in the conduct of the proceedings.[52]

[51] See *Stögmüller v. Austria*, European Court of Human Rights, 10 November 1969, Series A no 9, p. 40, para. 4.
[52] See *B. v. Austria*, European Court of Human Rights, 28 March 1990, para. 42.

Domestic law establishes a system by which pre-trial detention is periodically reviewed by the court, both before and after the filing of an indictment until the pronouncement of the first instance verdict.[53]

A. Lack of Uniformity in the Starting Time of Extensions of Detention

Usually, both under the old and new codes, the extension of a suspect's detention was considered by the competent panel either on the day when the previous detention order was due to expire or a few days in advance. Both the old and new codes are unclear on the actual starting point of extensions of pre-trial custody.[54] The OSCE has observed that, most commonly, the courts issued decisions to extend detention, but calculated the starting point from the date when the previous order was due to expire (hereinafter "first practice"),[55] whereas other times they calculated the period of the extension of detention to start from the date they filed their decision (hereinafter "second practice").[56]

The OSCE is of the view that the court should make its decision based on present and not future circumstances. Since the court's decision to extend detention is effective immediately, the first practice actually leads to the court exceeding its authority by extending detention for a period essentially longer than the one prescribed by law.[57] The "second practice" is not only more logical and lawful - since it assesses the situation at the time of issuing the decision - but is also consistent with the principle that the court minimise the suspect's overall pre-trial detention.

B. Lack of Justification in the Extension of Detention Orders

Like initial orders on detention, orders extending detention must also be properly justified.[58] The OSCE has noted that the vast majority of decisions or rulings extending detention were not fully reasoned, if at all. When reviewing the grounds for detention, courts failed to perform a serious analysis with regard to the persistence or existence of the legal grounds for pre-trial detention. The lack of specificity in these decisions demonstrates an insufficient review of the circumstances of the case at the relevant stage of the proceedings, which violates the procedural law and hinders the possibility to appeal.

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[53] For the system of the old code see Articles 197, 199 and 265 FRY CPC, as well as UNMIK Regulation 1999/26 On the Extension of Periods of Pretrial Detention, 22 December 1999. For the new code system see Articles 282 – 287 and 306 PCPC.

[54] Article 197 FRY CPC only referred to the maximum periods for which the competent court could extend detention. Article 285 PCPC refers to the maximum period for which extensions of detention may be ordered by the competent court, although it specifies that the defence shall be informed of the prosecutor's motion to extend detention no less than three days prior to the expiry of the current ruling on detention on remand.

[55] For example, in a case before the District Court in Pejë/Peć, the accused was charged with participating in a group that commits violence, obstructing an official person performing official duties, blackmail and unlawful weapons possession. The defendant was arrested on 5 May 2004, and on 6 May 2004, the pre-trial judge ordered him detained on remand for one month until 4 June 2004. On 1 June 2004, the three-judge panel decided to extend the defendant's detention for one month, so that it continued from 4 June 2004 until 4 July 2004.

[56] For example, in a case before the District Court in Prizren under the new codes, the defendant charged with bodily injury was arrested on 1 July 2004. On 4 July 2004, the pre-trial judge ordered his detention to last until 1 August 2004. However, on 9 July 2004, only five days after the decision of the pre-trial judge, the three-judge panel decided to extend the detention of the defendant for an additional two months, and specified that it would last until 9 September 2004.

[57] For instance, in the example mentioned in the previous footnote regarding the case before the District Court in Prizren, had the panel followed the "first practice" of counting the start of the extension from the date the previous ruling would expire, it would have resulted in the evidently unlawful situation of extending the detention for approximately two months and three weeks.

[58] Neither the old nor the new codes explicitly outline what kind of justification the extension of detention orders should include. Nevertheless, decisions or rulings to extend detention would be covered by the scope of the Justice Circular 2000/27, *supra* footnote 48, which calls for all decisions on detention to be made on the basis of a fully reasoned written decision detailing the grounds for detention and any evidence relied upon in support of those grounds.

i) The Failure to Justify the Persistence of "Reasonable Suspicion"

As previously mentioned, international standards assert that the persistence of "reasonable suspicion"[59] that the defendant has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention.[60] It should be borne in mind that certain evidence that may initially support the existence of a reasonable suspicion at the early phases of criminal proceedings may become less relevant with the passage of time, especially if it is not corroborated by other evidentiary material.[61] Therefore, courts must satisfy themselves that reasonable suspicion continues to exist, whenever they determine an issue of pre-trial detention.

The OSCE observed that in most instances, courts have not established facts pointing to the continued existence of a reasonable suspicion that the defendant committed a crime, rather satisfying themselves merely with the decision to conduct an investigation.[62] This practice may lead to situations where persons continue to be detained when reasonable suspicion has ceased to exist. The following case illustrates how extreme the failings of the district courts and the Supreme Court can be when considering issues of detention, and how prejudicial this can be to the defendant:

> In a case before the Prizren District Court involving twelve accused charged, under the old code, with aggravated theft and robbery, one accused was detained on 12 May 2001 and kept in pre-trial detention until 26 January 2004, totalling almost two years and eight months. This was despite the fact that the accused had an alibi, namely, that he had been in detention on the day of the robbery, which he presented when he was heard by the investigating judge. Although this information was even supported by documentation from the Prizren Detention Centre, it was apparently never taken into consideration by the court, which extended detention 15 times, or by the appellate court, which rejected four times the appeals of the defence. Furthermore, the court rejected one of the extraordinary reviews of detention that was filed. At the beginning of the main trial on 26 January 2004, the trial panel finally considered that the accused should be released, because the grounds for detention had ceased to exist.

It is worth citing a passage from the verdict in this case, dated 4 March 2004, which speaks to the injustices caused by the failings of the District and Supreme Court:

> *"We are compelled to mention a couple of other matters that we feel we must address before taking of leave of this matter for they illustrate the grave injustices that have been inflicted upon some of the persons in this case, and which we hope shall not be repeated.* […] When [one of the defendants] appeared before the investigating judge on 24th August 2001 charged with participating in the commission of the criminal act of robbery in complicity on 31st July 2000 […] he told the investigating judge that he was in detention from 25th May 2000 to 18th August 2000,

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[59] See *Fox, Cambell and Hartley v. U.K.*, European Court of Human Rights, 30 August 1990, para. 32, which states that: "having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."

[60] See *Stögmüller v. Austria*, *supra* footnote 51.

[61] See *Labita v. Italy*, European Court of Human Rights, 6 April 2000, paras. 157 ff., where the Court addressed the pre-trial detention of a defendant on the basis of an uncorroborated statement.

[62] This practice may be owed to the conclusion of the fifth joint session of the Federal Court, the Supreme Courts of republics and provinces and the Supreme Military Court on 28/12/1976, which was adopted as the Basic Standpoint at the 18th session dated 25 and 26/06/1981. The text is quoted in Branko Petric, *Commentary*, *supra* footnote 47, on Article 197 FRY CPC and reads as follows: "When the Supreme Court decides on the extension of detention, as well as when the second instance court decides on the appeal of the detained person against the decision of the panel from Article 23(6) FRY CPC, when determining detention or extension of the deadline, it is not authorised to assess the existence of reasonable suspicion whether the detained person has committed a criminal act."

in the Prizren Detention Centre and could therefore not have committed the criminal charge brought against him.

The investigating judge ordered his pre trial detention, and this was subsequently, extended by the criminal panel, and the Supreme Court until his trial started on 19th January 2004. No attempt was made to verify from Prizren Detention Centre, just in an adjacent building to the court, whether the statement of the accused was true, and if it was, whether, he could have had an opportunity to go and commit the criminal act brought against him. The verification of this fact was important for establishing whether or not there existed a grounded suspicion if the accused had participated in the commission of the criminal act brought against him. The Investigating Judge and the Prosecutor were under a duty to resolve this issue, and it was very simple to do, given the proximity of the offices of the police, prosecutor, detention centre and the court. No effort was at all made to clear this up. Nevertheless the pre trial detention of the accused was routinely extended as if grounded suspicion existed that the accused had committed the criminal act brought against him. At the trial the prosecutor had no evidence to offer against the accused, and lamely, at the conclusion of the trial, conceded that the accused […] had been in detention at the time, and therefore could not have committed the criminal act in question. He dropped the charges against him.

After the glaring failure in the investigation we are shocked that the prosecutor could have brought an indictment against a person who clearly could not have committed the criminal act in question […].

The injustice inflicted on [the accused] *in this case resulting in two and half years of pre trial detention calls for redress from the administration without waiting for a possible action by* [the accused]. [The accused] *should never have been detained even for one day for a crime he could not have committed*. […]

In his closing address the Public Prosecutor, in answer to criticism that these charges ought not to have brought in light of the paucity of evidence, stated that it was the fault of counsel for the accused who did not traverse the indictment, and the court that proceeded to conduct a trial. We regret to note that the Public Prosecutor appeared to be totally oblivious to the true role of a prosecutor as guardian of both the public and individual interest, as set out in Articles 15 and 17 (3) of the LCP.

We wish to state further that apart from the obvious injustice suffered by the victims of this kind of prosecution, unnecessary injury is further inflicted on the injured parties […] *Public confidence in the justice system is diminished. The courts, and everyone involved in the process, accused persons, the state, witnesses and injured parties are put to expense in terms of money and time which would, usefully, be deployed elsewhere to greater public and individual good than the case with fatally flawed prosecutions."* (Emphases added)

The OSCE is of the view that, whenever a decision on detention is taken, the courts must examine the case to ensure that reasonable suspicion persists, and not rely solely on the fact that a decision to conduct an investigation has been issued.

ii) The Lack of Adequate Justification for the Continued Existence of the Other Grounds for Detention and for the Insufficiency of Alternative Measures

Once the persistence of a reasonable suspicion is ascertained, in order to extend detention, the court also has to demonstrate that one or more of the grounds for detention continue to exist. The court may also find that additional or new bases justify detention, which it must specifically explain.[63]

The OSCE has noted that, similar to the initial detention orders, in the majority of decisions extending detention the courts fail to explain the specific circumstances which indicate a fear that the defendant

[63] See Branko Petric, *Commentary*, *supra* footnote 47, on Article 197 FRY CPC.

would abscond, interfere with evidence, complete or repeat a criminal act, or, according to the old code, disturb the citizens. Additionally, the courts generally fail to justify or explain the reasons for which the alternative measures are insufficient at that stage of the proceedings. The following are examples illustrating the lack of proper justification in the decisions extending pre-trial detention, as noted in courts throughout Kosovo. In order to facilitate the reader, the text has been divided into sections dealing with each of the grounds for detention, despite the fact that many of the examples may fall under more than one section.

a) The risk of absconding

The European Court of Human Rights has emphasised that absconding as a ground for detention cannot be gauged solely on the basis of the severity of the sentence risked, but must be assessed with reference to a number of other relevant factors.[64] The European Court has also held that for this reason to be credible, the domestic courts must explain why there is a danger of absconding and not simply confirm the detention in "an identical, not to say stereotyped, form of words, without in any way explaining why there was a danger of absconding" or why this danger could not have been countered by alternatives to detention measures.[65] The OSCE has observed that very frequently the courts did not properly substantiate the risk of flight, in breach of applicable domestic and international law.

> In a case before the District Court in Prishtinë/Priština under the old code, the accused was charged with unlawful possession of weapons. He was detained on 28 December 2002 on the grounds of the risk of flight, the fear of influencing witnesses and the possibility of disturbing the citizens, without citing any circumstances relating to these. On 17 January 2003, the three-judge panel extended his pre-trial detention because: "there is a founded fear that if the accused was free he would flee and would be inaccessible to the law enforcement authorities" (unofficial translation). The panel also found that there was a possibility of disturbing the citizens, but did not cite any circumstances to substantiate its opinion.
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> In a case before the District Court in Gjilan/Gnjilane, the defendant was charged with illegal possession of weapons. The indictment was filed after the new code's entry into force and did not include a proposal for detention. On 23 April 2004, the three-judge panel decided *ex officio* to extend detention on remand, because it concluded that: "such circumstances still exist which justify the grounded fear that if the accused were in freedom, by analysing the weight of the criminal offence, the manner and the circumstances in which it was committed, [the panel] evaluated that he may flee or repeat the criminal offence" (unofficial translation). Apart from not properly justifying the risk of flight or the fear of relapsing into crime, this ruling made no reference to the possible application of measures alternative to custody. On 7 June 2004, the accused was sentenced to imprisonment of two months and fifteen days, which corresponds exactly to his time in pre-trial detention, and his immediate release was ordered.

b) The risk of influencing witnesses or interfering with evidence

As regards the risk of influencing witnesses or co-defendants, the European Court has found that although such risk may be genuine at the outset of the detention, it may gradually diminish, or even disappear altogether.[66] As regards the domestic law, both the old and the new code provide the possibility of ordering pre-trial detention if there are grounds to believe that the defendant might interfere with evidence or there are specific circumstances indicating that witnesses and other parties will be influenced.[67]

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[64] See *Yagci and Sargin v. Turkey*, European Court of Human Rights, 9 June 1995, para. 52.
[65] See *Yagci and Sargin v. Turkey*, ibid; also see *Tomasi v. France*, European Court of Human Rights, 27 August 1992, para. 98.
[66] See *Tomasi v. France*, ibid, paras. 92-95.
[67] Articles 191(2) item (2) FRY CPC and 281(1) subpara. (2)(ii) PCPC.

Detention ordered on such grounds should be terminated as soon as the evidence on account of which detention on remand was ordered has been taken or secured.[68] Consequently, in order to apply or continue applying this ground for detention, the court should be satisfied that particular circumstances point to the risk of interference with evidence, and mention them in its extension of detention decisions. The OSCE has noted that the majority of decisions extending detention merely reiterated the letter of the law and lacked reference to any specific circumstances.

> In a case under the old code before the District Court in Gjilan/Gnjilane, the defendant was charged with attempted rape and detained on 10 April 2003, on the grounds of the risk of flight, and the risk of interfering with evidence and influencing witnesses. On 10 May 2003, the three-judge panel extended the pre-trial detention because, due to "objective reasons," two (named) witnesses had not been heard and the injured party's blood test had not been completed. The court added that: "if the suspect were at liberty, he would hinder the investigation by influencing the still unheard witnesses" (unofficial translation); the court also mentioned that there was a risk of flight and of repetition of the criminal offence. It may be noted that the 12 May 2004 appeal of the defence counsel mentioned that the two "unheard" witnesses had been proposed by the defence. In fact, the evidence of the case file indicates that the witnesses were actually heard on 7 May 2003, three days before the extension of detention decision. It is of interest that the Supreme Court decision rejected the appeal on 19 May 2003 reiterating the incorrect assertion that the witnesses had not been heard.
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> In a case before the Gjilan/Gnjilane Municipal Court the accused was charged with aggravated theft and detained on 21 March 2004. After the filing of the indictment on 9 April 2004, and under the new code, the three-judge panel reviewed the defendant's detention in the absence of a proposal by the prosecutor and extended it for two months, because: "there are still reasons from Article 281 (2) items 1, 2, and 3 PCPC, by which the reasonable fear exists that the suspect could avoid the criminal proceedings, repeat the criminal act and as such obstruct the normal conduct of criminal proceedings" (unofficial translation). The ruling did not mention any particular circumstances for substantiating any of the grounds, while it only made a numerical reference to the fear of influencing witnesses. Moreover, the ruling did not even make any reference to the applicability of measures alternative to custody.

c) The fear of relapse into crime

In connection with the risk of continued criminality as a ground for detention on remand in serious offences, the European Court has found that, among other conditions, the danger must be a plausible one and the measure appropriate, in light of the circumstances of the case and in particular the past history and personality of the person concerned.[69] However, the OSCE has observed that the courts fail to substantiate the grounds given.

> In a case before the Pejë/Peć District Court under the old code, the accused was charged with endangering the security of persons and unlawful possession of weapons. On 15 May 2003, the district court panel extended his pre-trial detention because of the fear of influencing witnesses and added that: "since the criminal offence has remained as an attempt, there is a grounded fear that, if at liberty, the defendant could conclude the act" (unofficial translation). Nevertheless, the panel did not give any description of even which act there was a fear of completion. On the 23 July 2003, the defendant was found guilty on both counts, sentenced to a unified term of one-year imprisonment and released from detention.

[68] Articles 191(3) FRY CPC and 281(2) PCPC.
[69] See *Clooth v. Belgium*, European Court of Human Rights, 12 December 1991, para. 40.

In a case before the Gjilan/Gnjilane Municipal Court, the accused was arrested on 30 June 2004 and charged with unauthorised purchase, distribution and sale of dangerous narcotic and psychotropic drugs, under the new code. After the filing of the indictment, which did not propose the extension of detention, the three-judge panel extended the detention on 5 July 2004, having "*ex officio* ascertained that the legal grounds of Article 281 (1) point 2 (iii) PCPC exist, by which the grounded fear exists that the defendant could repeat the criminal offence and as such obstruct the further normal conduct of the criminal proceedings. After the administration of the evidence and documentation in the case file, the panel of this court ascertained that the extension of the detention for two more months is reasonable…" (unofficial translation). The ruling extending detention on remand did not offer any specific circumstances to justify the application of the detention grounds. Similarly, it did not refer to the applicability of the measures alternative to detention on remand or explain why these would not suffice. The accused was found guilty, sentenced to one-year imprisonment and released because the grounds for detention ceased to exist.

As may be seen from the examples above, the courts frequently extend detention on remand without making reference to the particular circumstances that prompt them to decide that detention continues to be necessary. In most cases the courts fail to even mention why the alternative measures were not applicable.[70] Particularly when there have been changes in the circumstances of a case, a court should demonstrate in its decision how these circumstances may affect the detention of the accused and especially whether measures alternative to custody may be applicable. By not properly reasoning their decisions, the courts fail to meet the standards of fair trial and due process, even when the decision to continue pre-trial detention is proper in the actual circumstances.

IV. ISSUES ON THE CHALLENGES TO PRE-TRIAL DETENTION ORDERS

International standards provide for the right of everyone deprived of his liberty to have the lawfulness of his or her detention speedily reviewed by a court.[71] In order to be effective this right requires that the detainee be informed of the reasons of his or her detention.[72]

Domestic law provides for the right to appeal detention orders[73] and the right to file, at any time, a petition to review the legality of one's detention (also known as "*habeas corpus*" petition).[74] The decision on the appeal is taken in a session of the appellate panel, while the decision on a *habeas corpus* petition may follow a hearing of the parties.

This part examines the following issues:

[70] It is paradoxical that, in numerous cases, before the pronouncement of the verdict, while a defendant is presumed to be innocent, detention on remand is easily found to be grounded, whereas after the same defendant has been found guilty, the court deems that the grounds for keeping him in detention cease to exist.
[71] Article 5(4) ECHR.
[72] The European Court has repeatedly ruled that: "It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them our in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5(3) of the Convention." See *Labita v. Italy*, *supra* footnote 61, para. 152.
[73] For the old code, see Articles 192, 197, 199(3), 395(2) and 394(4) FRY CPC. For the new code, see Articles 283(3), 285(5), and 287 PCPC.
[74] Article 286(2-4) PCPC.

- The lack of justification in the decisions on appeals against detention orders; more specifically, the decisions on appeals:

  i) do not adequately consider the arguments of the defence,
  ii) fail to address individually the arguments of co-defendants,
  iii) fail to examine the existence of a reasonable suspicion as a condition for pre-trial detention, and
  iv) fail to acknowledge the lack of justification in the appealed orders;

- the delays in deciding on appeals against detention orders;
- the fact that the appeals procedure may violate the equality of arms;
- certain problems regarding the *habeas corpus* petition.

A. Lack of Justification in Decisions on Appeals against Detention Orders

Like initial orders on detention and orders extending detention, decisions on appeal must be properly justified.[75] However, the OSCE has observed that instead of functioning as a guarantee for the accused to challenge the legality of previous decisions on detention, it is common in practice for the appellate courts to merely "rubber-stamp" the appealed decision and to reiterate stereotype phrases. The following categories of examples illustrate this phenomenon further.

i) Failure to Adequately Heed the Arguments of the Defence

Frequently, appellate panels do not properly justify their decisions on appeals against detention and fail to consider or even mention the arguments presented by the appellant.

> In a case before the Pejë/Peć District Court under the old code, the accused was charged with endangering the security of persons and unlawful possession or use of weapons. After the indictment had been filed, detention was extended on 20 June 2003 only on the ground that, if at liberty, the accused could cause disturbance to the citizens. This ground was presented for the first time at this stage. On 23 June 2004 the defence appealed the order also mentioning the court's reasoning for this ground was not appropriate, especially since a reconciliation agreement between the accused and the injured party, who additionally requested the release of the detainee, already existed in the case file. The Supreme Court decision on the appeal, dated 27 June 2004, did not even mention this fact, rejected the appeal and reiterated the reasoning of the district court decision.
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> In a case before the Municipal Court in Prishtinë/Priština, the accused was charged with fraud under the new code. The case followed the procedure of summary proceedings, on the basis of a private charge.[76] On 10 September 2004 the pre-trial judge ordered his detention for fifteen days. On 23 September 2004, the three-judge panel extended his detention for one month, following the prosecutor's proposal, because of the risk of flight and of influencing witnesses. The defence counsel appealed the panel's ruling on 24 September 2004, explicitly pointing out, *inter alia*, that in such cases the law did not provide for the extension of detention beyond fifteen days before the filing of a summary indictment (which had not been filed at that stage); hence the extension order was unsustainable and illegal. The district court panel rejected the appeal on 7 October 2004 by simply reiterating that the risk of flight and fear of influencing witnesses existed. The summary indictment was filed with the court on 4 October 2004.

[75] See Justice Circular 2000/27, *supra* footnote 48.
[76] Summary proceedings provisions apply to proceedings before the municipal court for criminal offences punishable by a fine or imprisonment of up to three years; see Articles 461 ff. PCPC.

In the latter example, the detention of the accused was extended by the panel for one month, despite the fact that no summary indictment had been filed until that point in time, and notwithstanding the fact that the maximum legal time-limit of fifteen days detention had passed. Consequently, not only was the prosecutor's proposal for extension without legal basis, but also the panel did not have the authority to extend it. What is even more remarkable is that, although the defence counsel challenged the said order demonstrating that it was evidently unlawful, the appellate court appears either to have failed to read the appeal or to be completely ignorant of the fact that this case followed the summary procedure.

ii) Failure of the Appellate Court to Individually Address the Arguments of Co-Accused

In cases with more than one detained defendants, when their defence counsel appealed the detention orders, the appellate courts usually considered all of the appeals in one unified decision, mentioning general and abstract grounds for justifying detention; the particular arguments and specific circumstances of each accused were not addressed separately. International case-law states that when the grounds for detention are stated in these terms, they are insufficient to justify the continued detention.[77] The following are selected examples reflecting this practice, which exists throughout Kosovo:

> In a case before the District Court in Gjilan/Gnjilane, the accused persons were charged with murder, participation in a group that commits murder and agreement to commit murder under the old code. The defence counsel of four of these accused filed separate appeals against the 4 June 2004 decision of the panel to extend detention. The appeal made a variety of arguments and pointed to different personal circumstances of each accused. For instance, one of these appeals, dated 18 June 2004, challenged in great length the extension decision because of the wrong determination of the factual state and because of violations of the criminal procedure.[78] The Supreme Court, in one very brief decision, dated 12 July 2004, rejected all four appeals as ungrounded and reiterated the same limited generalised reasons as in the extension order.
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> In a case before the Pejë/Peć District Court, two defendants were arrested on 2 May 2004 and charged, under the new codes, with the criminal acts of participating in a group that commits a criminal offence, inciting national, racial, religious or ethnic hatred, discord or intolerance, while one of them was additionally charged with unlawful possession of weapons. On 31 May 2004, the three-judge panel ruled to extend the suspects' detention on remand for an additional two months.[79] The defence counsel of the two defendants filed separate appeals against this ruling, raising a variety of arguments, some of which differed.[80] The 22 June 2004 Supreme Court

[77] See *Labita v. Italy*, *supra* footnote 61, para. 163.

[78] This appeal brief argued that the decision to extend detention did not consider the personal circumstances and character of the accused in question, that the grounds given for extending the detention were too abstract and general, that the presumption of innocence had been violated by the choice of words in the previous decisions, and that the authorities were not showing special diligence in proceeding with the trial. Additionally, it specifically criticised that the extension of detention decision applied the grounds for detention generally to all accused, in violation of international human rights law.

[79] The three-judge panel did not even make a numerical reference to any of the grounds for detention, but stated that "[t]he grounds detention was based on in the previous decisions of the Pre-trial Judge and the Three-judge Panel have not ceased to exist [sic]." Thereafter, the panel made certain abstract comments on the existence of reasonable suspicion, on the speedy conduct of the investigation, and declared that it maintained the reasoning of the previous decisions as to the risk of influencing witnesses and repetition of the offences.

[80] For instance, one of the appeals argued extensively that the extension of detention order lacked proper justification, which was only abstract, that the panel should have not avoided to evaluate the continuation of reasonable suspicion, that there were no circumstances to justify the fear of intimidation of witnesses, that the defendant had not been previously convicted and there were no circumstances showing the risk of repeating the criminal act, whereas the appeal also referred to other special circumstances. The other appeal focused on the lack of reasonable suspicion from the evidence produced, claimed that the evidence did not indicate a risk of repetition of the offence, and also mentioned special facts as to the case of this particular accused.

decision stated that it agreed with the three-judge panel that "there still exists a continuing danger that the suspect could flee to avoid prosecution if released at this stage of the proceedings. The panel based its conclusion on the existence of the danger of flight on specific and sufficient evidence and facts." Furthermore, the Supreme Court concluded that the panel correctly found that there was a risk of influencing witnesses and others, and of completing threatened criminal acts.[81] The Supreme Court decision did not address the different arguments of the defence. Moreover, it paradoxically opined that the three-judge panel based its opinion on the risk of flight on sufficient evidence, although the latter had not even mentioned the risk of flight, thus indicating that the Supreme Court had not even properly considered the appealed ruling.

iii) Failure to Examine the Existence of a Reasonable Suspicion as a Condition for Pre-Trial Detention

The decisions reviewing appeals consistently failed to consider the existence or persistence of a "reasonable suspicion" against the detained accused, despite the fact that many appeals presented concrete facts to this. The courts appeared to proceed on the assumption that, since there existed a valid decision to conduct an investigation, the appellate panel did not (or should not) examine the reasonable suspicion, since it was a matter that had already been decided.[82] In certain cases the courts refused to examine the persistence of a reasonable suspicion as a condition for the continuation of detention without giving a concrete justification for this refusal, even though the defence had specifically challenged the reasonable suspicion in their appeal. The following serves as an example of this practice:

> In a case before the District Court in Gjilan/Gnjilane under the old code, the accused persons were charged with murder, participating in a group that commits murder and for agreeing to commit murder. The defence counsel of four of the accused appealed the 4 June 2004 decision to extend the defendants' detention. Among various other arguments, the defence challenged the continued existence of a reasonable suspicion against their clients; most of the counsel claimed that this was mainly based on the statement of one co-accused, who had subsequently retracted it, while this testimony was not corroborated by any other evidence. On 12 July 2004, the Supreme Court rejected the appeals and stated: "As to the appeal arguments of the defence regarding the factual situation, these cannot be the subject of consideration at this stage of the proceedings" (unofficial translation).

It is unclear why the panels reviewing the appeals on detention did not examine the arguments of the defence against the existence of reasonable suspicion. The European Court has found that the guarantees of Article 5 (4) ECHR would be deprived of their substance if the judge could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the "lawfulness" of the deprivation of liberty.[83]

iv) Failure to Acknowledge the Lack of Justification of the Appealed Decision

A large number of appeals challenged the decisions on detention on the basis that the decision was not properly justified, which constitutes a procedural violation. However, almost no appellate court even considered this argument in its decision, let alone accepted it. Rather, the appellate courts simply reiterated the existence of the substantive grounds for detention.

> In a case under the old code before the District Court in Mitrovicë/Mitrovica, on 13 January 2004 the defence counsel appealed the initial detention order dated 12 January 2004. The appeal

[81] Actually, the previous decisions referred to a risk of repeating the criminal acts and not of completing any threatened acts, as the Supreme Court mentioned.
[82] For the probable reason of this phenomenon, see *supra* footnote 62.
[83] See the case of *Ilijkov v. Bulgaria*, European Court of Human Rights, 26 July 2001, paras. 94 ff.

asserted serious violations of the provisions of the criminal procedure, essentially the order's lack of unambiguous and concrete justification, and the wrongly established factual state. On 14 January 2004, in its decision rejecting the appeal, the district court failed to consider the argument that there had been a lack of justification.

In a case before the Pejë/Peć District Court, the accused was arrested on 27 January 2004. After the filing of the indictment, and according to the new procedure, on 26 July 2004 the three-judge panel extended his detention for two months because there was a grounded fear that the accused might flee in order to avoid the prosecution and [high] sentence. On 29 July the defence counsel appealed this ruling because of the wrong application of the law and the lack of concrete reasoning. On 4 August 2004, the Supreme Court panel rejected the appeal without even considering the argument that the ruling lacked justification.

As it may be seen from the above examples, the appellate courts and the Supreme Court fail to address the issue of improper justification of the detention order, even when this is raised by the appellant.[84]

In conclusion, in detention on remand matters, the decisions of the appellate courts - regardless of whether or not they are substantially correct - are generally inadequately reasoned. Given that the vast majority of the appeals against detention rulings are rejected while the decisions on appeal are also improperly substantiated, it would appear that the arguments of the defence are not being properly considered. Furthermore, by failing to consider defence arguments relating to the existence of reasonable suspicion, the appellate courts may be perpetuating situations of unlawful detention. Lastly, by not criticising the lack of justification of detention rulings by the lower courts, the Supreme Court in particular has not fulfilled its role of providing guidance to them and may have thus contributed to the practice of issuing unjustified detention decisions. This practice may ultimately lead to a breach of the right to liberty.

B. Delays in Deciding on Appeals against Detention Orders

Everyone deprived of his liberty is entitled to take proceedings by which the lawfulness of his or her detention shall be "decided speedily" by a court.[85] Unlike the old code,[86] the new criminal procedure explicitly foresees that appeals against the initial rulings on detention on remand, as well as those extending detention, "shall be decided within forty-eight hours of the filing of the appeal."[87] Despite these provisions, the OSCE has noted cases, in which the deadline for deciding on appeals against detention on remand was not respected:

In a case before the Pejë/Peć District Court, two defendants, arrested on 2 May 2004, were charged with participating in a group that commits a criminal offence, inciting national, racial, religious or ethnic hatred, discord or intolerance, while one of them was additionally charged with

[84] It should be mentioned that in deciding on appeals against *judgments*, the appellate court is obliged to examine even *ex officio* several issues, including whether the grounds of a judgment are not supported by material facts; see Article 415(1) PCPC.

[85] See Article 9(4) ICCPR and 5(4) ECHR. The European Court has clarified that where there is a second instance of jurisdiction for appeals against detention, the State must in principle accord to the detainees the same guarantees on appeal as at first instance; see *Toth v. Austria*, European Court of Human Rights, 12 December 1991, para. 84.

[86] The old code specifically provided for the right to appeal the initial detention order within 24 hours of being served the order, while the appeal had to be decided within 48 hours. Decisions extending detention could be appealed within three days from their service, although no time-limit was foreseen for issuing the decision on appeal against the extension of detention. The decisions of the Supreme Court to extend detention could not be appealed. See Articles 192, 197, 199(3), 395(2) and 394(4) FRY CPC.

[87] According to the new procedure, an appeal against the detention on remand ruling must be filed within 24 hours from the service. The appeal must be served to the other party, who within 24 hours from its service may submit arguments to the court. The appeal must be decided within 48 hours from its filing; see Articles 283(3), 285(5), and 287 PCPC.

unlawful possession of weapons. On 31 May 2004, the three-judge panel ruled to extend the suspects' detention on remand for an additional two months. On the same date, one of the defence counsel appealed this ruling, while the other appealed it on 2 June 2004.[88] On 4 June 2004, the district public prosecutor replied to one of the appeals. Although the Supreme Court should have decided on the appeals within 48 hours from their filing,[89] it did not do so until the 22 June 2004, approximately 20 days after the filing of the appeal.

In a case before the District Court in Prizren, the suspects faced charges of inciting national, racial, religious or ethnic hatred, discord or intolerance, of causing general danger and of participating in a group that commits a criminal act. They were arrested on 5 April 2004. On 4 May 2004, the three-judge panel extended their detention for two additional months, while, on the same date, the defence counsel of one of the defendants appealed this ruling. The Supreme Court issued its decision on the appeal only on 12 May 2004, six days after the time limit, returning the file to the three-judge panel to reconsider the issue of detention. On 17 May 2004, the three-judge panel decided again to extend the detention of the suspect. The same defence counsel appealed the latter ruling on 18 May 2004, but the Supreme Court did not render its decision until 27 May 2004, seven days after the time limit.

In the cases mentioned above, the Supreme Court did not abide by the set time limit for deciding on the appeals against detention, and did not act with the necessary urgency that should be afforded to cases of detained persons.

C. Violation of the Principle of the Equality of Arms in the Appeals Procedure

The OSCE has noted that in various cases of appeals against detention on remand rulings, the applicable provisions of the new code and consequent judicial practice do not respect the principle of equality of arms.[90] This is because the prosecution has two opportunities to present arguments - firstly through the district public prosecutor and a secondly through the Public Prosecutor of Kosovo - whereas the defence only has one.[91] The following example illustrates this practice:

In a case before the Pejë/Peć District Court, on 31 May 2004, the three-judge panel ruled to extend the detention on remand of both suspects for an additional two months. Both defence counsel appealed this ruling.[92] On 4 June 2004, the District Public Prosecutor replied to one of the appeals. The Supreme Court also sought the opinion of the Office of the Public Prosecutor of Kosovo, who, on 21 June 2004, proposed the rejection of both appeals. The defence was not privy to these submissions and therefore could not comment upon them. On 22 June 2004, the Supreme Court issued its decision rejecting the appeals.

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[88] The dates quoted in the text are those stated on the appeal documents. Note, however, that the Supreme Court decision refers to their date as the 3 June 2004.

[89] Article 285(5) PCPC.

[90] The principle of equality of arms between the parties, the prosecutor and the detained person, includes the notion that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party; for the application of the principle of the equality of arms in the context of appeals against pre-trial detention see, among others, *Garcia Alva v. Germany*, European Court of Human Rights, 13 February 2001, para. 39.

[91] In practice, if the defence appeals a decision on detention, the district public prosecutor may submit a written reply to the defence arguments [Article 283(3) PCPC]. However, the Court also sends the file to the Public Prosecutor of Kosovo for comments (Article 409 PCPC). The defence is not provided with the submissions of the Public Prosecutor of Kosovo, which seemingly are not even included in the case file, and therefore has no opportunity to respond.

[92] The appeals themselves quote 31 May 2004 and 2 June 2004, respectively, although the Supreme Court decision refers to their date as the 3 June 2004.

The OSCE is of the view that the above practice may violate the principle of the equality of arms to the detriment of the defence. The defence should have the right to view all submissions by the prosecution and to respond thereto.

D. Issues Regarding the *Habeas Corpus* Petition

Apart from providing to the parties the opportunity to challenge a detention on remand ruling, the new procedural code also affords to the defence the possibility of filing, at any time, a petition before the pre-trial or the presiding judge, in order for the latter to determine the lawfulness of detention.[93] The petition challenging directly the factual detention is also known as *habeas corpus*. The competent judge may hold a hearing if the *habeas corpus* petition establishes a *prima facie* case of the unlawfulness of detention.[94] The OSCE has noted that this petition has rarely been actually used by the defence since its introduction, although there have been certain cases in which the defence could have indeed availed itself of this right.

In the following case, however, where the defence counsel made a motion requesting the court to order the immediate release of the defendant as there was no legal basis for his detention, it appears that the court did not react to it.

> In a case before the Prizren District Court, the attorney of one defendant appealed the 4 May 2004 extension of detention on remand ruling. The Supreme Court accepted the appeal on 12 May 2004, annulled the extension ruling and sent the case for re-evaluation to the three-judge panel. Nevertheless, the Supreme Court did not decide on whether the defendant should continue to be detained or be released pending the panel's decision; however, the accused remained in detention. On 13 May 2004 the defence counsel filed a submission specifically requesting the immediate release of his client, because there was no legal basis for his detention. The court did not take any action on this submission. The defendant remained in detention until the three-judge panel decided again to extend the detention of the suspect on 17 May 2004.

In this example, since that there was no valid order for detention on remand between the 12 and 17 May 2004, the accused was unlawfully detained for this period. The court did not consider the 13 May 2004 submission,[95] either by holding a hearing or by directly releasing the defendant. It is unclear whether the court failed to examine this petition due to ignorance of the law or for other reasons.

In conclusion, the aforementioned examples sufficiently demonstrate that the appellate courts fail to properly consider the arguments of the defence in their decisions on appeals. The majority of appellate courts' decisions are improperly justified and appear to simply "rubber-stamp" the appealed decisions. Moreover, the appellate courts often disregard the stringent time-limit provided by law to decide on an appeal against detention, while the appellate procedure may be in violation of the principle of equality of arms. Lastly, despite the fact that there have been few occasions where the defence has used the new *habeas corpus* petition, it has already been noted that the courts may be uninformed on how to address such motions.

[93] Article 286(2 -4) PCPC. It is of note that the first paragraph of Article 286 also gives the possibility to the pre-trial or presiding judge to terminate *ex officio* the detention on remand at any time during the investigation.
[94] Article 286(3) PCPC.
[95] This submission fulfilled the basic requirements of a *habeas corpus* petition, although its drafting could have been clearer.

V. ISSUES REGARDING THE LENGTH OF PRE-TRIAL DETENTION

International law stipulates that everyone arrested or detained shall be entitled to a trial within a reasonable time or release pending trial.[96] In multifarious cases, the European Court of Human Rights has ruled that even when "relevant and sufficient" grounds continue to justify detention during the entire pre-trial period, Article 5 (3) ECHR may still be infringed if the defendant's detention is prolonged beyond a "reasonable time," because the proceedings have not been conducted with the required expedition.[97] The factors considered in assessing whether a trial has taken place within a reasonable time are, in particular, the complexity of the case, the conduct of the accused and the efficiency of the national authorities.[98] The European Convention also states that everyone who has been the victim of unlawful detention or arrest shall have the enforceable right to compensation.[99]

In accordance with international standards, domestic law explicitly states that the court should carry out proceedings without delay. When the accused is held in pre-trial detention, the law additionally foresees that the duration of custody must be kept to the shortest necessary time and obliges all bodies and agencies participating in criminal proceedings to proceed with particular urgency.[100] Finally, according to the new code, anyone held in illegal detention is entitled to "full rehabilitation" and "just compensation from budgetary resources."[101]

A. Unjustified Delays in Pre-trial Detention

In spite of domestic provisions and international standards demanding that pre-trial custody be kept to the shortest time necessary, the OSCE has noted practices that may infringe on the right to liberty and security of the accused persons:

> In a case before the District Court in Mitrovicë/Mitrovica, the accused, charged with murder and attempted murder, was detained on 7 May 2001. The investigation was promptly completed and on 3 August 2001 the indictment was filed. However, the trial did not start until the 11 November 2002, approximately one year and three months after the filing of the indictment. This delay was not attributable to the defendant. Furthermore, during the main trial, the court ordered on 5 May 2003, the Forensic Institute of the Neuro-psychiatric Clinic in Prishtinë/Priština to examine the defendant and issue an expert report. This expert report was finally submitted to the court on 7 May 2004, a year later. Neither this delay was attributable to the defendant.

The OSCE has noted numerous other cases, in which the detainee's right to a speedy trial may have been breached due to considerable delays in obtaining expert reports.[102] In many instances, the assigned experts were in a foreign jurisdiction, as the following example demonstrates:

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[96] Article 5(3) ECHR. The "reasonable time" guarantee overlaps with that in Article 6 (1) ECHR, but the European Court has found that Article 5(3) concerns the proceedings from the stage of arrest until the delivery of the first instance verdict; see *B. v. Austria*, European Court of Human Rights, *supra* footnote 52, paras. 33 ff.
[97] See *Tomasi v. France*, *supra* footnote 65, paras. 99 and 102.
[98] See *Abdoella v. the Netherlands*, European Court of Human Rights, 25 November 1992, para. 14.
[99] See Article 5(5) ECHR and 9(5) ICCPR.
[100] Article 190(2) FRY CPC and Articles 5(3) and 279(2) PCPC.
[101] Articles 16 and 534 – 538 PCPC.
[102] The case-law of the European Court has found in manifold cases involving delayed expertise that, since the experts were acting in the context of judicial proceedings supervised by the judge, the latter remained responsible for the preparation of the case and for the speedy conduct of the trial. Additionally, as regards the sanction which a court could impose on the expert, the Court recalled that in ratifying the Convention governments undertook the obligation of organising their legal systems so as to ensure compliance with the requirements of Article 6(1) ECHR, including that of trial within a reasonable time; *Capuano v. Italy*, European Court of Human Rights, 25 June 1987, para. 30.

> In a case before the District Court in Prishtinë/Priština, the accused was charged with unnatural sexual acts with a person under 14 years of age. The accused was detained on 2 September 2002, while on 25 September 2002 an evidentiary item was sent for forensic examination to a relevant institute in Bulgaria. The trial started on 3 March 2003, and on 26 March 2003, it was postponed for an indefinite time, until the expert report from Bulgaria was submitted to the Court. The defendant remained in detention until 6 September 2003, when he was released on bail. The expert report was submitted in July 2004 and the trial recommenced on 26 August 2004.[103]

In this example, the presiding judge communicated orally with the Bulgarian liaison officer in order to inquire about the expert report, which was submitted approximately 20 months after it was ordered. More importantly, the defendant spent half of his total one-year detention awaiting the submission of the expert report.

In numerous cases the authorities have not acted with the special urgency, which is required in the cases of detained persons. Delays have also been caused in various monitored cases because, among other reasons, the court held infrequent trial sessions, or it easily postponed sessions due to the absence of witnesses,[104] or even because the judges in the panel went on long leave consecutively and not concurrently. All these practices of unjustified or preventable delays may lead to a breach of the defendant's right to be tried within a reasonable time or be released pending trial.

B. Unjustified Delays in Executing Release Orders

Delays in executing release orders further exacerbate problems. International case-law states that, although some delay in executing a decision ordering the release of a detainee is understandable, preventable delays would lead to arbitrary detention. The European Court has found that the fact that a defendant remained in detention for 11 hours after the decision directing that he should be released immediately violated his right to liberty and security.[105] Despite also the clear domestic provisions specifying the urgency in cases dealing with detention,[106] the OSCE has noticed non-compliant practices:

> In a case under the old code before the Mitrovicë/Mitrovica Municipal Court, the accused was arrested for theft on 28 February 2004 and detained pending trial. After the filing of the indictment, the three-judge panel decided to release the defendant on 16 April 2004. Nevertheless, the accused was not actually released from Lipjan/Lipljan Detention Centre until 19 April 2004.
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> In a case before the Pejë/Peć District Court under the new code, on 12 April 2004, the pre-trial judge rejected the prosecutor's application to extend the defendant's detention, but instead ordered that he be released on bail. After the conditions of bail had been fulfilled, the court ordered on 13 April 2004 the immediate release of the suspect.[107] However, the suspect was not immediately

[103] On the same date, the presiding judge established that the Bulgarian expert report was not satisfactory and the trial was again postponed until further notice, in order to obtain the required expertise.
[104] See *Cevizovic v. Germany*, European Court of Human Rights, 29 July 2004, para. 51, where the Court found that "the trial court did not proceed with diligence when holding an average of less than four court hearings per month without making an effort to summon witnesses and experts in a more efficient way […] The Court finds that the competent court should have fixed a tighter hearing schedule in order to speed up the proceedings."
[105] See *Quinn v. France*, European Court of Human Rights, 22 March 1995, para. 42, and the principle contained in *Labita v. Italy*, *supra* footnote 61, paras. 166 ff.
[106] Article 190(2) FRY CPC and Articles 5(3) and 279(2) PCPC.
[107] The suspect was ordered to deposit 35.000 Euros and give a written declaration, in which he undertook not to repeat the criminal offence and to answer to the summons of the court.

released.[108] On 14 April 2004 the appellate panel accepted the prosecutor's appeal and ordered that the suspect be detained on remand for one month.[109] Notwithstanding the appellate decision, the suspect had been held illegally in detention from 13 to 14 April.

In both the above-mentioned cases, despite the courts' orders for immediate release, the defendants remained in detention.[110] Certain delays in executing the release orders may be partly due to the applicable procedure,[111] although the delays in the above examples would not be justifiable.

VI. RECOMMENDATIONS

- All courts should provide adequate and proper reasons when issuing rulings relating to detention on remand, be they the initial rulings, the extensions, or the decisions on appeal.

- Appellate courts, and in particular the Supreme Court, should consistently issue decisions which instruct lower courts that rulings relating to detention on remand should be properly justified according to the law. In particular, that courts should:
  - Cite relevant material evidence and the individual factual circumstances of the case, which led to the determination that detention on remand is required;
  - examine the continued existence of reasonable suspicion against the defendant whenever a determination on detention is made;
  - substantiate the determination that alternative measures to custody are not suitable in the individual case;
  - demonstrate that the defence arguments have been considered.
- In appeals involving co-defendants, appellate courts should address the individual circumstances of the accused persons separately.
- Since there have been a number of court decisions which have properly addressed the issue of detention, all courts should endeavour to raise their practice to this standard. To this end, the Department of Justice should make these decisions available (in an anonymous form if necessary) to all courts in Kosovo, to serve as examples of good practice.
- The Supreme Court should issue a legal opinion[112] instructing courts to adopt a uniform approach regarding the starting time of the extension of detention on remand rulings, whereby the period of extension of detention would commence on the date of the court's decision.

[108] The reasons for this are unclear. It would appear that the court's decision to release the suspect was stayed pending the hearing of the Public Prosecutor's appeal. If this was the reason, then it is contrary to Article 283(3) PCPC.
[109] On 10 May 2004, in spite of the motion to extend the detention filed by the Public Prosecutor, the panel of judges of the Pejë/Peć District Court ordered the release of the suspect on bail.
[110] The fact that a decision is taken subsequently to keep the accused in detention, such as the decision on appeal in the second example, does not render the unlawful period of detention legal.
[111] The procedure on the communication of court orders to the detention centres is established in Justice Circular 2001/17 Communication of Court Orders to Detention Centres and Visits of Judges, 18 June 2001. Regarding the decisions ordering the release of the accused, Point 12 of the Justice Circular foresees that the original documents be delivered to the detention centres, before the decision can be executed. It is explicitly stated that no decision will be accepted by fax or phone. Considering the practical circumstances of administrative issues and working hours of the courts, if a release order is issued later in the day, it may practically mean that the detainee will remain in custody for an additional day.
[112] See Article 31(7) of the Law on Regular Courts.

- Appellate courts, and in particular the Supreme Court of Kosovo, should ensure that their decisions on appeals against detention rulings are issued within the time limit of 48 hours from the filing of the appeal.
- The Kosovo Judicial Institute should offer additional training to judges on the law pertaining to *habeas corpus* petitions and the provision empowering the pre-trial judge to initiate *ex officio* the termination of detention on remand at any time during the investigation.
- At the appellate court level, the defence should be served all submissions of the Office of the Public Prosecutor of Kosovo.
- The courts should ensure that they and all participating agencies – such as forensics institutes, centres for social work etc - act with special urgency in the proceedings of detained defendants, and prevent unjustified delays.
- The Kosovo Judicial Institute should offer training to judges and prosecutors on the use the provisions in the new code which are designed to ensure that expert reports are filed in a timely manner. This may include the setting of deadlines for the submission of the expert reports and of applying financial sanctions when the experts breach these deadlines without reasonable excuse.
- The Department of Justice should take the necessary steps to ensure that all the participating agencies act immediately on a court order for release of an accused from detention.

CHAPTER 5

CRIMINAL PUNISHMENT

> "*[T]here are two justifications of punishment. What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing.* […]
>
> *What we may call the utilitarian view holds that on the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order.* […]"[113]

I. INTRODUCTION

The purposes of punishment can be broken down into four groups: Retribution, deterrence, rehabilitation and reconciliation.[114] Retribution exists primarily to ensure that the offender of a crime endures suffering at least equal to that endured by the victim of the original crime. The latter three utilitarian grounds are prospective, aimed at reducing the likelihood of repeat offences. Thus the punishment of criminal offenders contributes to the protection of individuals by declaring that the commission of crimes is not acceptable to the society and by deterring persons from committing criminal acts. [115]

This chapter looks into how the domestic legislation and judicial practice on sentencing and punishment in Kosovo relate to international human rights standards. Through extensive monitoring, the OSCE has noticed significant shortcomings in the use of different forms of punishment. These shortcomings can be divided into three main areas of concern:

- The first is the lack of appropriate reasoning. The courts at all levels fail to substantiate their reasons, or deal with the specific circumstances of the case, when deciding on the punishment;
- the second is the excessive use of custodial measures and lack of consideration of alternatives; and,
- the third relates to lack of institutional capacity which, in practice, reduces the number of possible alternative measures.

[113] John Rawls, *Two Concepts of Rules*, The Philosophical Review, Vol. 64, 1955, pp. 3 13. This is a revision of a paper given at the Harvard Philosophy Club on 30 April 1954.

[114] See e.g. Lawrence M. Hinmen, Lecturer in Ethics at University of San Diego, briefing lecture on the purposes of punishment, 13 March 2001.

[115] In Kosovo, the customary law of the Code of Lekë Dukagjini, otherwise known as Kanun, may still influence the determination of sentences by Kosovo Albanian judges. The name refers to the Albanian prince Lekë Dukagjini (1410-1481) to whom the codification of the law is attributed. The Kanun provides detailed rules for governing daily life and prescribes rights, obligations, duties, levies and punishment. Perhaps most famously, the Kanun reiterates the vengeful principle of "blood will follow the pointing finger" or *lex talonis*; "an eye for an eye." The OSCE has noticed that judges on occasions still make reference to terms prescribed by the Kanun; for example judges may inquire whether the parties have "reconciled." However, the greatest influence on punishment and sentencing practice stems from the provisions of the Criminal Code of the former Socialist Federal Republic of Yugoslavia, which formed the applicable law since 1977. [The Criminal Code of the Socialist Federal Republic of Yugoslavia, Official Gazette SFRY No. 44/76 with changes included in SFRY 36/77 (FRY CC)]. The new codes of 2004 maintain the framework of the FRY laws and, in addition, provide for a number of welcome amendments.

II. INTERNATIONAL STANDARDS AND THE USE OF IMPRISONMENT

Punishment may seriously limit the rights and freedoms of the convicted person. In order to ensure that these limitations are not implemented in an unlawful or arbitrary manner, international human rights standards include a series of safeguards regulating the criminal procedure and the use of punishment.[116] Though there are many forms of punishment, imprisonment is still one of the most common.[117] However, as imprisonment constitutes a severe limitation of one of the most valued human rights, the right to liberty, it has been specifically regulated in several human rights conventions.[118] The principle of minimum intervention and the respect for the right to liberty have led to the establishment of international standards promoting the use of non-custodial measures and limiting the use of imprisonment.[119]

Besides the rehabilitative affect, imprisonment can also have negative affects on an offender. These may be made worse by prison overcrowding. It may be difficult in an overcrowded prison to implement proper standards for the treatment of the prisoners, which in turn may lead to serious breaches of the rights of the convicted person. One way to avoid overcrowding is the use of imprisonment only as a sanction of last resort. In this regard, the Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) state that "alternatives to imprisonment can be an effective means of treating offenders within the community to the best advantage of both the offender and society."[120] It may be expected that a UN administered province should follows these principles. Further, the Council of Europe has stated that imprisonment should only be used "where the seriousness of the offence would make any other sanction or measure clearly inadequate."[121] It should be noted that the extension of the prison capacity seldom offers a lasting solution to the problem of overcrowding.[122] Efforts should therefore be made to minimise custodial sentences and use alternative non-custodial measures.[123]

III. PRISONS IN KOSOVO

Prior to 1999, there were five prisons in Kosovo, one in each district, and a correctional institution in Dubrava, with a branch of the correctional institution in Gjurakovc/Đurakovac. There was also a correctional institution in Smrekovnicë/Smrekovnica (for short-term imprisonment) and an educational-

[116] Such as the principles *nullum crimen sine lege* (no crime without a law) [Article 11 of the Universal Declaration of Human Rights (UDHR), Article 15 ICCPR and Article 7 ECHR], and *ne bis in idem* (double jeopardy) [Article 14(7) ICCPR and Article 4 Protocol No. 7 to the ECHR]. Also see the right to a fair trial in Articles 10 and 11 UDHR, Article 14 ICCPR and Article 6 ECHR.

[117] See The International Centre for Criminal Law Reform and Criminal Justice Policy, *International Prison Policy Development Instrument*, (July 2001), 1st ed. which states that "Simply, around the world there is the belief that prison is preferable to any alternative; thus, the punitive element that characterizes this sanction remains the cornerstone of modern day correctional and penal systems. In spite of the proven efficiency and effectiveness of non custodial alternatives, harsher penalties in the form of longer prison sentences continue to be imposed."

[118] Articles 9, 10(3) and 11 ICCPR and Article 5 ECHR.

[119] Some of the most important of these standards are included in the Tokyo Rules.

[120] Preamble, the Tokyo Rules.

[121] Council of Europe, Recommendation No. R (99) 22 of the Committee of Ministers to Members States Concerning Prison Overcrowding and Prison Population Inflation. [hereafter Recommendation No. R (99) 22] Appendix, para. 1.

[122] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated the following on the relation between overcrowding and increased prison capacity; "Indeed, a number of European States have embarked on extensive programmes of prison building, only to find their prison populations rising in tandem with the increased capacity acquired by their prison estates. By contrast, the existence of policies to limit or modulate the number of persons being sent to prison has in certain States made an important contribution to maintaining the prison population at a manageable level." Extract from the 7th General Report [CPT/Inf(97) 10], para. 14.

[123] Council of Europe, Recommendation No. R (99) 22. Appendix, para. 14.

correctional institution in Lipjan/Lipljan (for juveniles). Mentally ill persons under security measures were placed in Dubrava correctional institution.[124]

Today, the Penal Management Division/Kosovo Correctional Service, which operates under the DOJ, currently functions through seven correctional locations: Prishtinë/Priština Detention Centre, Prizren Detention Centre, Mitrovicë/Mitrovica Detention Centre, Pejë/Peć Detention Centre, Gjilan/Gnjilane Detention Centre, Dubrava Prison and Lipjan/Lipljan Prison. After the NATO military operations conducted between March and June 1999, these institutions were placed under the administration of UNMIK authorities.

While in January 2002 the total prison population was less than 800,[125] on 31 October 2004 there were 1193 persons held in custody throughout Kosovo.[126] This progressively increasing number of persons in custody (suspects/accused/sentenced) in the correctional system, led to overcrowding of the prisons and detention facilities. Overcrowding of prisons may result in deteriorating hygiene; continuous lack of privacy; decreased activities out of the cell and lack of appropriate medical services. These, in turn, may lead to increased tension and violence between inmates, and between prisoners and the prison personnel.[127] In these situations human rights violations are far more likely.

On 4 September 2003 the problems and shortcomings of the prisons in Kosovo became evident as the inmates of Block 2 of Dubrava Prison occupied and barricaded the block in protest against the living conditions. After several hours of negotiations, the prison guards attempted to enter the barricaded block. Some inmates reacted by setting mattresses on fire, which rapidly spread. Five inmates were killed and sixteen others injured.[128]

An independent commission was established to investigate the circumstances that led to the unrest, to evaluate the reaction of the Penal Management Division and to make recommendations to address the deficiencies and prevent similar events in the future. The Commission found that even though Dubrava prison had 804 inmates on the day of the unrest, the level of overcrowding was not one of the main reasons behind the incident.[129] However, the Commission did point out several issues that could be closely related to the rapid prison population increase that had taken place during the last years and pointed to the Penal Management Division's lack of capacity to meet the needs of all the inmates. As one of the main reasons for the unrest, the Commission pointed out the lack of occupational activities for inmates. The Commission also mentioned the lack of well trained personnel and water shortages.[130] The Commission additionally highlighted the very limited possibilities of conditional release that had been offered until that date and recommended that the Conditional Release Commission should be strengthened and made more efficient in order to speed up the application procedure.[131]

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[124] This information was provided by the DJA, Statistical Service.

[125] NGO Prison Monitoring Mission in Kosovo, Report of the Finnish Human Rights Project, 4 January 2002.

[126] The prison population reached its highest number during 2004 in April when 1397 persons were held in custody; see DOJ Weekly Report (2-8 April 2004). The reason for the notable increase in the prison population in the last years is partly due to the increase in the population and partly due to other factors such as a more efficient criminal system.

[127] CPT, Extract from the 7th General Report, para. 13.

[128] Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 15 October 2003, S/2003/996, para. 21.

[129] Report of the Dubrava Commission into the disturbance and fire of the 4th September 2003 (hereinafter Report of the Dubrava Commission), pp. 15-16.

[130] Report of the Dubrava Commission, ibid, pp. 12-13.

[131] Just prior to the disturbance in August 2003, the Conditional Release Commission had a backlog of 112 cases awaiting the Commission's decision. See the Report of the Dubrava Commission, ibid, pp. 17, 22.

IV. SENTENCING

In sentencing, the court must ensure that the punishment constitutes an individualised measure, which complies with the general purposes of punishment, namely prevention, rehabilitation and deterrence.[132] To this end, the court should look into the circumstances specific to the accused and the committed crime when it determines punishment.[133] Further the court should give complete and detailed reasoning in its decision.[134]

A. Sentencing According to FRY CC

The FRY CC laid out the general principles for sentencing, stating that the courts should decide on a punishment within the limits laid out by the law, considering the purpose of the punishment and all mitigating and aggravating circumstances.[135] According to the law, the purpose of the punishment was to prevent the offender from committing criminal acts, to rehabilitate the offender and to have a rehabilitative influence on others.[136] Additionally, the law mentioned that the punishment should seek to strengthen the moral fibre of a socialist self-managing society and influence the development of the citizens' social responsibility and discipline. The court was thus obliged to consider the aspects of prevention, rehabilitation and deterrence in each individual case.[137]

There were no detailed guidelines available on the use of different kinds of punishment and the evaluation of mitigating and aggravating circumstances. Certain general instructions could, however, be found in the commentary to the law, which stated that re-education of the perpetrator was achieved through imprisonment or confiscation of property while prevention (or deterrence) was achieved by imprisonment.[138] Apart from setting out the issues and circumstances that should be considered when deciding on the punishment, the law also stated that the written verdict should include a detailed reasoning as to how the court evaluated the circumstances in the specific case, especially when the court decided on a punishment that went beyond the established minimum or maximum penalty.[139]

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[132] Article 34 PCC.

[133] The Tokyo Rules state that the judicial authorities should take into consideration the rehabilitative needs of the offender, the protection of society and the interest of the victim. See Article 8.1.

[134] Council of Europe, Recommendation No. R (92) 12 of the Committee of Ministers to Member States Concerning Consistency in Sentencing states as follows: "1. Courts should in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed. 2. What counts as 'reason' is a motivation which relates the particular sentence to the normal range of sentence for the type of crime and to the declared rationales for sentencing."

[135] Article 41 FRY CC enumerates the following factors: the degree of criminal responsibility, the motive, the degree of danger or injury to the protected object, the circumstances in which the criminal act was committed, the past conduct of the offender, the personal situation of the offender, the conduct after the commission of the criminal act, and other circumstances relating to the personality of the offender.

[136] Article 33 FRY CC. See also Article 6 Criminal Law of Socialist Autonomy Province of Kosovo, OG SAPK, No. 20/77, (KPC) which adds that during the execution of the sentence, no physical suffering shall be inflicted on a convicted person, nor shall his human dignity be offended.

[137] Notably, retribution was not included as one of the purposes. The commentary suggests that the law was more aimed at prevention; see Dr. Franjo Bacic, Ljubo Bavcon, Miroslav Djordjevic, Bozidar Kraus, Ljubisa Lazarevic, Momir Lutovac, Nikola Srzentic and Aleksandar Stajic, *Commentary of the Criminal Law of Socialist Federative Republic of Yugoslavia (SFRY),* (Belgrade, Savremena Administracija., 1978), on Article 33, para. 2.

[138] Ibid.

[139] Article 357 FRY CPC. See also Branko Petric, *Commentary*, *supra* footnote 47 on Article 357 para. VII(1), which states that the circumstances affecting the punishment should be established, assessed, and reasoned in each concrete case. Thus, the reasoning of the verdict should include the individualisation of the punishment.

B. Sentencing Under the PCC

The provisions on sentencing and calculating the punishment laid down in PCC are substantially the same as those in FRY CC. The PCC states that the purpose of punishment is prevention, rehabilitation and deterrence, similar to the previous legislation.[140] Furthermore, the law states that the court should decide on a punishment within the limits laid down in the law, taking into consideration the purpose of the punishment and considering the relevant mitigating and aggravating circumstances.[141] The main change in the new law is the possibility for the accused to enter a plea. If the accused pleads guilty, it should be considered as a mitigating circumstance.[142]

C. Conclusions

There is, and was, an obligation for the court to make an individualised decision on the punishment and to state and assess the mitigating and aggravating circumstances in relation to each accused. This is of importance not only to fulfil the formal requirements of the procedural code but also to ensure that the accused and society in general understand the purpose of the punishment and to ensure consistency in the sentencing throughout Kosovo. There is, however, a lack of sentencing guidelines to instruct the courts in the use of different forms of punishment. This could be remedied by detailed reasoning on behalf of the higher courts which may provide guidance to lower courts.

V. SENTENCING PRACTICE

In spite of the requirements laid out in the law, the OSCE has monitored a large number of cases which revealed notable shortcomings in relation the courts' sentencing, namely:

- Breaches of the statutory limits of a crime;
- insufficient reasoning; and,
- inadequate use of mitigating and aggravating circumstances.

The same problems have been noted in relation to cases under the old law as those conducted under the new codes. Accordingly, the following discussion applies equally to cases under either legal structure.

A. Sentencing which Contravenes the Established Legal Limits

For custodial punishment to be applied in compliance with international human rights standards it should be lawful, i.e. comply with domestic legislation.[143] The law sets out the range of the punishments applicable to each crime by defining minimum and maximum penalties which limit the courts' discretion when deciding on the punishment. However, cases have been monitored where the courts have failed to respect these limits.

This has been noted, in particular, in relation to trafficking cases, about which the OSCE has reported previously.[144] Despite the fact that the minimum penalty for trafficking in persons is two years'

[140] Article 34 PCC. The PCC, however, does not include any reference to the strengthening of the moral fiber of a socialist self-managing society, etc.
[141] Article 64 PCC.
[142] Articles 314 and 358 PCPC and Article 64(1) PCC.
[143] Article 9 ICCPR and Article 5(1)(a) ECHR.
[144] See the OSCE Review of the Criminal Justice System (March 2002 – April 2003) "Protection of Witnesses in the Criminal Justice System," p. 43.

imprisonment, in several cases the courts have given sentences below this limit. The following two cases serve as examples.[145]

> In the first case, from the Prishtinë/Priština District Court, two accused were convicted on 12 December 2003 for unauthorised border crossing and trafficking in persons. Both accused were sentenced to two months' imprisonment for unauthorised border crossing and one year and five months for trafficking in persons. They were given an integrated sentence of one year and six months of imprisonment. The court did not justify its decision to impose a punishment that did not comply with the minimum penalty and did not even mention this fact.[146]
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> In a second case, this time from the Prizren District Court, three accused were convicted for trafficking in persons on 19 December 2003. Two of the accused were sentenced to two years and six months' imprisonment, which falls within the legal range. However, the third accused was sentenced to one year and six months of imprisonment. In its reasoning the court referred to mitigating and aggravating circumstances but failed to mention (or justify) that it had imposed a punishment below the prescribed minimum penalty.[147]

The punishment of any criminal act plays an important role in society and constitutes a balance between the interest of the convicted, the injured party and society as a whole; a balance that is not upheld when the law is violated. Additionally, in cases involving violence against women, such as trafficking in persons, the authorities have an obligation to offer an effective remedy[148] that complies with the established rules of procedure.[149] In the mentioned cases the domestic law was not respected which, in turn, led to a breach of the victims' right to an effective remedy.

B. Insufficient Reasoning

Despite the legal requirements for an individualised punishment and reasoning, the OSCE has noted that the courts, at all levels, seldom give sufficiently detailed reasons in their decisions relating to punishment, regardless of whether they are correct in substance. Most written verdicts simply enumerate the mitigating and aggravating factors without further evaluation, and then make a standard reference to the purpose of the punishment, stating that it will be fulfilled through the chosen form.[150] The majority of cases do not include any assessment of the mentioned circumstances or their influence on the court's decision, or any reference to the severity of the chosen punishment in relation to the legal limits set out for the specific crime.

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[145] Article 139 PCC and UNMIK Regulation 2001/4 On the Prohibition of Trafficking in Persons in Kosovo, Section 2. According to statistics from UNMIK, DJA, during 2003, two persons were given a suspended sentence, one person was sentenced for trafficking to between two and six months' imprisonment and five persons were sentenced for trafficking to between 6 and 12 months. All of these sentences are below the established minimum penalty.

[146] In relation to the possibility to impose a mitigated punishment see Section C below.

[147] On retrial, the prosecutor withdrew the charges due to lack of evidence.

[148] Article 13 ECHR.

[149] In cases of violence against women the non compliance with the domestic legislation may constitute a breach of the Convention on the Elimination of All forms of Discrimination Against Women, see the Convention Article 2(b) and (c). It should be noted that the Committee on the Elimination of Discrimination against Women stated in its report on the situation in the Republic of Moldavia (UN doc. GAOR A/55/38, p. 59 para. 102) that "In the light of its general recommendation 19 on violence against women, the Committee calls 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, and that women victims of violence have immediate means of redress and protection."

[150] Frequently, the enumeration of the circumstances is in itself very general including, for example, as reference the person's economic status as a mitigating circumstance without indicating whether the court considered that the accused had a good or a bad economic status.

One example of such a brief standard reasoning can be found in a case from the Prizren Municipal Court. In its written verdict, dated 26 June 2003, the court sentenced the accused to five months' imprisonment for theft. In relation to its decision on the punishment, the court simply named the mitigating and aggravating circumstances and then concluded that the court had decided on five months' imprisonment, having a strong belief that this would achieve the affect and aim of the punishment. The court did not state how it had evaluated the circumstances.

The second example came from the Pejë/Peć District Court and concerned charges of grave bodily injury resulting in death. On 5 May 2004 the court sentenced the accused to six years' imprisonment for having beaten his uncle several times with a wooden stick. The court was very brief when referring to its decision on the punishment, enumerating the mitigating circumstances and stating that it did not find any aggravating circumstance. As in the previous example, the court made no account for its assessment of the circumstances or its evaluation of the severity of the crime.

In many cases the courts fail to individualise their reasoning. In cases of joint procedures, the courts tend to deal with several accused together instead of making an individual assessment for each accused. In the following cases, the court dealt with several accused who had notably different personal situations without properly addressing these differences.

In a case from the Lipjan/Lipljan Municipal Court, which involved charges of theft, two of the accused were adult while the third person was a juvenile. In the verdict, dated 14 August 2003, the court sentenced the two adult accused to eight months' imprisonment, suspended for two years and imposed educational measures of increased supervision by parents on the juvenile. In its reasoning on the punishment the court dealt with all three of them together making no special reference to the situation of the juvenile. The court merely outlined the mitigating and aggravating circumstances applicable to all three accused together.

In another case, the court seemed to have forgotten one of the accused when it accounted for its decision on the punishment. On 29 January 2004 the Pejë/Peć District Court convicted three persons for robbery causing grave bodily injury and sentenced two of them to five and a half years' imprisonment and the third to five years' imprisonment.[151] The fourth accused was convicted for illegal weapon possession and sentenced to one year's imprisonment suspended for two years.[152] In its reasoning the court considered the three accused convicted for robbery but did not even mention the fourth.[153]

C. Insufficient Reasoning in Cases of Mitigated Punishment

If the court finds that there are particularly mitigating circumstances which indicate that the purpose of the punishment could be achieved through a lesser punishment, the court may reduce the punishment below the established limit.[154] Similarly, in some cases the court may impose a longer term of imprisonment.[155]

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[151] Articles 137 and 138(1) KPC.

[152] Section 8(2 and 6) UNMIK Regulation 2001/7 On the Authorisation of Weapons in Kosovo.

[153] This case was appealed to the Supreme Court who partly accepted the appeal in its decision dated 20 May 2004 and reduced the punishment of the persons convicted for armed robbery. As the punishment of the person convicted for illegal weapon possession was not appealed it was not reviewed by the Supreme Court. It is worth noting that the Supreme Court did not comment on the fact that the court of first instance had not accounted for its consideration of mitigating and aggravating circumstances in relation to this person.

[154] Articles 66 and 67 PCC. These provisions correspond to Articles 42 and 43 FRY CC.

[155] The court may increase the penalty beyond the maximum penalty if the offender had been sentenced to imprisonment for more than one year on two previous occasions and less than five years had passed between the date

In these cases it is especially important that the court justifies its decision. Insufficient reasoning constitutes grounds for appeal.[156]

In practice, however, the courts often pass sentences below the established minimum penalty without offering a sufficient evaluation of the relevant circumstances. Below are some examples of this practice.

> In a case before the Lipjan/Lipljan Municipal Court two persons were convicted on 5 June 2003. One of the accused was sentenced to six months' imprisonment for aggravated theft, which under the previous legislation had a minimum penalty of one year's imprisonment.[157] In the written verdict the court stated the mitigating and aggravating factors that it had taken under consideration but did not justify its decision on a mitigated punishment. In fact the court failed to even mention that the punishment did not comply with the established minimum penalty.
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> The Gjilan/Gnjilane Municipal Court convicted three accused, on 8 July 2004, for an aggravated form of attacking officials while performing their duty, which has a prescribed minimum penalty of six months' imprisonment.[158] Despite this, the court chose to sentence the accused to one, two and three months' imprisonment, respectively. In its reasoning the court failed to establish the individual circumstances of each of the three accused and failed to state the particular circumstances that justified the lesser punishment. As in the previous example the reasoning did not mention that the chosen punishment was lower than the prescribed minimum penalty.

The lack of proper reasoning in the courts' decisions on punishment does not only constitute a breach of the formal requirements on the verdict in domestic law and of international standards, but may also affect the public's perception of the judicial system. When the courts decide on a punishment that does not comply with the prescribed minimum penalty without giving specific reasons they may give an impression of arbitrariness.

D. Insufficient Reasoning by the Supreme Court in Decisions on Appeals on Punishment

The Supreme Court constitutes the highest court in Kosovo. Through the cases that it adjudicates the Supreme Court should interpret the law and build a body of cases which guide the lower courts, with respect to sentencing. The decisions of the Supreme Court that concern punishment are therefore of particular importance in providing guidance and clarity as to how the different forms of punishment should be applied, how the mitigating and aggravating circumstances should be assessed, and to promote the use of alternative measures.[159] In practice, however, the Supreme Court rarely provides sufficient reasoning. On the contrary, in some cases it may even serve as an example of bad reasoning.

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when the offender was released from his previous imprisonment and the day of the criminal act. See Article 70 PCC. In relation to the previous legislation see 46 FRY CC.

[156] See Articles 396(8), 402 and 403 PCC which corresponds to Article 357(8), 363 and 364(1) FRY CPC in the previous law. See also Branko Petric, *Commentary*, *supra* footnote 47, on Article 357 para. VII(2).

[157] Article 135(1) KPC. A second accused in the same case was sentenced to four months' imprisonment for aiding in aggravated theft.

[158] Article 317(1 and 2) PCC.

[159] Council of Europe, Recommendation No. R (99) 22. Appendix, para. 22, states that the competent authorities should set necessary guidelines for the sentencing in order to reduce the use of imprisonment and to expanding the use of community sanctions and measures. See also Council of Europe, Recommendation No. R (2000)22 of the Committee of Ministers to Member States on Improving the Implementation of the European rules on Community Sanctions and Measures, Appendix 2, para. 7) which additionally points out the role of the judicial authorities in the process of devising and revising policies on the use of community sanctions and measures.

In a large number of cases the Supreme Court has failed to provide any of its own reasoning and merely stated that the first instance court evaluated the aggravating and mitigating circumstances properly.[160]

> One example of this can be found in a Supreme Court verdict dated 16 March 2004. In this case the Supreme Court partly changed the Pejë/Peć District Court verdict and reduced the imposed fine from 900 Euros to 500 Euros, as certain charges concerning illegal possession of weapons were dropped. In relation to this punishment, the Supreme Court merely stated that the district court had evaluated the mitigating circumstances properly. The Supreme Court continued by stating that because of the partial withdrawal of the charges, the court had decided to change the punishment and that the lower punishment would comply with the purpose of the punishment. The Supreme Court thus failed to assess the District Court's very limited reasoning on the punishment and furthermore failed to account for its own consideration of these factors when it decided on the changed punishment.[161]
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> In a case with similar facts, the Pejë/Peć District Court had sentenced a person to a 300 Euros fine for illegal weapons possession.[162] In its decision the district court had stated that it had considered the following mitigating circumstances: That the accused was not previously convicted; he was of a poor economic status; he had behaved correctly before the court; and his old age – 77 years. The court did not mention any aggravating circumstances. The sentence was appealed by the prosecutor on the grounds that the District Court had placed too much weight upon the mitigating circumstances. On 11 May 2004, the Supreme Court refused the appeal as ungrounded. In its reasoning the Supreme Court simply stated that it considered that the evaluation of the mitigating circumstances in the verdict had been done properly and in accordance with the law. Even though this sentence can be seen as milder than many other sentences on similar charges, the Supreme Court did not take the opportunity to expand on the evaluation of the mitigating circumstances or the affect that the accused's age may have on the verdict.

The increased requirement of detailed reasoning in cases where the courts decide on a punishment that does not comply with the minimum and maximum penalties has already been mentioned. It is especially unfortunate that even the Supreme Court, in some cases, has lowered the previous sentence below the established minimum penalty without making a detailed account for its decision.

> In one example, the District Court in Prishtinë/Priština sentenced three accused for grave cases of theft with violence and robbery to six, five and five years' imprisonment respectively. In its verdict, dated 15 April 2004, the Supreme Court partially approved the appeal by the defence counsel and lowered the punishment to five, four and four years of imprisonment, respectively, despite the fact that the crime has a minimum penalty of five years' imprisonment. The Supreme Court made no mention of the fact that, for two of the accused, the sentence was lower than the established minimum penalty.
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> A second example can be found in a verdict involving three accused charged with grave cases of theft with violence and robbery in complicity, which has a minimum penalty of five years'

[160] The court in the second instance shall review the verdict insofar as it is contested by the appeal [Article 415(1) PCPC or 376 (1) FRY CPC]. One of the reasons a verdict may be contested is if the first instance court did not correctly meet out the punishment in view of the circumstances relevant to the level of punishment, or because the court applied or failed to apply provisions concerning mitigation of punishment [Article 406(1) or 367(1) FRY CPC]. In case the appeal filed on behalf of the accused does not contain the basis for contesting the verdict and/or argument supporting the appeal, the appellate court is obliged to review *ex officio*, among other things, the decision concerning the sentence [Article 415(2) PCPC or 376 (2) FRY CPC].

[161] The Pejë/Peć District Court had merely enumerated the mitigating and aggravating circumstances.

[162] The accused was convicted for having had an AK 47 and 88 chasings of ammunition in his possession.

imprisonment.[163] The Supreme Court changed the verdict of the District Court in Pejë/Peć regarding the punishment and lowered the sentence from five years and six months' imprisonment to four years for the first accused, from five years to three years and six months for the second accused and from five years and six months to three years and six months for the third accused. The Supreme Court gave no reasoning why the sentence was lowered below the minimum penalty.

The Supreme Court has therefore not fulfilled its role as the prime interpreter of the law and provide the lower courts with proper guidance on sentencing.

E. Inadequate Use of Mitigating and Aggravating Circumstances

The shortcomings in relation to the reasoning by the courts are not limited to the detail of the reasoning or lack of individualised sentence. The OSCE has noted that many cases indicate that the judges lack a proper understanding of how different circumstances may or should affect the decision on punishment. Although the range of mitigating and aggravating circumstances is extensive, and the courts have discretion as to how to apply these to punishment, there are certain factors which clearly should or should not be taken into consideration.

The OSCE has monitored cases in which courts have considered circumstances which are patently irrelevant. In other cases the consideration in itself constituted a breach of the law. A mitigating or aggravating circumstance must be of relevance to the criminal offence or to the offender's personal circumstances. Standard references to, or listing of, mitigating or aggravating factors have led to references being made to circumstances that are not relevant to the specific case. One such mitigating factor which the courts often refer to is the economic situation of the offender.

> One example where the relevance of the accused's poor economic situation as the mitigating factor could be questioned can be found in a verdict, dated 21 March 2003, from the Pejë/Peć District Court. In this case a man was convicted for illegal weapons possession (three automatic weapons and ammunition). The man was sentenced to eight months' imprisonment. When deciding on the punishment the court referred to the accused's poor economic status as a mitigating factor.[164]
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> The Prizren District Court sentenced a man to six years' imprisonment for rape in a verdict dated 12 January 2004. The man had forced his daughter to have sexual intercourse with him. Among the circumstances considered, the court mentioned the man's poor economic situation as a mitigating factor.

It is difficult to see how the offender's economic situation could have any influence, mitigating or aggravating, on the courts' decision on the punishment in cases such as these. In other cases courts have shown a lack of understanding of what circumstances may be taken into consideration.

> In a verdict dated 2 June 2004, the Prizren Municipal Court sentenced two persons to six months' imprisonment each for the theft of two bells and a candlestick from a church. The crime occurred during the riots in March and thus took place in a political environment which could affect the perception of the crime. However, some of the circumstances referred to by the court were not of relevance when deciding on the punishment for the criminal offence. The court considered, as one of the aggravating factors, that the crime has affected Kosovo's image in the western world. As a

[163] Articles 138(1) and 137 KPC.
[164] The sentence was upheld on appeal by the Supreme Court in a verdict dated 13 March 2004. The Supreme Court stated that the first instance court had evaluated the existing circumstances and their impact on the punishment.

mitigating circumstance the court, among other factors, considered that the accused did not have a political agenda. Both of these circumstances mitigating and aggravating should not have been considered. The aggravating circumstance is of a general and political character and has no direct connection to the crime or to the accused. The mitigating circumstance on the other hand refers to the fact that the theft was committed without a political agenda. Though a political agenda may constitute an aggravating factor, the lack of it would not constitute a mitigating factor when the criminal act is theft.

There are also cases where the court has considered something as an aggravating factor which according to the law can not be considered as such.

> On 18 May 2004 the Kamenicë/Kamenica Municipal Court convicted a man for participating in a group hindering an official in his duties and sentenced him to 60 days imprisonment. In its reasoning the court stated that it had considered as an aggravating factor that the accused was the subject of an ongoing criminal investigation. By taking this factor into account as an aggravating factor, the court violated the accused's right to be considered innocent until proven guilty.[165]

> In a second example, the Prizren Municipal Court convicted a man for attempted theft and sentenced him to one month's imprisonment on 20 August 2003. The court considered as an aggravating factor that the accused had committed the offence with the intention to illegally benefit from someone else's property. This can not constitute an aggravating factor in a theft case as it constitutes an element of the criminal act.[166]

F. Inconsistency

Consistency in sentencing is one of the fundamental principles of justice. Unwarranted disparity in sentencing of similar cases may lead to a perception of injustice and affect the public's confidence in the justice system. International standards have therefore been drafted to help secure consistency in sentencing.[167]

In Kosovo, however, the lack of established sentencing guidelines and jurisprudence leave the courts with very little guidance when deciding on the sentence, which inevitably leads to inconsistency. As there is limited possibility for judges to be informed of the sentencing practice of other judges, similar cases risk being treated differently by different judges. The OSCE has noted that there is a disparity in the treatment of similar cases by different courts. The first examples show how similar cases of murder may lead to notably different punishment.

> In a case before the Pejë/Peć District Court the accused was convicted for murder and illegal weapon possession on 11 February 2004.[168] According to the court the accused had intentionally taken the life of a female victim. The accused had, after a verbal conflict with the injured party over property issues, gone to his house, brought back an AK-47 assault rifle and shot the victim 23 times at a distance of 20 metres. When deciding on the punishment, the court stated as mitigating factors that the accused was not convicted before and was of a young age. As aggravating circumstances the court mentioned the way the crime was committed. The court sentenced the accused to seven years and six months of imprisonment for murder and to ten months for illegal weapon possession, passing a unified sentence of eight years.

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[165] Article 3 PCPC.
[166] See Article 134 KPC.
[167] Council of Europe, Recommendation No. R (92) 17 of the Committee of Ministers to the Member States Concerning Consistency in Sentencing.
[168] The accused was convicted for murder according to Article 30(1) KPC which has an established minimum penalty of five years' imprisonment.

In another case, before the same court, involving six accused and charges of murder, illegal weapon possession and participating in a brawl, one of the accused was convicted for murder and illegal weapons possession on 29 October 2003. All of the accused had participated in the fight during which one of them had shot twice in the air. The person convicted for murder had then taken the gun, fired twice and killed the injured party immediately. In relation to this person the court found no aggravating factors, and considered as mitigating factors that the accused had not been convicted before, his poor economic situation and that he had shown regret during the trial. However, the court sentenced him to a more severe punishment than in the previous example; eleven years and ten months for murder and four months for illegal weapon possession, given a unified sentence of twelve years' imprisonment.

Another area where there seems to be confusion in relation to the punishment is in relation to charges of illegal possession of weapons. These crimes carry a maximum penalty of eight years' imprisonment for illegal possession and use, and ten years' imprisonment for threatening use.[169] The following examples show how similar cases are being dealt with differently.

The first example, a case from the Gjilan/Gnjilane District Court, involved an accused convicted for the illegal possession of an AK 47 and 16 bullets. On 26 November 2003, the man was sentenced to four months' imprisonment.[170] It its reasoning the court considered as mitigating factors that the accused had no previous convictions, that the injured party had not joined the procedure,[171] that the accused was married with poor economic condition, and had a favourable attitude during the proceedings. As aggravating circumstances the court mentioned the general circumstances that the accused had not used the possibility to hand in the weapon during the weapon amnesty and the level of dangerousness of the crime.

This case could be compared to a case from the Pejë/Peć District Court where a man was convicted for the illegal possession of a higher amount of weapons and ammunition. On the 4 July 2003 the accused was sentenced to a fine of 450 Euros for the illegal possession of an AK 47 and around 300 bullets. The Court was very brief in its reasoning but stated that it had considered as mitigating circumstances that the accused had not been convicted previously, that he was of poor economic status and that he had behaved well before the court. No aggravating circumstances were mentioned. [172]

It is difficult to see how the differences in the criminal acts and the additional circumstances could lead to a fine in one case but justify a custodial sentence in the other. The lack of reasoning provided by the court exacerbates the inconsistency in sentencing.

[169] Article 328 PCC states that it is a criminal offence to own, control, possess or use a weapon without a valid authorisation, punishable with up to eight years' imprisonment or a fine up to 7.500 Euros and that it is a criminal offence to use any weapon in a threatening, intimidating or otherwise unauthorised manner, punishable with up to ten years of imprisonment or a fine up to 10.000 Euros. Under the previous legislation the corresponding provisions could be found in UNMIK Regulation 2001/7 On the Authorization of Weapons in Kosovo.

[170] The verdict was upheld by the Supreme Court on appeal. The Supreme Court stated, in its verdict dated 27 May 2004, that the pronounced sentence was in accordance with the level of criminal responsibility and the level of dangerousness of the crime.

[171] The accused was, in the same case, acquitted from charges of attempted murder. The court should not have taken into consideration the view of the injured party as this related to the murder charges and thus was not of relevance for the decision on the punishment for illegal weapon possession.

[172] The verdict was upheld on appeal by the Supreme Court which stated, in its verdict dated 1 June 2004, that the first instance court had properly valuated all the circumstances that influenced the sentencing.

G. Conclusions

The reasoning for the punishment in most cases does not comply with the requirements of the law. The verdicts do not offer detailed and individualised assessments of the relevant circumstances in relation to the crime and the offender. Additionally, some cases show a general lack of understanding in respect of how mitigating and aggravating circumstances should be assessed. These cases include the consideration of irrelevant factors and the consideration of factors in direct breach of the law. The mentioned shortcomings can be observed at all levels of the judicial system. Training is therefore needed to improve the courts' sentencing practise and reasoning. Part of the shortcoming can be explained by the lack of sentencing guidelines. In order to remedy this, the Supreme Court should assume its role not only as an appeal court but as the interpreter of the law and provide detailed reasoning in all its decisions on punishment. Furthermore according to proper judicial practice the lower courts should be given access to the Supreme Court's verdicts.[173] Such actions would also contribute to the more consistent application of punishments.

VI. FORMS OF PUNISHMENT

A. Forms of Punishment Under the FRY CC

The basic forms of punishment as laid out in the FRY CC were imprisonment, fine and confiscation of property.[174] Previously this list had included capital punishment but this was abolished on 10 June 1999.[175] Instead, a maximum penalty of 40 years' imprisonment was introduced. Sentences of imprisonment therefore range between 15 days and 40 years.[176]

i) Alternative Punishment to Imprisonment

The previous legislation allowed for several forms of alternative punishment. Under it, suspended sentences[177] or judicial admonition[178] could be imposed for socially less dangerous acts when a custodial sentence was deemed not necessary for the protection of criminal justice, and the court felt that an admonition, with or without the imposition of a suspended sentence, would sufficiently deter the offender from committing further criminal acts.[179]

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[173] Kosovo Law Centre is currently publishing a selection of the Supreme Court Judgments. However, this is the responsibility of the Ministry of Public Service, who should ensure the publication and distribution of all Supreme Court judgments.

[174] Article 34 FRY CC.

[175] Capital punishment was included in the law under the Former Republic of Yugoslavia but was abolished through UNMIK Regulation 1999/24 On the Law Applicable in Kosovo, Section 1.

[176] Regulation 2000/59 Amending UNMIK Regulation 1999/24 On the Applicable Law in Kosovo. The final paragraph of Section 1 adds that the maximum punishment should be applicable in cases where the death penalty applied according to the previously law.

[177] A suspended sentence means that the court imposes a punishment on a person but states that this punishment will only be executed if the person commits another crime during a certain period. The period of suspension should be established individually and be between one and five years. See Article 52(1) FRY CC. A suspended sentence could be imposed when the offender had been sentenced to a term not exceeding two years' imprisonment or a fine. However, a suspended sentence could not be imposed for a criminal act with a maximum punishment of ten years or more unless the verdict was imposed by reduction of the sentence in accordance with Article 42 FRY CC.

[178] Judicial admonition could be imposed for a crime with a maximum penalty of one year's imprisonment if it has been committed under such mitigating circumstance which rendered the criminal act particularly minor. Additionally admonition could be imposed for crimes with a maximum penalty of three years of imprisonment, in cases where the law specifically stated so (Article 59 FRY CC).

[179] Article 51 FRY CC.

A suspended sentence could be combined with certain obligations or conditions, such as to restore the material gain acquired through the criminal act within a certain time limit, to compensate the damage caused, or to fulfil other obligations provided for in criminal justice regulations.[180] As an additional possibility, the law allowed for the court to combine a suspended sentence with protective supervision such as measures of assistance, care, supervision and protection.[181]

ii) Fines

According to FRY CC a fine could be imposed both as principal and accessory punishment.[182] In case the perpetrator could not pay the fine, the court could order that the execution should be carried out through imprisonment, replacing approximately 15 Euros with one day of imprisonment. The term of imprisonment could not exceed six months.[183]

iii) Security Measures

Security measures included different kinds of treatment such as measures of mandatory psychiatric treatment and mandatory medical treatment for drug and alcohol addicts and specific restrictions such as the prohibition to carry out certain activities, to make public appearances or to drive a vehicle.[184] Additionally the courts could also decide on confiscation of property.[185]

B. Forms of Punishment Under the PCC

The PCC included several changes in relation to punishment of which the most important are the introduction of a number of additional alternative measures and the creation of the Probation Service. According to the law the principal punishments are imprisonment,[186] long-term imprisonment,[187] and fines.[188]

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[180] Article 52(2) FRY CC.
[181] Article 58 FRY CC.
[182] Article 35(2) FRY CC. The statutory limits for the range of a fine, established in Article 39 FRY CC, had been amended by UNMIK Regulation 1999/4 On the Currency Permitted to be Used in Kosovo (see also Administrative Direction 1999/2, Administrative Direction 2000/17 Implementing UNMIK Regulation 1999/4, Administrative Direction 2001/24, amending Administrative Direction 1999/2). According to these changes a fine could be between 50 and 25.000 Euros except in cases where the criminal act was committed from greed. In these cases the maximum penalty would be approximately 100.000 Euros.
[183] Article 39(3) FRY CC and Administrative Direction 2000/17 Section 2(ii) and Administrative Direction 2001/24, Section 3.1.
[184] These measures, which could only be imposed on a person who had committed a criminal act, aimed at removing circumstances or conditions, which could influence the perpetrator to commit further criminal acts.
[185] See Article 69 FRY CC.
[186] Imprisonment (which should not be confused with the punishment of long-term imprisonment) may not be shorter than 15 days or longer than 20 years. A sentence of imprisonment of up to three months can be replaced by the court with a fine or, when the perpetrator gives his or her consent, with community service work [Article 38(3) PCC].
[187] One of the changes presented in the new law is the introduction of long-term imprisonment, as imprisonment for a term of 21 to 40 years. This punishment may be provided for in cases of the most serious criminal offences committed intentionally under particularly aggravating circumstances or causing especially grave consequences (Article 37 PCC).
[188] The provisions in the new code as regards fines correspond in general to the provisions under the previous law with the same established amounts and time limits (Article 39 PCC). The only novelty is that the fine may be replaced with an order for community service, if the convicted person is unwilling or unable to pay the fine and he or she gives his or her consent to this. Only if the convicted person does not give his or her consent may the fine be replaced with imprisonment, up to six months [Article 39(3-4) PCC].

One of the main changes in the PCC is the introduction of alternative punishment as a category, including several new measures, such as supervision by the Probation Service, order for community service work and execution of sentences of imprisonment in semi-liberty.[189] By doing so the PCC has modernised the penal sanctions in Kosovo in line with established international standards.[190]

The possibility to use a suspended sentence[191] has been notably developed under the new law and can under the current legislation be combined with one of the following orders from the court:

- Order of supervision by the Probation Service;[192]
- order of community service work;[193]
- order for mandatory treatment.[194]

C. Conclusion

Both the new and the previous law established an obligation on the court to decide on an individualised punishment considering the specific circumstances relating to the accused. Several forms of punishment are provided. The previous law included a limited range of non-custodial measures, but included certain possibilities to individualise these measures through specific obligations. However, the structural framework and guidelines for the implementation of these obligations were lacking.

The new law has emphasised and developed the number of non-custodial measures available to the courts. Where the old law made a general reference to different measures, the new law lays out clear provisions, which should give the courts better guidance when implementing these measures.

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[189] This measure allows the court to order the execution of a sentence of imprisonment, up to one year, in semi-liberty taking into consideration the convicted person's obligations related to work, studies, family responsibilities or medical needs (Article 53 PCC).

[190] Article 1.5 of the Tokyo Rules declares that the Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment.

[191] As under the old law a suspended sentence may be pronounced when the court imposes a fine or imprisonment up to two years [Article 44(2) PCC]. It should be noted that the scope for imposing a suspended sentence has been reduced by the new law, to cases where a person is convicted for a crime with a maximum penalty of up to five years of imprisonment [Article 44(1) PCC]. Only when the provisions allowing for a mitigated punishment (i.e. a punishment below the statutory minimum penalty for the crime) are applied can the court pronounce a suspended sentence for a person convicted for a crime with a maximum penalty between five and ten years of imprisonment.

[192] Although, already under FRY CC, there was a possibility to combine a suspended sentence with measures of protective supervision, the new code grants the novel possibility of imposing a suspended sentence with an order for supervision by the Probation Service (Articles 58 FRY CC and 50 PCC). The supervision should aim at the integration of the convicted person and may last between six months and three years [Article 50(1-2) PCC]. The supervision includes the obligation to maintain contact with the Probation Service and may also be combined with additional obligations such as attending treatment, participating in vocational training, carrying out work activities, fulfilling family obligations or refraining from certain behaviour [Articles 50(2) and 51 PCC].

[193] The second novelty in relation to suspended sentences under the new code is the possibility to combine the sentence with community service work. The court may order a convicted person to perform unpaid community service work for a specified period of time, between 30 and 240 working hours, within a specific timeframe, not exceeding one year [Article 52(2-3) PCC]. This measure can be imposed on a convicted person who may be given a suspended sentence and where the court has pronounced a penalty of a fine up to 2.500 Euros or imprisonment for up to one year. However the measure may only be imposed with the consent of the convicted person [Article 52(1) PCC].

[194] As a third alternative, a suspended sentence may also be combined with an order for mandatory rehabilitation treatment. These measures may be imposed in cases where the convicted person is a first time offender and a drug or alcohol addict, and the addiction was the primary factor motivating the crime. It should be noted that the court does not decide on the duration of these measures when they are imposed. Instead the punishment shall be considered as served when the rehabilitation treatment program has been successfully completed (Article 49 PCC).

VII. THE USE OF DIFFERENT FORMS OF PUNISHMENT

In 2003, 6.282 persons were convicted for criminal offences by municipal and district courts in Kosovo.[195] Of these, 1.862 persons were sentenced to imprisonment while 4.420 were sentenced to admonition, suspended sentence or a fine.[196] Of the non-custodial measures, suspended sentences have been the most commonly applied. It should be noted that almost half of all sentences in the municipal courts and approximately one third of the cases in the district courts are suspended sentences.[197] Concerning the use of imprisonment, 25 percent of the sentences from the municipal courts, and almost half of the sentences from the district courts comprised of custodial sentences.[198] A closer study of the verdicts indicates that one third of those convicted for crimes against life and body were sentenced to imprisonment,[199] compared to approximately two thirds[200] of those convicted for crimes against property.

Monitoring the implementation of punishment has shown two main areas of concern:

- The lack of institutional capacity which seriously limits the range of available alternative measures; and,
- the preference shown for custodial measures in many cases.

A. Lack of Institutional Capacity

Without the institutional capacity to implement the measures created by the law, these do not constitute a real alternative for the courts. Though endeavours have been made to establish the necessary institutional capacity, notably with the creation of the Probation Service, institutional vacuums still restrict the courts' abilities to apply different punishments. This problem is especially severe in relation to juvenile offenders.

i) Lack of Appropriate Institutions

Measures of mandatory rehabilitation treatment for addictions to drugs and alcohol already existed under the previous law as a form of security measures.[201] In the new law these measures can theoretically be imposed both independently and in combination with a suspended sentence.[202] In practice, however, due to a lack of institutions that offer such treatment, these measures can currently not be executed.[203]

Additionally, there is no capacity to execute a court order of semi-liberty as no preparations have been made so far by the Penal Management Division to prepare for this new measure. As long as the

[195] Of the total number of 6.282, 4.870 persons were convicted by the municipal courts and 1.412 persons where convicted by the district courts. Courtesy of the DJA.
[196] Courtesy of the DJA.
[197] In the municipal courts 2.394 of 4.870 sentences were suspended sentences in 2003. During the same year 481 of a total of 1.412 sentences by the district courts were suspended sentences. Courtesy of the DJA.
[198] Of a total of 4.870 convicted persons by municipal courts, 1.200 were sentenced to imprisonment. Of the total number of 1.412 persons convicted by district courts, 662 were sentenced to imprisonment. Courtesy of the DJA.
[199] Of a total of 423 persons who committed crimes against life and body, 127 received a custodial sentence. Courtesy of the DJA.
[200] Of a total of 904 persons who committed crimes against property, 556 received a custodial sentence. Courtesy of the DJA.
[201] Article 65 FRY CC.
[202] Articles 49 and 77 PCC.
[203] Very similar concerns can be raised in relation to mandatory psychiatric treatment and the lack of a secure hospital institution for the implementation of such measures. These measures will not be considered here as they do not, as such, constitute punishment. However, the OSCE has reported on this previously; see Review of the Criminal Justice System (March 2002 – April 2003) "Protection of Witnesses in the Criminal Justice System", p. 34.

correctional centres do not have any capacity to ensure that the offenders comply with the conditions of semi-liberty, this measure can not be implemented effectively.

ii) The Probation Service

One of the major changes included in the new law is the creation of a series of obligations and tasks for the Probation Service, an institution that was only started in 2002. The Probation Service has grown notably since then and now has 48 officers throughout Kosovo.[204]

The Probation Service has been troubled by a lack of understanding of the importance of its work from within the Department of Justice together with a general shortage of resources.[205] The Probation Service was not granted its own budget until 4 March 2004. Before that the Service had to rely on direct financial support from donors. The riots in Dubrava Prison and the needs identified by the Dubrava Commission resulted in existing resources being channelled towards the prisons rather than to the Probation Service.

In the three regions where they are currently present, the probation officers have mainly focussed their work on preparing social enquiries in cases of juvenile offenders. The Service has not been involved in cases of adult perpetrators sentenced to alternative measures, although contacts and preparations have been made to allow for measures of supervision and community service when such cases arise. The law also foresees that the Probation Service supervise court orders to participate in mandatory rehabilitation treatment, vocational training, fulfil work and family obligations, and refrain from certain behaviour. Under the current circumstances the Probation Service does not have the capacity to carry out these tasks if and when they are ordered.

B. Excessive Use of Imprisonment

The use of imprisonment as the main form of punishment has been widespread throughout Kosovo.[206] As stated before, a study of the verdicts show that little consideration is given to the specific circumstances of each offender, the affect the punishment may have on the offender, and the possibility to use non-custodial measures.

The following cases are examples where the court seemingly failed to take into consideration the use of an alternative measure, such as a suspended sentence or a fine.

> In a case before the Prishtinë/Priština Municipal Court, two accused were convicted on 3 October 2003 for having committed theft in complicity and sentenced to three months' imprisonment each.[207] The two accused had stolen money from an older man and fled the scene. When deciding on the punishment, the court had considered among other mitigating factors, that both the accused were young, had never been convicted before, and that one of them had a family. As aggravating factors the court considered the circumstances of the criminal act including the age of the injured party. Though the decision by the court lies completely within the legal framework for the crime, it is noteworthy that according to its reasoning the court did not consider a non-custodial measure.

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[204] In October 2004 the Probation Service had one office in Prizren with three officers, one office in Prishtinë/Priština with ten officers, and one office in Mitrovicë/Mitrovica with six probation officers. Additionally three persons were employed in the headquarters in Prishtinë/Priština. From 1 November 2004, 28 new officers will be recruited to staff new regional offices in Gjilan/Gnjilane and Pejë/Peć, and to increase the number of staff in existing offices. Thereafter, the Probation Service should have the capacity to cover the entire region of Kosovo.
[205] Interview with international UN Probation Officers 20 July 2004.
[206] Riza Loci, *The Application of Alternative Sanctions and Measures in Kosovo Case Law*, Kosovo Legal Studies, Vol.4, 2003, (Prishtinë/Priština, Kosovo Law Centre, 2003) p. 15.
[207] Article 134(1) KPC and Article 22 FRY CC.

> The Prizren District Court sentenced, on 18 August 2004, two men to six months' imprisonment each for unlawful purchase, possession and distribution of narcotics. One of the accused had bought 175g of marihuana with the intention of reselling it. The second accused had knowledge of this and had personally used 11 grams of the marihuana. A third accused was acquitted. The court stated that it had taken into consideration the defendants' young age, their good behaviour before the court, that they had not been convicted previously and that they had promised not commit further crimes. The only aggravating factor considered by the court was the increase of similar crimes in Kosovo. The court made no reference to the applicability of alternative measures nor did it justify why it had decided to impose imprisonment.

In these cases, the accused were first time offenders and their crimes had not involved any violence. In such cases, it is remarkable that the court failed to take into consideration the application of alternative, non-custodial sentences.

In many cases, the courts appear to give little consideration to alternative non-custodial measures, where such measures could have been appropriate. The alternative measures that are being used are judicial admonition, fines and suspended sentence. Under the previous law, the courts rarely combined a suspended sentence with specific obligations or protective supervision, due to a lack of the necessary materials and organisations to execute the measures.[208] As a result, the measures became forgotten and overlooked.

C. Lack of Appreciation for the New Measures

Despite the creation on a series of alternative measures to imprisonment, in the new law, the courts have so far (at the time of writing) shown great reluctance to use these measures. Thus far there have been no cases of suspended sentence and supervision by the Probation Service; no cases of suspended sentence combined with an order for community service work for adults; and, no cases for the replacement of imprisonment with community service work. It should be noted that with the entry into force of the PCC, the provisions on punishment and alternative measures became immediately applicable where they were more favourable for the accused.[209]

The reason for the courts' reluctance to implement these new measures can most likely be attributed to a series of factors including a lack of familiarity with the new law and lack of understanding of the purpose of alternative measures.

D. Execution of Imprisonment

In line with the principle of minimum intervention, international standards require the competent authorities to consider a wide range of post-sentencing alternatives to custody.[210] The release of the criminal offender from an institution to a non-custodial programme should be considered at the earliest stage possible.[211]

In addition to the sanction of semi-liberty, there are two forms of early release in Kosovo: The discretionary release system (conditional release), and the mandatory release system (early release).[212]

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[208] See Riza Loci, *The Application of Alternative Sanctions and Measures in Kosovo Case Law*, Kosovo Legal Studies, Vol.4, 2003, (Prishtinë/Priština, Kosovo Law Centre, 2003) p. 16.
[209] Article 2 PCC.
[210] Article 9.1 the Tokyo Rules. See also Council of Europe Recommendation No. R (99) 22. Appendix, paras. 10 and 23.
[211] Article 9.4 the Tokyo Rules.
[212] The law allows for conditional release of prisoners who had served half of his or her term of imprisonment [see Article 80 PCPC, in relation to the previous law see Articles 38(6) FRY CC and 9 KPC]. The procedure for

i) The Use of Conditional Release in Practice

Since its start in 2002, the Conditional Release Commission has gradually augmented its work. By October 2004, approximately 240 cases had been reviewed. According to the Interim Policy on Conditional Release for Sentenced Persons, the Commission shall systematically consider all eligible prisoners and juveniles for conditional release.[213]

The main problem that the Commission has faced so far is the backlog of cases. In October 2004, there were approximately 90 cases awaiting review or reconsideration by the Conditional Release Commission.[214] To remedy this, the Commission has been meeting two to three times each month, considering approximately ten applications, per session. Efforts have also been made to improve the efficiency of the work of the Commission and to expeditiously review the petitions of ill persons. The OSCE welcomes these efforts to ensure that all prisoners eligible for conditional release are being considered by the Commission without delay.

E. Conclusions

Although several of the measures included in the law are not practically available due to lack of institutional capacity, the greatest limitation on the application of alternative non-custodial measures is the courts' reluctance to use these measures. Courts thus far have preferred to stick with custodial measures, which will not help the problem of overcrowding in prisons.

VIII. PUNISHMENT OF JUVENILES AND INTERNATIONAL HUMAN RIGHTS STANDARDS

Juveniles who fall foul of the law have the right to special protection. The criminal procedure and, in particular, deprivation of liberty may have a severe impact on the juvenile's education and psychological development. Special safeguards have therefore been established for the protection of juveniles in the criminal justice system. Parts of these safeguards relate to punishment of juvenile offenders, which is therefore regulated separately from that of adults.[215]

The most significant instrument for the protection of juveniles is the Convention on the Rights of the Child (CRC).[216] The CRC lays out several basic principles that should guide the criminal procedure and the use of pre-trial detention and custodial punishment. The most important of these is the principle of *the*

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conditional release was laid out in Justice Circular 2002/7 On Conditional Release Policy Adopted by Penal Management Division/Kosovo Correctional Service, 24 September 2002, as amended by Justice Circular 2003/6, 10 October 2003. The Justice Circular created a Conditional Release Commission, which could decide on the conditional release on individual cases.

In relation to early release the institutional director of the prison may release a prisoner who has served three quarters of his or her imprisonment term up to three months before the expiry date of the imposed sentence (see Article 169 Law on Execution of Penal Sanctions, which has been developed further in Justice Circular 2001/25 Early Release Policy For Sentenced Prisoners, 28 November 2001).

[213] Justice Circular 2003/6 Amending Justice Circular No. 2002/7 On Conditional Release Policy Adopted by Penal Management Division/ Kosovo Correctional Service, 10 October 2003. The OSCE has had difficulties in verifying whether the Commission considers cases *ex officio* or only on the application of the prisoner.

[214] Part of this backlog was created between May and June 2004 when the Commissions meetings were suspended.

[215] Under the previous legislation several different terms were used to refer to offenders who were under the age of 18 years (child, minor, junior juvenile and senior juvenile). Similar terms are used by the new code (child, minor, juveniles and young adults). Under the new code these terms may include offenders up to the age of 21 [See Article 2 UNMIK Regulation 2004/8 On the Juvenile Justice Code of Kosovo (JJC)]. In order to avoid confusion we have chosen to refer to juveniles as any offender who at the age of the crime was older than 14 years, and thus criminally responsible for his acts, and younger than 18 years.

[216] Convention on the Rights of the Child, Adopted by United Nations General Assembly Resolution 44/25 of November 1989 (CRC).

best interest of the child which states that: In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.[217] It is thus the obligation of the court to give due consideration to the child's interest in all phases of the criminal procedure.

Additionally the CRC refers to the purpose of juvenile justice stating that juvenile justice should operate to promote "the child's reintegration and the child's assuming of a constructive role in society."[218] According to the Beijing Rules, "[t]he juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence." No punishment should therefore be determined solely with reference to the severity of the crime. Assessment of the appropriate punishment must consider the individual circumstances of the offender and the influence that the sanction may have on the juvenile.[219]

In accordance with these general principles, the use of custodial measures shall be in compliance with domestic law, be limited only to cases where there is no other reasonable possibility, and be limited to the shortest possible time.[220] Furthermore, custodial measures should only be used if the juvenile committed a serious crime involving violence against another person, or in several criminal acts involving other serious offences where there exists no other appropriate measure.[221]

The following parts will be looking into how the domestic legislation in Kosovo complies with these international human rights standards, and how these provisions are implemented in practice.

IX. MEASURES APPLICABLE TO JUVENILE OFFENDERS

A. Applicable Measures Under FRY CC

According to the FRY CC, a juvenile perpetrator who was between 14 and 16 years old at the time of the crime could not be formally punished, but only subjected to educational measures. A juvenile over the age of 16, but not yet 18, could be subjected to educational measures and exceptionally sentenced to juvenile imprisonment.[222] Notably, a suspended sentence could not be imposed on a juvenile.[223]

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[217] Article 3(1) CRC. See also United Nations Standards Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Adopted by United Nations General Assembly Resolution 40/33 of 29 November 1985 para. 14.2, which states that "The proceedings shall be conducive to the best interest of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely."

[218] Article 40(1) CRC.

[219] See Beijing Rules para. 5.1.

[220] Article 37(b) CRC.

[221] The Beijing Rules para. 17.1.

[222] Article 73 FRY CC. Educational measures and juvenile imprisonment had, according to FRY CC, the special objective to ensure the education, rehabilitation and proper development of juvenile offenders by extended protection, assistance and supervision, providing them with expert training, and developing their personal responsibility. Additionally, the purpose of juvenile imprisonment was to exercise special influence on juvenile offenders in order to prevent them from committing criminal acts in the future, as well as to deter other juveniles from committing criminal acts (Article 74 FRY CC).

[223] See Article 73(4) FRY CC. This article also states that judicial admonition cannot be imposed on a juvenile, however, according to Article 12 KPC the court may reprimand the juvenile stressing the damaging character of his actions. Concerning the suspended sentence of juvenile offenders over the age of 21 at the time of the trial see article 81(4) FRY CC.

i) Educational Measures

The previous law established three different forms of educational measures, disciplinary measures, intensive supervision, and institutional measures.[224] The least severe measure was disciplinary measures, which included reprimand and referral to a disciplinary centre.[225] Intensive supervision was applicable when extended measures of education, rehabilitation or treatment, with adequate supervision were needed.[226] The law foresaw that this supervision could be carried out by the parents, an assigned family or by the Guardianship Authority.[227] The supervision could last between one and three years.[228]

Institutional measures could be imposed when it was necessary to detach the juvenile completely from his or her environment.[229] These measures included referral to an educational facility (for between six months and three years) or to an educational-correctional institution (between one and five years).[230] Furthermore, the law foresaw the possibility of conditional release from an educational correctional institution.

ii) Juvenile Imprisonment

Juvenile imprisonment was only applicable for perpetrators who were between the age of 16 and 18 years at the time of the commission of the offence, when the juvenile had committed a crime punishable with more than five years' imprisonment, and educational measures were deemed insufficient due to the grave consequences of the act and the high degree of criminal responsibility.[231] Although juvenile custody could not exceed the maximum period of imprisonment of the crime, the court was not bound by the established minimum penalty.[232] There was a maximum length of ten years for any juvenile custody.[233]

B. Applicable Measures Under the Juvenile Justice Code

During the reform of the criminal law, almost all provisions concerning juvenile offenders were consolidated into UNMIK Regulation 2004/8 On the Juvenile Justice Code of Kosovo (JJC) facilitating all

[224] Article 75(2) FRY CC. See also Articles 13 – 21 KPC.
[225] The referral could either be for certain hours during a number of days, or for a continuous stay during a maximum of 20 days. During this period the juvenile should not be allowed to fall behind in school. See Article 13 KPC and Articles 267 – 273 Law on Execution of Penal Sanctions.
[226] Article 75 FRY CC.
[227] According to previous codes the court could combine the measures of intensive supervision with a series of obligations for the juvenile such as to apologise to the injured party, attend school regularly, accept employment, submit to medical institutions, participate in community work etc.
[228] Articles 14 – 17 KPC. The duration of the measure was not decided at the time of the initial sentencing but dependent on the development of the juvenile. The court that imposed the measures decided on their termination.
[229] Article 75 FRY CC.
[230] The law also included the referral to a special institution stating that such a referral should last as long as necessary for the juveniles medical treatment and rehabilitation, see Article 21 KPC. The KPC made no further reference to what kind of institution it referred to, it seems however that the institutional stay would have to be more related to the juveniles medical needs than to a penal sanction (also see Articles 285, 319 – 323 the Law on Execution of Penal Sanctions, which speak about handicapped juveniles institutions). These measures are therefore not included in this report. The law referred to an educational facility as an institution of social protection for education of children and youth, while an educational-correctional institution should have been established only for this purpose and could be of open, semi open or closed type. See Articles 299, 300 and 303 Law on Execution of Penal Sanctions.
[231] Article 77 FRY CC.
[232] Article 25(2) KPC. The old law was not clear about the minimum length of juvenile custody. Article 78 FRY CC stated that juvenile imprisonment should not be shorter than one year and not longer than ten years. However, this provision was not included in the KPC and, as will be seen further down, in practice the courts at the time imposed juvenile imprisonment sentences which were shorter than one year.
[233] Article 78 FRY CC.

parties to find and apply the relevant provisions.[234] The new law stresses that the courts have to impose the most appropriate sanction, considering the criminal offence and circumstances surrounding the offender. Age, psychological development, character, aptitudes, motives, education, environment, previous convictions, and any other circumstances that may affect the efficiency of the measures are all factors to be considered.[235] The JJC has included the principle of the best interest of the child as one of the guiding principles when deciding on any measure or punishment.[236] Emphasising the use of non-custodial sanctions, the JJC states that the deprivation of liberty shall be imposed only as a last resort and be limited to the shortest time possible. The sanctions and measures included in the JJC are: diversion measures; educational measures; fines; order for community service; and juvenile imprisonment.[237]

If the offender was under the age of 16 at the time of the crime, the court may only impose diversion or educational measures. One important change in the new code is that the court must decide on the duration of any measure or punishment in its initial decision.[238] Further, the court may order the suspension of a custodial sentence when imposing juvenile imprisonment or measures of committal to an educational institution or educational-correctional institution of up to two years.[239]

i) Diversion Measures

The JJC introduces for the first time in Kosovo criminal legislation "diversion measures." These measures, which may be imposed by the prosecutor or the juvenile judge, include mediation between the offender and the injured party or the offender and his or her family, compensation to the injured party, regular school attendance, employment or professional training, community service work, education in traffic regulations and psychological training. It should be noted that these measures may only be imposed when the juvenile has accepted his or her responsibility for the crime, expressed a readiness to make peace with the injured party and to perform the measures.[240] These measures aim to limit the negative effects of criminal proceedings against a juvenile, and may be imposed on a juvenile who has committed a crime punishable with a fine or a term of imprisonment of no more than three years.

ii) Educational Measures

The range of educational measures has not changed notably from the previous legal regime.[241] These measures include:

- Disciplinary measures, such as judicial admonition and committal to a disciplinary centre;
- measures of intensive supervision, which include intensive supervision by parent, guardian, a foster family or the Guardian Authority; and,
- institutional measures, which include the committal to an educational institution, to an educational-correctional institution and to a special care facility.

The term of the educational measures may not exceed the maximum term of imprisonment prescribed for the crime, and measures of intensive supervision should last between three months and two years (which is a reduction in relation to the previous legislation). Most notably, however, the term of the educational

[234] The JJC defines a juvenile as anybody up to 21 years (see Articles 9 and 10 JJC). The JJC is thus also applicable, in certain cases, to perpetrators up to the age of 21 and, exceptionally, to the age of 23.
[235] Article 7 JJC.
[236] Article 7(1) JJC.
[237] Article 6 JJC.
[238] Article 6(4) JJC.
[239] Article 6(5) JJC.
[240] Article 14 JJC.
[241] Article 17 JJC.

measure will now be decided by the court when it imposes the measure, eliminating some of the uncertainty previously connected to educational measures.

iii) Orders for Community Service Work

There now exists the possibility to replace an institutional educational measure or juvenile imprisonment with an order for community service work. If the juvenile gives his or her consent, the court may order community service work in place of an order for educational measures of up to three years, juvenile imprisonment of up to two years, or a fine. The community service work should last for a specified term, between 30 and 120 hours. The type and conditions of work are the responsibility of the Probation Service.[242]

iv) Juvenile Imprisonment

Where the previous legislation was not clear on the minimum term of juvenile imprisonment, the JJC states that juvenile imprisonment may not be shorter than six months. Generally, juvenile imprisonment may not exceed the established maximum penalty for the crime, and should not be longer than five years. Only in the case of serious criminal offences may the term of juvenile imprisonment be as long as ten years. The same is true for cases where the juvenile committed at least two concurrent crimes each punishable by more than ten years' imprisonment.[243]

C. Conclusions

Although the previous legislation offered several alternative non-custodial measures, it did not sufficiently emphasise that custodial measures were only to be applied as a last resort. This has been remedied in the JJC which clearly states that the use of custody should be kept to an absolute minimum and that the best interest of the juvenile should be the guiding principle, thus complying with existing human rights standards. Furthermore the wide range of alternative measures included in the JJC offers the courts the possibility to impose an individualised measure that takes into account the specific situation of the juvenile.

X. IMPLEMENTATION OF SANCTIONS AND PUNISHMENT AGAINST JUVENILES

In 2003 approximately 365 juveniles were convicted for criminal offences in Kosovo. Of these, 307 received supervision orders and 14 received a reprimand. 41 juveniles received a sentence including custodial measures.[244] The numbers from the first six months of 2004 are similar. During this period 116 juveniles were convicted for crimes and of these 11 received custodial measures.[245]

The OSCE has been able to register a series of shortcomings related to the sentencing practice and the use of custodial and alternative measures, including:

- Institutional shortcomings;
- the lack of differentiation in the execution of educational-correctional measures and juvenile imprisonment;
- the unnecessary use of custodial measures to separate the juvenile from his or her environment;

[242] If the offender does not comply with the order within the established time, the remaining work may be transferred into a proportionate duration of the original institutional sentence (Article 28 JJC).
[243] Article 31 JJC.
[244] The statistics are courtesy of the DJA.
[245] Ibid.

- the lack of consideration of non-custodial measures;
- insufficient reasoning; and,
- failure to establish the duration of imposed educational measures.

A. Institutional Shortcomings

The execution of sanctions is hampered by a lack of adequate institutions for convicted juveniles. Of the institutions foreseen in the law, Kosovo lacks disciplinary centres, educational institutions and special care facilities. Additionally, there is no capacity to offer foster homes.[246] In relation to the newly presented diversion measures, no steps have been taken so far to secure their implementation and it is not clear who carries the administrative responsibility to facilitate this.

Further, educational-correctional measures are executed in Lipjan/Lipljan Correctional Centre in violation of the Law on Execution of Penal Sanctions. The law foresees that these measures should be executed in a separate institution established only for this purpose,[247] and is very clear in its intention to separate and differentiate educational measures from juvenile imprisonment. According to the director of Lipjan/Lipljan Correctional Centre, male juveniles who are subject to educational measures and juveniles sentenced to imprisonment are kept separate from each other, but given mainly the same access to education and offered the same support and activities.[248] The reality does therefore not reflect the difference between the two types of sanctions that is foreseen in the law. In relation to female juveniles the difference is even less, as the juveniles sentenced to juvenile imprisonment and the juveniles subject to educational-correctional measures are held together and given the same treatment.[249] Further, they are held together with adult female prisoners.[250]

An additional aspect which affects the execution and use of the different punishments is the institutional capacity to follow up on the measures. Under the new law the main responsibility for this lies with the

[246] The responsibility to provide for foster families lay previously on the Guardianship Authority but has in the new law been placed with the Probation Service (Articles 90 and 91 JJC).
[247] Article 109 JJC and Article 303 Law on Execution of Penal Sanctions.
[248] The Director of Lipjan/Lipljan Correctional Centre stated in an interview on 14 September 2004 that steps are being taken to offer more activities for the juveniles on educational measures and thus create a greater difference in the treatment between the two forms of sanctions, however, so far the treatment is mainly the same. Furthermore efforts are being made to improve the education offered to juveniles both subjected to educational measures and sentenced to imprisonment. So far the education does not comply with the established curricula and does therefore not allow for the juveniles to graduate. In these cases the juveniles subjected to educational-correctional measures could be allowed to attend lessons outside the institution (see Article 115 JJC). Despite the limited scope of the education offered at Lipjan/Lipljan Correctional Centre the juveniles have so far not been allowed to attend lessons outside the Correctional Centre.
[249] On 6 October 2004, 42 juveniles were placed at Lipjan/Lipljan Correctional Centre. Of these, 39 were male juveniles, 11 in detention, 15 sentenced to imprisonment and 13 on educational measures, and three were female juveniles, one sentenced to imprisonment and two were in detention.
[250] As a general rule international human rights standards do not allow for juvenile and adult offenders to be held together. Article 10(3) ICCPR states that juvenile offenders should be segregated from adults and be accorded treatment appropriate to their age and legal status. However, the CRC has developed the provision stating that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest to do so" [Article 37(c) CRC]. In this perspective it could be argued that, due to their very limited number, it is in the interest of the juveniles not to be separated from the adults completely. However, when deciding on the level of separation of the juveniles from the adults the best interest of the juvenile must be taken into consideration in each case and practical issues such as lack of space should by no means be allowed to play a decisive role in the decision. It must also be assured that the female juveniles are offered that same range of activities and possibilities of education as the male juveniles.

Probation Service which is responsible for the follow-up on diversion measures,[251] measures of intensive supervision by parent, guardian, or a foster family,[252] community service work,[253] mandatory treatment[254] institutional educational measures and juveniles imprisonment[255] and for maintaining contact with the juvenile after release.[256] Under the current circumstances the Probation Service does not have the capacity to carry out these tasks to the extent foreseen in the law.

Taking into account the limitations imposed by the lack of adequate institutions, the range of sanctions is thus limited to:

- Intensive supervision by a parent;
- intensive supervision by a guardianship body;
- community service work; or
- juvenile custody.

This limited range of alternative measures leaves the judges very limited possibility to impose a suitable sanction in the best interest of the juvenile. This is in breach of international human rights standards which state that "a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."[257]

B. The Lack of Differentiation in the Execution of Educational-Correctional Measures and Juvenile Imprisonment

As the educational-correctional measures are executed in the same institution with almost identical treatment to juvenile imprisonment, the distinction between the two has become blurred. Juvenile imprisonment is intended to be a more severe punishment applicable only when the accused have committed a grave crime, and when the imposition of educational measures would not be appropriate because of the seriousness of the crime.[258] Unfortunately, in practice, educational-correctional measures may end up being the more severe of the two, which could lead to harsher sentences being imposed for lesser offenders. Why may educational-correctional measures be harsher in practice? Firstly, under the old law educational measures did not carry a pre-established length (it depended on the social and psychological development of the juvenile) while the duration of an imprisonment term was determined at the time of sentence;[259] thus there was greater uncertainty with educational measures.[260] Secondly, because educational-correctional measures may be imposed for a minimum of one year, whereas imprisonment may be less, particularly if conditional release is considered.[261] Thus, juveniles purportedly given the

[251] Article 79(3) JJC.
[252] Articles 20(3), 21(3), 88, 89 and 123 JJC.
[253] Article 28(2) and 129(2) JJC.
[254] Articles 120-122 JJC.
[255] Article 137 JJC.
[256] Article 138 JJC.
[257] Article 40(4) CRC. See also the Beijing Rules para. 18.1.
[258] Articles 73, 77 FRY CC and Article 30 JJC.
[259] The social workers prepare a report on the juveniles which are sent to the court every six months or on the request of the court. Though educational measures may last between one to five years, in most cases the juveniles are released after two or three years. In very rare cases do the measures last longer than four years.
[260] Under the new law the courts should establish the duration of the imposed measure [see Article 6(4) JJC]. However, practice shows that so far the courts have failed to this (see below Section F Failure to Establish the Duration of Imposed Educational Measures).
[261] This is valid both under the old law and the new law [see Articles 25(3) and 31 JJC and Article 19 and 25 KPC].

lighter sentence of educational-correctional measures, ironically, may end up spending longer in the same institution under the same conditions as those who received the purportedly harsher sentence of juvenile imprisonment. The institutional shortcomings have thus led to a situation where educational-correctional measures have the potential to lose their educational rehabilitative character.

C. The Unnecessary Use of Custodial Measures to Separate the Juveniles from Their Environment

Due to the institutional shortcomings, educational-correctional measures are imposed to separate the juvenile from his or her environment. In these cases - where placement in a foster family or at an educational institution would have fulfilled this purpose - the courts find themselves forced instead to impose custodial measures. The following cases are some examples of such cases.

> In the first example, a case from the Mitrovicë/Mitrovica District Court, a female juvenile was found guilty of infanticide, in a sentence dated 12 March 2003. In its reasoning, the court put great emphasis on the fact that the juvenile was still living in the same house as the father of the child, her brother-in-law, and that the family of the juvenile did not have the economic means to move somewhere else. The court therefore stated that, taking into account the family circumstances in which the juvenile lives, the court considered that it is necessary to separate the juvenile from the family environment in order for her re-socialisation and education. The court therefore pronounced educational-correctional measures.
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> The second example is from the Prishtinë/Priština District Court. In this case the juvenile, who was only fourteen years at the time of the crimes, was found guilty of having committed eight criminal acts of theft with violence, robbery and aggravated theft. The court imposed educational-correctional measures. In the verdict, dated 2 March 2004, the court referred to his family situation and stated that the juvenile dropped out from school; he started to wander the streets; his family lived under very bad economic conditions and that, as a child, he committed several criminal acts of a similar nature. He was already in contact with the Centre for Social Work but without success. The court pronounced educational measures that would separate the juvenile from his surroundings. Considering the personality of the juvenile, the family situation, and the fact that his parents could not increase the supervision, the court decided to pronounce educational-correctional measures. The lack of alternative measures that would place the juvenile in a different home thus led to the court's decision to impose a custodial measure.

In both these cases the court emphasised the need to remove the juvenile from his or her family environment. However, removal from the family environment should not require that the juvenile is held in custody; a foster home or an open institution could fulfil the purpose of the punishment without the negative effects of custody on the social, mental and educational development of the juvenile.[262]

D. The Lack of Consideration of Non-Custodial Measures

International standards make it very clear that custodial measures should only be used as a last resort, if there are no other appropriate applicable measures.[263] This requires that the court considers the application of alternative measures in each case before it decides on imposing custodial measures. However, in practice, the OSCE has observed that this principle is not always respected, particularly in relation to juveniles who previously have been sentenced to educational measures. In these cases the courts have a tendency to apply custodial measures without a thorough assessment of the consequences or a

[262] It is also of note that in both cases the court referred to the economic situation of the family in its decision on the punishment. The economic situation of the family of the juvenile should not constitute the justification for custodial measures limiting the juveniles' freedom.
[263] See Article 37(b) CRC and the Beijing Rules para. 17.1.

determination of whether alternative measures could fulfil the purpose of the punishment. The courts habitually appear to apply the policy that re-offenders should always be sentenced to custodial measures. The following cases are some examples on such reasoning.

> One such example can be seen in a sentence, dated 4 April 2003, from the Pejë/Peć Municipal Court, in which the court imposed educational-correctional measures. In this case the juvenile had committed the criminal acts of light bodily injury, attempted aggravated theft and aggravated theft. The court stated that it based its decision on the following grounds; the social danger of the criminal act, that the juvenile was a recidivist, and that the educational measures of raised observation by a Guardianship Authority had not been successful. No assessment was made as to whether additional non-custodial measure would have been applicable.
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> The second example is from the Mitrovicë/Mitrovica Municipal Court. The court decided on 21 August 2003 to impose educational-correctional measures on a juvenile for committing aggravated theft.[264] The juvenile, who was fourteen at the time of the crime, had previously been subjected to educational measures of raised supervision. When deciding on the punishment, the court considered the circumstances of the crime and the juvenile's family situation and came to the conclusion that a custodial measure was adequate. However, the court failed to consider the applicability of non-custodial measures in the case and limited its reasoning by stating that it had taken into account that the previously imposed measures had not been successful.

In the above cases the court failed to consider whether additional non-custodial measures could have fulfilled the purpose of the punishment (for example, raised supervision by a Guardianship Authority combined with community service).[265] It is therefore questionable whether educational-correctional measures were the only adequate applicable measures.

E. Insufficient Reasoning

Courts must provide full and proper reasons for their decisions imposing punishment.[266] As the use of custodial measures should be more restricted in juvenile cases, it is important that the courts clearly account for the factual circumstances and determine that a custodial measure is the only applicable measure. Though it should be noted that the courts' reasoning in juvenile cases generally is more detailed than in adult cases, the OSCE has noted serious shortcomings in juvenile cases as well.

In order to limit the undue use of imprisonment, both the current and the previous law state that juvenile imprisonment is only applicable in cases where the criminal act is punishable with more than five years imprisonment and the imposition of educational measures would not be appropriate given the seriousness of the offence, the resulting consequences, and the accused's level of culpability.[267] The courts' reasoning in cases of juvenile imprisonment should therefore clearly outline the facts and circumstances upon which they are based. However, in many cases, courts have imposed juvenile imprisonment without properly accounting for why educational measures were not considered as an appropriate alternative. The following examples illustrate this problem:

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[264] The fact that the defence counsel and the Centre for Social Work agreed with the imposed measure does not affect the court's obligation to take into consideration the possibility to impose a non-custodial measure.

[265] In co-operation with the judges for juveniles the NGO *"Terres des hommes"* has been working with juveniles sentenced to community service since 2002. The courts have used the possibility to combine the educational measure raised observation by a Guardianship Authority, with certain obligations and sentenced juveniles to community service of a period between 40 and 120 hours. The organisation and administration of the execution of the community service has been dealt with by *Terres des hommes*, who also followed up in the juvenile through reports to the court as well as to the Centre of Social Work.

[266] Article 74 JJC clearly states that part four of the PCPC is applicable also in juvenile cases.

[267] Article 30 JJC. Concerning the previous legislation see Article 77 FRY CC.

In a case from the Pejë/Peć District Court involving five adult and one juvenile accused accused, the court sentenced the juvenile to nine months of imprisonment for illegal possession of weapon. In its verdict, dated 29 October 2003, the court made no reference as to why it had chosen to impose juvenile imprisonment.

The second case is from the Prizren District Court. This case involved four accused and one juvenile.[268] In its sentence, dated 18 December 2003, the court ordered the juvenile to serve one year and six months of juvenile imprisonment for having committed grave bodily injury. In its reasoning the court made no reference to the possibility of imposing educational measures, even though this had been proposed by the Centre for Social Work.

F. Failure to Establish the Duration of Imposed Educational Measures

The periodic review of the punishment and the possibility for the court to terminate the measure before its completion is maintained in the new code. [269] However, under the new code the court must also expressly determine the maximum duration of the measure at the time of sentencing.[270] This allows the judge to ensure that the measure is proportional with the committed crime.[271] Previously, the court could only decide on the type of measure imposed at the time of the verdict.

However, thus far, in sentences imposed since the JJC came into force courts have in many cases failed to determine the duration of the measures on an individualised basis. Instead, the courts have continued their previous practice of merely referring to the statutory limits of the measure.[272] The following cases are a few examples.[273]

In a verdict from the Prizren District Court, dated 1 July 2004, the court convicted a juvenile for illegal weapons possession. The court imposed educational measures of extended supervision by the Guardianship Authority with 120 hours of community service work of not less than two hours per day, to be conducted within three months. The court failed to set the duration of the extended supervision, stating only that it should last between one and three years. This time range refers to the previous law and is not in accordance with the statutory limits in the new law which are between three months to two years.[274]

In a verdict dated 29 September 2004, the Mitrovicë/Mitrovica Municipal Court sentenced a juvenile to intensive supervision by the Guardianship Authority for having committed aggravated theft. In its decision the court stated that the measure should not be shorter than three months or

[268] Three of the accused were convicted for participating in a brawl while the fourth accused was convicted for illegal possession of weapons.
[269] Every six months, or on the request by the juvenile, his or her representative or the institution, the court that imposed the educational measure shall review its execution and decide whether to continue or terminate the execution of the measure, or substitute it for a less severe measure (see Article 124 JJC).
[270] Article 6(4) JJC.
[271] See Beijing Rules para. 5.1.
[272] The JJC entered into force on 20 April 2004. The new code does not include any transitional provisions regulating its implementation in cases which had been initiated before its entry into force. When it comes to substantial criminal law, including for example provisions on punishment, general criminal principles state that the law which is most favourable for the accused should be implemented. This principle has been included in Article 2 JJC. In accordance with this principle the provisions on applicable measures and punishment in the JJC should be implemented in all cases which were completed after 20 April 2004.
[273] According to Lipjan/Lipljan Correctional Centre no juveniles were subjected to educational-correctional measure during the period 20 April – 6 October 2004. The OSCE has therefore not been able to monitor whether the courts will deal with custodial sentences in the same way.
[274] See Article 16(1) KPC and Article 17(3) JJC.

exceed two years, and that the court would determine the exact length at a later stage. The court thus simply referred to the statutory limits of the measure and failed to decide on the duration of the measure.[275]

G. Conclusions

Though the JJC included some important changes and improvements to the legislative framework, the main concerns in relation to the sentencing of juveniles perpetrators remain the same. A lack of necessary institutions severely limits the number of alternative measures available to the courts, in spite of a theoretical diversity. Consequently, juvenile offenders do not get the individualised support and treatment to which they are entitled.

The situation is worsened by the courts' reluctance to use the available alternative measures. As a result there is an excessive use of custodial measures in violation of international human rights standards and the principle of the best interest of the child.

XI. RECOMMENDATIONS

Punishment of adults

- In appeals decisions, appellate courts, and in particular the Supreme Court, should consistently instruct lower courts that verdicts and decisions relating to punishment should include a detailed and individualised reasoning. In particular that courts should:
  - Decide on an individualised punishment within the limits established by the law;
  - give full detailed reasoning when deciding on a mitigated punishment, including the existence of such particular circumstance which indicates that the purpose of the punishment may be achieved through a lower punishment;
  - adequately apply mitigating and aggravating circumstances in accordance with the law; and,
  - consider the application of alternative measures to imprisonment in all cases.
- The Kosovo Judicial Institute should offer training on sentencing, highlighting the need of individualised and detailed reasoning as well as the correct use of mitigating and aggravating circumstances.
- The Department of Judicial Administration should ensure that all Supreme Court verdicts are published and made readily available to the judges and prosecutors at all levels.
- The Department of Justice should ensure that the necessary institutional capacity for the implementation of the measures and sanctions foreseen in the law is properly established and maintained. This includes:
  - the establishment of an institution for mandatory rehabilitation treatment for drug and alcohol addictions; and,
  - preparations for the execution of imprisonment in semi-liberty.
- The Kosovo Judicial Institute should offer all judges and prosecutors training on the new alternative measures to ensure that they become familiar with and confident to use these measures.

[275] Article 17(3) states that measures of intensive supervision should not be less than three months or more than two years.

- The Probation Service regional offices should be encouraged to establish contacts with judges and prosecutors at the municipal and district court level to promote a greater understanding within the judiciary of the services provided by the Probation Service and the use of alternative measures. (This recommendation is also applicable for juvenile punishment.)

Punishment of Juveniles

- The Department of Justice should ensure that the institutional capacity necessary to comply with the JJC is in place. This includes the creation of the following institutions:
  - A disciplinary centre;
  - an educational institution;
  - a special care facility; and,
  - an educational-correctional institution of semi-confined type.
- The Department of Justice should use its best endeavours to separate juvenile and adult inmates, and to separate juvenile detainees from sentenced juveniles and adults.
- The Department of Justice should ensure that the execution of educational-correctional measures complies with the conditions laid down by the law; i.e. that educational measures constitute a real alternative to imprisonment, offering the juveniles protection, assistance and supervision, whilst creating conditions for their educational, social and mental development.
- The juvenile judges, prosecutors or the competent authorities should develop a system for the implementation of diversion measures.
- The Probation Service should take immediate steps to identify foster families for the implementation of educational measures of increased supervision and placement in a foster family.
- The Department of Justice should ensure that the Probation Service has the capacity to follow up on the implementation of diversion measures, the execution of the different forms of educational measures and the release of juveniles sentenced to juvenile imprisonment, throughout Kosovo.
- In order to improve the implementation of the measures foreseen in the law and facilitate the co-ordination and co-operation between the different actors involved in juvenile punishment, a central level working group should be established with representatives from the Penal Management Division (including a representative from the Probation Service), the Ministry of Work and Social Welfare, the Ministry of Education, Science and Technology and the Ministry of Health.
- The Kosovo Judicial Institute should continue to offer juvenile judges training on the juvenile justice code, international standards applicable on juvenile justice, and the use of alternative measures.
- The responsible training agencies (such as the Kosovo Judicial Institute, the Criminal Defence Resource Centre, and the Kosovo Law Centre) should organise roundtable discussions for the discussion of and the commenting on the implementation of the Juvenile Justice Code. Juvenile judges, prosecutors, defence counsel, representatives from the Probation Service, international experts and others should be invited to participate in these roundtable discussions, resulting in the publication of a series of conclusions which should made readily available to all parties involved in juvenile justice.

CHAPTER 6

CASES RELATING TO THE EVENTS OF MARCH 2004

I. INTRODUCTION

One of the most noteworthy events which took place during the reporting period of this Review were riots which occurred between 17 and 19 March 2004. The violence illustrated the fragility of inter-ethnic relations in Kosovo and the criminal proceedings that followed from the violence served as a test of the readiness and effectiveness of the judicial system to answer to widespread ethnical violence. The OSCE has closely monitored the criminal prosecutions linked to the March violence, and in particular the response of the local judiciary - their dedication and capacity to handle these cases.[276] The following chapter provides an overview of the criminal proceedings that were monitored until the end of the reporting period. The OSCE will publish a later report on the courts' complete handling of riot related cases in due course.

II. TYPES OF CASES

The criminal cases that stem from the March violence range from acts of petty theft and looting to more serious offences such as the widespread destruction of property, attacks on KFOR and the Police, and murder. During and after the riots around 500 arrests were made and cases against approximately 350 persons have entered the judicial system. Notably the proceedings are not distributed evenly throughout the regions even though all areas were affected by the riots. Prizren, which sustained the highest incidence of property destruction, has cases against 120 persons, but most of them in the minor offences courts; Gjilan/Gnjilane has cases against 113 persons; Prishtinë/Priština follows with 96; Mitrovicë/Mitrovica only has 9, in spite of the fact that it was an area of fierce clashes; and in Pejë/Peć there are cases against 10 persons.[277]

III. THE POLICE RESPONSE

UNMIK Police have established investigation task forces at headquarters and regional levels dedicated to investigating the criminal acts which took place over 17-19 March. In October 2004 the Department of Justice reported that a special police unit codenamed "Operation Thor" has been dedicated to record all March riots-related offences in a central database in order to sort out cases by degrees of seriousness and help prioritise investigations. Investigators from Operation Thor are working in every region and the Police Main Headquarters specifically on cases emerging from the March riots. The OSCE welcomes this effort.

However, despite this initiative, the number of arrested persons is relatively few when compared with the scale of the events. UNMIK Police counted 33 major riots over 17 – 18 March, involving an estimated 51.000 participants.[278] Operation Thor is currently conducting investigations in relation to 1.380 criminal incidents.[279] To date there have been around 500 riot related arrests or cases handed over from Operation

[276] The OSCE first reported on the effects of the riots and the cases arising from these events in its report entitled "Human Rights Challenges following the March riots," Department of Human Rights and Rule of Law, published on 25 May 2004.
[277] These figures in this chapter include cases up until 9 December 2004.
[278] V.I.P. Daily News Report, 23 March 2004 "UNMIK police spokesman […] said that the police supposed that some 51,000 people were involved in 33 riots." Also see "Collapse in Kosovo – ICG Europe report No. 155," 22 April 2004, p. 15.
[279] Interview with the Chief of Operation Thor, 3 November 2004.

Thor to the prosecutors.[280] The number of persons currently under investigation was not made known to the OSCE, but it is known that investigations are still ongoing.

Furthermore, most of the major crimes remain unresolved; only four persons have been charged with leading the riots, and of the 19 murder investigations, only two cases (one involving five accused) are being processed.[281] Most of the arrested persons were merely participants and looters.

IV. RESPONSE OF THE JUDICIARY

Thus far, there have been 348 persons brought before the courts for riot related offences. Of these, 98 are still being investigated, 79 persons are indicted and awaiting trial, and cases against 171 persons have been completed. The OSCE has monitored a selection of the cases from the minor offences and municipal courts and the vast majority of the 44 cases from the district courts. In doing so, the OSCE has observed a number of concerns relating to the investigative stage. However, the OSCE has thus far observed that during the trial stage there have not been any major procedural concerns with the judiciary's handling of these cases.

A. The Investigative Stage

The disparity between the estimated number of participants and the number of arrested persons may be partly due to the reluctance of witnesses to come forward and testify, or due to their not giving evidence fully and forthrightly, when they appear before the court; be that out of sympathy for the suspects or because of fear of intimidation.[282]

> In a case before the Pejë/Peć District Court, two accused were charged with participating in a group that commits violence and inciting national, racial, religious or ethnic hatred, discord or intolerance, and unlawful possession of weapons. During the investigation, the OSCE noted that even KPS officers gave very vague and often contradictory testimonies, giving the impression that they were unwilling to co-operate with the prosecutorial authority.

Another problem is the difficulty to locate the injured parties or witnesses. During and directly after the violence many Kosovo Serbs left their homes for larger enclaves or Serbia proper, which has added to the difficulty for the judiciary to locate and summon them to testify.

> In a case before the Municipal Court of Prishtinë/Priština against four defendants charged with aggravated theft, the court has not been able to locate the injured party, a Kosovo Serb;[283] consequently, the investigation has been pending since 23 March 2004.

Furthermore, it appears that in a number of cases the courts or the prosecutors have been reluctant to diligently pursue the continuation of the investigation, for unknown reasons. The following are examples of a wider observation:

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[280] Ibid.
[281] Ibid.
[282] According to the Chief of Operation Thor, the major difficulty in conducting the investigations into the March riots has been the witnesses' fear of intimidation or reprisals should they give evidence against the perpetrators. In many cases, witnesses have identified a perpetrator orally, but are unwilling to make a written statement, thus rendering the evidence redundant so far as court proceedings are concerned. This problem has arisen in relation to witnesses from both the Kosovo Serb and Kosovo Albanian communities. See further discussion of this concern in Chapter 8.
[283] According to the investigative judge in this case, he sent a request to the police on 28 April 2004 to locate the injured party.

Two similar cases before the Municipal Court in Gjilan/Gnjilane are of note: In the first case, on 22 March 2004 the prosecutor filed a request to conduct an investigation against the defendants for attempted aggravated theft in complicity; in the second case, the prosecutor filed such a request on 25 March 2004 for the criminal act of attacking an official person in performance of his duties. For both cases, two hearings were scheduled, on 13 and 27 September, respectively. However, in both cases, the hearings were postponed because, according to the judge, the witnesses, KPS officers, did not appear before the court.[284] No other actions were taken by the court in either case during the reporting period.

Two other cases before the Municipal Court in Gjilan/Gnjilane are also of interest: In one of these cases the prosecutor requested on 22 March 2004 that the suspects be investigated for the offence of aggravated theft in complicity; in the other case, the prosecutor requested on 23 March 2004 that the suspects be investigated for attempted aggravated theft in complicity. In both cases, no other investigative action was taken during the reporting period.

B. The Trial Stage

To date, of the relatively few cases that have gone to trial, the courts have conducted the trials fairly and efficiently. However, the OSCE has noted that, in some cases, courts sentenced the accused to a punishment below the minimum penalty prescribed by the law, without giving appropriate reasoning.[285]

In a case before the Gjilan/Gnjilane Municipal Court on 2 June 2004, two accused charged with the criminal offence of causing general danger in a place of a large gathering (burning a car with Serbian registration plates), received imprisonment terms of five months, which is below the minimum prescribed by the law.[286] The Court did not adequately explain the reasons for this deviation.

In another case before the same Court, on 8 June 2004, two accused convicted of the criminal offence of aggravated theft received imprisonment terms of four months, which is also below the minimum prescribed by the law.[287] The Court did not give adequate reasoning for this either.

In conclusion, the relatively small number of criminal cases that have entered the justice system may be partly due to the reluctance of witnesses, even police officers, to appear before the court when summoned, as well as to testify fully and forthrightly when they do appear. Further, it may be owed to the difficulties the investigating authorities face in locating witnesses, injured parties or suspects for judicial proceedings. Additionally, in a number of cases which remain at a standstill, it also appears that the courts and prosecutors have not diligently pursued the continuation of the proceedings. Finally, as regards the trial stage, no major concerns have been noted thus far, with the exception of some cases in which courts have

[284] The OSCE noted that no summonses for these witnesses existed in the case files; the investigating judge explained that because these witnesses were "official persons," they were summoned differently: If these persons are not found or do not sign the summonses, then the summonses are not returned to the court. The investigating judge added that when police officers fail to appear, the judge can send a note to their supervisor; in the cases in question however, the investigating judge claimed that he contacted the officers' supervisor orally. It is noteworthy that, according to information received by the President of the Gjilan/Gnjilane Municipal Court, the only difference in the summoning of police officers, compared to the regular procedure for summoning witnesses, is that the summonses for officers are delivered to their place of work, instead of their place of residence; notwithstanding, the receipt that the summonses have been received must be signed and returned to the court.

[285] See further discussion on this topic in Chapter 5 of the present Review.

[286] The minimum penalty of causing general danger in a place of a large gathering is six months' imprisonment. See Article 291(3) PCC.

[287] Aggravated theft has a minimum penalty of six months' imprisonment. See Article 253(1) PCC.

imposed sentences which are below the minimum prescribed penalties without providing adequate reasoning for this in their verdicts.

CHAPTER 7

RIGHT TO EFFECTIVE DEFENCE

I. INTRODUCTION

The right to present an effective defence and the right to be represented by legal counsel are included in international human rights standards.[288] Related to these rights is the defence counsel's obligation to act in the best interests of their clients. In Kosovo, the relevant standards are enshrined within the domestic law and the Kosovo Code of Lawyers' Professional Ethics.[289] These provisions oblige defence counsel to play an active part throughout the proceedings so as to ensure that the rights and interests of their clients are protected.

Under the new criminal procedure code, defence counsel's role is more adversarial in nature, demanding a more pro-active, in-depth approach to casework than may have been expected under the previous procedure code. In large part, these developments will require more assertiveness on the part of local counsel; closer contacts with the client, in-depth investigative efforts, and more specific and supportive arguments, enabling the accused and his advocate to put forth the best possible defence.

II. THE RIGHT TO AN EFFECTIVE DEFENCE IN PRACTICE

During the reporting period, the OSCE has identified a number of instances where the right to effective defence of the accused had been violated. Defence counsel have routinely failed to observe procedures designed to guarantee the rights of their clients to a fair trial. Failings observed by the OSCE during the reporting period comprise of on-going weaknesses.

The most common issues of concern are:

- Failure to attend;
- failure to seek time to prepare the defence;
- failure to seek alternatives to pre-trial custody;
- failure to plead in mitigation and seek alternative punishments;
- problems regarding the conduct of *ex officio* defence counsel.

A. Failure to Attend (Right to be Represented by Counsel)

Under both domestic legislation and international law, an accused is entitled to appoint defence counsel at any stage of the proceedings.[290] Under the new law the accused has the right to defence counsel throughout the entire course of criminal proceedings.[291] The law also states that the police, public prosecutor, pre-trial judge or presiding judge shall instruct the suspect or defendant that he or she has the right to engage a defence counsel and that defence counsel can be present during the examination of the

[288] Articles 14(3) ICCPR and 6(3) ECHR state that any accused has the right to defend himself in person or through the legal counsel of his choosing and in cases where it is required by the interest of justice to have legal assistance offered to him for free by the court. As part of this right, the accused is also entitled to adequate time and facilities for the preparation for his or her defence.
[289] Articles 12 and 69-77 PCPC; Articles 11 and 67 -75 FRY CPC; sections 2(d) and 3 of UNMIK Regulation 2001/28 On Rights of Persons Arrested by Law Enforcement Authorities.
[290] Article 6(3)(b) and (c) ECHR.
[291] Article 69 PCPC.

accused.[292] In multiple cases monitored by the OSCE in various stages of the proceedings, however, defence counsel have not been present during proceedings conducted against their clients. Two examples are outlined below:

> In a case before the Gjilan/Gnjilane District Court involving charges of illegal possession of weapons, the session was postponed on 26 October 2004 due to the defence counsel's absence. The court had summoned the defence counsel who had failed to inform the court that he was on vacation.
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> In a case held before the Gjilan/Gnjilane District Court, involving charges of grave cases of theft with violence and robbery and aggravated theft, the OSCE noted repeated absences of defence counsel. Defence counsel consistently circumvented their duties by transferring their powers of attorney amongst each other during trial sessions. For instance, on several occasions one defence counsel was representing between eight and nine accused. Such behaviour persisted until one of the defence counsel, in a trial session on 14 May 2003, complained that he could no longer continue to replace his colleagues. The defendants had, until this point, put up with an inconsistent and ill-prepared defence.

The OSCE is of the opinion that the failure of defence counsel to attend hearings may seriously jeopardise the right of a person to a fair trial. Defence counsel cannot advocate effectively on behalf of their clients if they do not attend investigations or trial sessions. In instances where defence counsel fail to attend hearings, evidence may not be thoroughly scrutinised from the perspective of the accused, inconsistencies in prosecution testimony may go unchallenged and pertinent procedural issues, such as requesting additional witnesses when new information comes to light, may be ignored. When evidence is not properly tested, exculpatory evidence may not be revealed and mitigating circumstances not properly highlighted.

B. Failure to Seek Time to Prepare the Defence

Both applicable domestic law and international law provide that the accused should be given sufficient time to prepare his or her defence.[293] Despite this clear right, the OSCE has frequently observed, during the monitoring of judicial proceedings, defence counsel failing to request sufficient time to enable a thorough defence to be prepared. Furthermore, it has been noted that most courthouses do not have a separate room in which counsel and defendant can consult in private.

> In the Gjilan/Gnjilane Municipal Court, three persons were convicted on 13 October 2003 for grave bodily injury. Two of the defendants had no defence counsel. At the beginning of the main trial the presiding judge appointed an additional defence counsel to represent these two accused. The trial proceeded immediately, and defence counsel did not request time in order to prepare the defence. All defendants were found guilty and each sentenced to three months' imprisonment.
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> In a case against a man charged with theft before the Municipal Court in Gjilan/Gnjilane in November 2003, the court appointed defence counsel left the session only a few minutes after the session started, stating that he was engaged at another trial. The presiding judge then appointed another defence counsel who did not ask for time to read the indictment or consult with the accused. Counsel posed no questions to witnesses during the trial and left immediately after giving the final speech, not waiting for the end of the trial.

[292] Article 69(2) PCPC. See also UNMIK Regulation 2001/28 On Rights of Persons Arrested by Law Enforcement Authorities.
[293] Article 12(1) PCPC and Article 6(3) ECHR.

In order to advocate effectively, it is crucial that defence counsel obtain detailed instructions from their clients. It is for this reason that the right to adequate time to prepare defence is enshrined in international human rights standards.[294] Defence counsel should actively seek time to consult with their clients, especially prior to court sessions, when necessary.

Moreover, adequate space in each courthouse, for instance a separate room, should be afforded to the defendant to consult with his or her counsel in private.

C. Failure to Seek Alternatives to Pre-trial Custody

The OSCE is concerned that defence counsel in many cases are not sufficiently active in protecting the rights of their client. One point where defence counsel regularly fail to act is in relation to effectively challenging proposals for pre-trial custody or suggest viable alternatives.

> In a case before the District Court in Pejë/Peć the accused was charged with the following criminal offences: participating in a crowd that commits a criminal offence, obstructing an official person in performing official duties, blackmail and unlawful weapons possession. During the 6 May 2004 detention on remand hearing, the defence counsel opposed the detention on remand proposal, but did not offer any other alternatives to custody. The pre-trial judge ordered detention for one month. The defence counsel appealed this ruling on 10 May 2004, where he also demonstrated readiness to pay bail.[295] The appeal was rejected. Notwithstanding the proposal in the appeal brief, it is unclear why the defence counsel did not specifically propose any alternatives, such as bail, at the initial remand hearing.
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> In a trial session convened in the Gjilan/Gnjilane District Court on 10 March 2004, a privately appointed defence counsel made an oral submission for his client to be released. The reasoning proffered was rather unusual: Aside from the guarantees normally expected from an accused requesting his freedom, defence counsel in this case suggested that, since two of his clients are brothers, one could be kept in detention and the other one released. As far as the OSCE could understand, the one in detention would be kept as a "hostage" and be a guarantee that his brother would attend court. The presiding judge refused to include such an absurd submission in the record.

The new procedural code describes eight means by which the presence of an accused may be ensured at court and the proceedings may be conducted successfully. Seven of which are alternatives to detention on remand: Summons; order for arrest; promise of the defendant not to leave his or her place of residence; prohibition of approaching a specific place or person; attendance at police stations; bail; and house detention.[296] Underscoring a suspects' right to liberty in all but exceptional cases, the OSCE encourages more creative and pro-active challenges to pre-trial detention by defence counsel. In this respect, the OSCE supports additional training programmes designed to enrich the advocacy skills of local counsel and to promote the utilisation of the full spectrum of the law.

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[294] Article 14(3)(b) ICCPR and Article 6(3)(b) ECHR.

[295] The appeal brief stated: "…for the suspect we ask to defend himself in freedom. In this respect, as guarantee we offer all the legal requirements so that the suspect may defend himself in freedom. We are ready to pay the bail as decided by the court as a proof and a guarantee that the suspect shall appear at every court's summons." (official translation).

[296] Articles 268 – 281 PCPC.

D. Failure to Plead in Mitigation and Seek Alternative Punishments

In relation to the last phase of the criminal procedure, the decision on the punishment, two problems in particular have been observed: Failure of defence counsel to present effectively any relevant mitigating factors; and their failure to seek alternatives to custodial sentences.

In most of the cases observed by the OSCE defence counsel tend to limit their final speeches to the issue of guilt or innocence, rarely proposing alternative methods of punishment even in instances of non-violent crime. Further, defence counsel often fail to highlight the mitigating circumstances which might convince the court to consider a more lenient or an alternative punishment. A few examples representative of this problem are outlined below:

> In a case before the Pejë/Peć District Court an accused faced charges of inflicting grave bodily injury resulting in death after a fight between the accused and his uncle. During the final speech the defence counsel argued that the court should acquit the accused as he had acted in necessary defence or convict him for a different charge. The defence counsel failed to mention any mitigating circumstances. On 5 May 2004 the accused was convicted and sentenced to six years' imprisonment.
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> In a case from the Prizren District Court, a woman was convicted for killing her husband. The woman was convicted for having shot her husband after several years of being a victim of domestic violence. Despite the fact that the defence counsel referred to these circumstances in his final speech he failed to present any mitigating factors. Instead the defence counsel stated that the accused should be acquitted for having acted in self-defence. On 21 May 2004 the woman was sentenced to unified sentence of nine years' and five months' imprisonment.

Defence counsel's failure to effectively advocate in their clients' interest may lead to inappropriate sentencing and does not comply with the defendants' right to an effective defence. It should be mentioned that the courts' practice to routinely cite mitigating and aggravating factors without any assessment and their general failure to consider alternative measures to imprisonment may discourage the defence counsel to make such motions. However, this can not be used as an excuse for the defence counsel not to defend the best interests of their clients.

E. Problems Regarding the Conduct of *Ex Officio* Defence Counsel

The OSCE has noticed that the concerns mentioned above are especially common among court appointed defence counsel. The following examples illustrate this observation:

> In a case before the Mitrovicë/Mitrovica District Court, a juvenile was charged with trafficking in persons under the age of 18 years and intermediation in the exercise of prostitution. A defence counsel was appointed *ex officio* to represent the juvenile. Counsel did not attend certain investigative hearings to which he was duly summoned, giving poor or no justification to the court regarding his absence; even in the hearings he attended, he failed to cross-examine witnesses proposed by the prosecution or propose any witnesses for the defence; after a hearing, he told the OSCE that he was not doing the job of defence counsel in this case, but simply attending the hearings, because, as *ex officio* appointed, he was not getting paid for his services and the parents of the juvenile were not interested in paying him; he added that he knew about 80% of the case file. The court appointed the same defence counsel to represent the juvenile during trial, which started in June 2003. The OSCE observed that the counsel was similarly passive during the main trial, while his main contribution was giving a brief closing speech at the end. The juvenile was sentenced to educational-correctional measures.

In another case at the Mitrovicë/Mitrovica District Court the accused was detained on 7 August 2002 and charged with attempted murder and unlawful possession of weapons. According to the presiding judge, the court-appointed defence counsel who represented the accused during investigation declined to represent him also during trial, since his *ex officio* appointment meant that he would not receive financial remuneration from the accused. The presiding judge had to appoint another attorney to represent the defendant during trial, which started on 23 April 2003.

Defence counsel have often expressed to the court and to the OSCE their concerns about being engaged in a case *ex officio*, often implying or explicitly stating that the established remuneration is inadequate and a disincentive to work on such cases.[297] Nevertheless, it should be reiterated that defence counsel have an obligation to defend their clients to the best of their ability, notwithstanding the issue of fees.

III. RECOMMENDATIONS

The OSCE advises that:

- Defence counsel should ensure that they attend all hearings in which their client requires counsel or, if they are unable to attend, inform the court in a timely manner;
- Defence counsel should ensure that they take clear instructions from their clients and, where necessary, request extra time to prepare for hearings;
- Defence counsel should, where appropriate, urge the court to consider alternatives to pre-trial custody;
- Defence counsel should, where appropriate, urge the court to consider alternatives to imprisonment in the event of a guilty verdict, and present relevant mitigating circumstances;
- Defence counsel should act in the best interests of their clients, irrespective of whether they are retained privately or court appointed;
- The Kosovo Bar Association should be open for complaints and take disciplinary action against its members who fail to fulfil their professional duties to their clients, in particular, ex officio defence counsel who fail to represent their clients without proper justification.

Further, the OSCE considers that, to some extent, the above recurrent problems may be alleviated if the Kosovo Bar Association members were given greater support, including the following:

- The Special Representative to the Secretary General should promulgate the Law on Advocacy as a priority so that continuous education for defence counsel becomes mandatory.
- The Kosovo Bar Association should ensure that the continuous education addresses the issues raised in this Review;
- The Department of Justice should forward newly issued Justice Circulars to the Kosovo Bar Association for distribution to its members;
- A Justice Circular should be issued informing courts of their obligation to make written decisions and verdicts freely available to defence counsel;

[297] See Justice Circular 2001/21 Claims for Payment/Compensation for Lay Judges, Court-Appointed Defence Counsel, Experts, Interpreters, Court Appraisers and Other Professionals in Court Proceedings, and its Annexes, as well as Justice Circular 2001/22 Remuneration of Publicly Funded Defence Counsel in Accordance with Administrative Direction UNIK/DIR/2001/15, and its Annexes. In particular see the DJA Instruction On Payments to Court-Appointed Defence Counsel, 31 January 2000; according to this instruction, and after an unofficial conversion of DM into Euros, a court-appointed defence counsel receives, for instance, based on the impending penalty of the offence, between 20,45 and 30,68 Euros for the first hour of appearing in court representing one defendant. Every subsequent hour is paid a 30% of the initial hour's value. The maximum amount which defence counsel can be paid for *ex officio* representations within one month is 255,65 Euros.

- The Department of Judicial Administration should ensure that at least one consulting room in each court is available for defence counsel; and,
- The Department of Judicial Administration should re-examine the system of payment for court appointed advocates.

CHAPTER 8

PROTECTION OF WITNESSES IN THE CRIMINAL JUSTICE SYSTEM

I. INTRODUCTION

Witnesses are crucial to successful prosecutions. If witnesses are intimidated by the accused or his/her associates, they may become too frightened to provide evidence for the prosecution; threats and violence against witnesses undermine public confidence in the judicial system as a whole and important witnesses may refuse to assist authorities for fear of reprisal. Ultimately, major prosecutions may collapse. The Fifth Review highlighted the scale of witness intimidation in Kosovo. Further, it encouraged the authorities to address the problem by providing a more effective witness protection system and made a number of recommendations in this regard.[298] This chapter examines the continuing problem of witness intimidation and the shortcomings in the witness protection system.

II. THE WITNESS PROTECTION SYSTEM

By way of background; two interrelated methods of providing protection for witnesses in criminal proceedings are in place in Kosovo. Firstly, the physical protection of witnesses is provided before, during and after trial by a specialised police unit known as the Witness Protection Unit (WPU). Secondly, measures to conceal the identity of witnesses while giving evidence are administered by the courts pursuant to a statutory framework. UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, dated September 2001[299] (witness protection regulation) has now been incorporated in the new code. Together, these two main methods of providing protection may be termed the "witness protection system."

III. INCIDENTS OF INTIMIDATION

Many concerns have remained since the last OSCE review on the criminal justice system; according to the Chief of Operation Thor,[300] the major difficulty in conducting the investigations into the March riots has been the witnesses' fear of intimidation or reprisal should they give evidence against the perpetrators.[301] Further, towards the end of 2003 and early in 2004, a number of incidents occurred which resulted in the death or injury of persons who were involved in investigations of high profile cases. Attacks on trial witnesses have persisted.

> In a case before the Gjilan/Gnjilane District Court in August 2003, a witness testified that she lied during the previous session as a result of threats from the accused and his friends.[302]
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> In an incident, in October 2003, one of the witnesses in the Dukagjini group trial survived a murder attempt by unknown persons.[303] This witness was placed under a "House Protection Program", and was guarded by a special protection unit.

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[298] Fifth Review at pp. 26-27.

[299] See also, UNMIK Regulation No. 2002/1 Amending UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, dated 24 January 2002, which extended the temporal applicability of Regulation 2001/20; and Administrative Direction 2002/25, Implementing UNMIK Regulation 2001/20 On the Protection of Injured Parties and Witnesses in Criminal Proceedings, dated 13 November 2002.

[300] For more information on Operation Thor, see page 65 above.

[301] See above Chapter 6.

[302] DOJ Weekly Report (07-14 August 2003).

[303] This was known as the Dukagjini group trial and was a case involving former high - ranking Kosovo Liberation Army (KLA) members, charged and convicted for unlawful detention resulting in death.

In a rape trial held in the Prishtinë/Priština District Court during October and November 2003, the mother of the victim, while giving testimony, stated that one person present in the court (pointing to the defence counsel for the accused), came to her house on a previous occasion and introduced himself as a person from the District Court. Apparently, the advocate told the witness not to testify against the accused and to forgive him so that her daughter (the victim) could marry the accused's brother.

During an investigation into a kidnapping and organised crime case conducted by the Gjilan/Gnjilane District Court in October 2003, one witness testified that he was threatened on seventeen separate occasions. The witness stated that before he knew of his looming court summons, the person who threatened him showed him the witness list containing the names of the persons the court intended to summon. The investigating judge of the case denied that the list had been released to anyone except defence counsel, who had clearly been ordered not to disclose such details to anyone else.

In a case before the Pejë/Peć District Court, an injured party, who had denounced an accused charged with terrorist offences who was trying to extort money from him and threaten his business, suffered numerous threats / attacks, such as the throwing of a hand grenade into the injured party's shop and shooting at the injured party shortly after the verdict was announced on 20 August 2004. This was done irrespective of the fact that there was a plea agreement concluded between the prosecution and the defence, with the approval of the injured party.

In another case concluded before the Pejë/Peć District Court on 24 August 2004, involving kidnapping committed in criminal association, the charges were lowered pursuant to an agreement by which the accused consented to plead guilty for the crime of unlawful deprivation of liberty. In this case, the prosecutor intended to protect the injured party and his family from any further intimidation from the group involved in the criminal acts (of which some members are still at large), by reaching a compromise between the parties through the plea agreement. However, once again these intentions were frustrated as, in spite of the benefits such an agreement brought to the accused, the injured party's family continued to be threatened constantly as a result of the accused's conviction.

In September 2004, one of the witnesses from the Llapi group trial was attacked by gunmen in front of his house in Prishtinë/Priština.[304] The witness sustained no injuries during the attack.

It is important to note that the incidents of witness intimidation monitored by the OSCE are likely to represent only a fraction of the actual cases. Witnesses who have been threatened are often too scared to report the matter to the police. Further, by its very nature, the full effect of the public's fear of possible intimidation cannot be measured; it is impossible to know how many potential witnesses choose not to report what they knew to the police at the outset for fear of reprisal.

IV. SHORTCOMINGS IN THE WITNESS PROTECTION SYSTEM

It would appear that the WPU continues to face major logistical and financial difficulties.[305] Space in the safe-house is limited, and this in itself has led to a number of witnesses in need of protection being refused. In its Fifth Review, the OSCE recommended that the UNMIK Police and Justice Pillar provide

[304] This was known as the Llapi group trial and involved former high ranking KLA members, charged and convicted for war crimes.
[305] Interview with the WPU, 6 September 2004.

the WPU with the financial resources required to establish a more expansive witness protection programme for a greater number of witnesses. Such resources are still required.

Although the courts have wide ranging powers to conceal the identity of witnesses, these are rarely used in practice, despite numerous incidents of intimidation. The reason for the rare use appears to be a lack of appreciation of the possibility to use protective measures amongst the police, prosecutors and the courts, coupled with a lack of technical equipment in the courts. In cases where intimidation may arise, it is crucial that witnesses are offered protection in terms of concealing their identity at the earliest stage. Thus, the OSCE in its Fifth Review recommended that the court or the prosecutor, at the first available opportunity, inform any witness who may be under threat, of the witness protection measures available under the witness protection regulation. It would appear that this is still not happening.

Even with an effective witness protection system, it is important to win over the public. The intimidations and murders have left a significant section of the public fearing that they will be intimidated if they give statements to the police or testify at trial. This is particularly true in high profile cases. It will take a great deal of effort to restore the public's faith that the authorities are capable of protecting them. Thus, the OSCE recommended that a public information campaign be launched to reassure the public that there are means by which the authorities can protect witnesses in Kosovo. No such campaign had occurred.

V. POSITIVE DEVELOPMENTS SINCE THE FIFTH REVIEW

In the previous report the OSCE made numerous recommendations on how to improve the witness protection system. These included measures such as additional training and guidance for practitioners and the police, additional funding and support for the WPU, and the effective screening of police officers being considered for posts in victim and witness protection units. The following developments have been implemented.

The Department of Justice circulated a Justice Circular 2003/5 On Witness Protection Programs, which clarified the procedure to be followed by the WPU with respect to the Witness Protection Program. The circular describes the duties and obligations of the WPU and notes that the WPU may adopt an alternative to enrolment in the program at the instigation of a prosecutor or a judge. The circular establishes a structured, co-ordinated relationship between the WPU, prosecutors and the courts and is welcomed by the OSCE as a means to alleviate some of the prior uncertainties and procedural inconsistencies.

Further, the OSCE identified cases of human trafficking as particularly vulnerable to victim/witness interference.[306] However, since the publication of the Fifth Review, the UNMIK Police and Justice Pillar opened a shelter for victims of trafficking.[307] Through this shelter, opened in June 2003, UNMIK is able to provide security, anonymity and a wide range of support services to victims of trafficking. Not only will this be of direct benefit to the victims themselves, but this facility will assist the courts' access to the victims and contribute to the restoration of trust in the criminal justice system by both victims and the public alike.

Finally, on 17 and 18 October 2003, in response to the recommendations from the OSCE Report, the Kosovo Judicial Institute (KJI) held a training seminar on, *inter alia*, terrorism, organised crime, and witness protection. Approximately 30 national and international judges and prosecutors attended the

[306] The prosecution of numerous human traffickers had been hampered by a general lack of co-operation by victims and witnesses of the crime due to intimidation by the traffickers. In a number of cases, where serious intimidation was apparent, victims were immediately repatriated prior to the conclusion of the judicial proceedings, out of reach of the local police and courts.

[307] The shelter was set up with financial support from the OSCE through a voluntary grant to the OSCE from the US Government, and donations from individuals and organizations in Kosovo.

seminar. The training was organised in co-operation with the DOJ, and the International Criminal Tribunal for the former Yugoslavia (ICTY). The training was a combination of lecturing, discussions and case studies. This training was appreciated and should be repeated on a regular basis to include more local judges and prosecutors as well as newly arrived international judges and prosecutors.

However, many of the recommendations suggested in the Fifth Review have still not been implemented by the relevant authorities and are therefore repeated below:

VI. RECOMMENDATIONS

- The Special Representative of the Secretary General should issue an administrative direction to introduce a mandatory obligation on the court or the prosecutor, at the first available opportunity, to inform any witness who may be under threat, of the witness protection measures available in the new codes.
- The UNMIK Police and Justice Pillar should provide the Witness Protection Unit with more financial resources in order to establish a more expansive witness protection programme to a greater number of witnesses.
- The UNMIK Police and Justice Pillar should continue its extensive efforts to identify countries willing to receive protected witnesses who require relocation outside of Kosovo.
- The UNMIK Police and Justice Pillar should supply each District Court with the practical or technological means to facilitate the concealment of witnesses, such as screens, voice-altering devices, closed circuit television or video facilities.
- The law should be amended to make explicit that it is a criminal offence to breach an order for protective measures, or for an official who performs duties in connection with protective measures to reveal confidential information. Stiff penalties should be imposed upon court officials and practitioners who flout these rules.
- The Kosovo Judicial Institute and the Criminal Defence Resource Centre in co-operation with the Kosovo Bar Association should continue to provide training for judges, prosecutors and lawyers on the role and operation of the Witness Protection Unit, and the use of protective measures in court.
- A public information campaign should be launched by the UNMIK Police and Justice Pillar to reassure the public that there are means by which the authorities can protect witnesses in Kosovo.
- In the view of the transfer of competencies from the UNMIK Police to Kosovo Police Service officers, a thorough screening procedure should be established for the selection of Kosovo Police Service officers for deployment in the Witness Protection Unit.
- The police should start to provide information to witnesses on the witness protection system in Kosovo, where appropriate, in realistic and honest terms, as soon they report a crime to the police.

CHAPTER 9

SIGNIFICANT DEVELOPMENTS IN THE LEGAL SYSTEM

I. LEGAL PROVISIONS

Since the last OSCE Review of the criminal justice system, there have been several significant developments in terms of new provisions, most notably the new criminal codes. These developments are listed below:

II. REGULATIONS

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

UNMIK Regulation No. 2003/25 On the Provisional Criminal Code of Kosovo, promulgated on 6 July 2003. The Code entered into force on 6 April 2004.[308]

UNMIK Regulation No. 2003/26 On the Provisional Criminal Procedure Code of Kosovo, promulgated on 6 July 2003. The Code entered into force on 6 April 2004.[309]

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

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

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

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

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

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

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

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

[308] Article 357 PCC.
[309] Article 557 PCPC.

III. ADMINISTRATIVE DIRECTIONS

Administrative Direction No. 2003/9 Implementing UNMIK Regulation No. 2001/12 On the Prohibition of Terrorism and Related Offences, enacted on 17 April 2003.

Administrative Direction No. 2003/16 Implementing UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo, enacted on 24 July 2003.

Administrative Direction No. 2003/18 Amending UNMIK Administrative Direction No. 2001/15 Implementing UNMIK Regulation No. 2001/10 On the Prohibition of Unauthorized Border/Boundary Crossings, enacted on 30 July 2003.

Administrative Direction No. 2003/31 Implementing UNMIK Regulation No. 2001/8 On the Establishment of the Kosovo Judicial and Prosecutorial Council, promulgated on 30 December 2003.

IV. KOSOVO ASSEMBLY LAWS

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

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

Law on Anti-Corruption no. 2004/34, approved by the Assembly on 8 September 2004, pending promulgation by the SRSG.

Law on the Rights and the Responsibilities of Citizens under Health Care No. 2004/38, approved by the Assembly on 8 September 2004, pending promulgation by the SRSG.