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**THE DEPARTMENT OF HUMAN RIGHTS,  
DECENTRALIZATION, AND COMMUNITIES  
Legal System Monitoring Section**

**A Legal Analysis of Trafficking in Persons Cases in Kosovo**

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## EXECUTIVE SUMMARY

The problem of trafficking in human beings (“trafficking”) continues to be a major human rights concern in Kosovo.

The monitoring of trafficking cases by the Organization for Security and Co-operation in Europe (OSCE) in 2006 and 2007 reveals a concerning lack of preparedness by the Kosovo authorities to handle these cases. In particular, the OSCE has noted a consistent failure of the relevant authorities to place the human rights of trafficked persons “at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.”<sup>1</sup>

In cases monitored by the OSCE, victims did not receive the basic guarantees provided by law, and frequently faced prosecution or the threat of prosecution. Witness protection measures were rarely used, despite the regular intimidation of victims. Moreover, judges and prosecutors often failed to understand the legal definition of the crime of trafficking, or permit perpetrators to go unpunished.

In summary, the OSCE observed that authorities involved in the investigation and prosecution of alleged traffickers fail to adopt a victim-centred approach, or to ensure that perpetrators face justice.

The OSCE’s Legal System Monitoring Section has addressed the issue of trafficking in previous reports.<sup>2</sup> It acknowledged positive developments at the legislative and institutional levels. However, most of the concerns related to the judicial handling of trafficking cases still exist.

Therefore, the OSCE remains deeply concerned by the continuing failure of the Kosovo judicial system to adequately respond to the worrying phenomenon of trafficking in human beings.

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<sup>1</sup> United Nations Office of the United Nations High Commissioner for Human Rights (“High Commissioner for Human Rights”), *Recommended Guidelines and Principles on Human Rights and Human Trafficking*, UN Doc. No. E/2002/68/Add.1, 20 May 2002 (“High Commissioner for Human Rights Recommended Principles”).

<sup>2</sup> First Legal System Monitoring Section Review of the Criminal Justice System (July 2000); Third Review of the Criminal Justice System (October 2001); Fourth Review of the Criminal Justice System (February 2002); Fifth Review of the Criminal Justice System (April 2003); Sixth Review of the Criminal Justice System (October 2004).

## INTRODUCTION

Since the beginning of 2006, there have been approximately 41 trafficking cases pending before the Kosovo courts.<sup>3</sup> Several other cases of possible trafficking that prosecutors classified as lesser crimes also reached the courts during this time period. The number of unreported cases is likely much higher. Since 2006, the OSCE has monitored<sup>4</sup> 26 trafficking cases.

The present report is based on the monitoring of investigations and trials of trafficking cases throughout Kosovo, and focuses on observed violations of domestic law and international human rights standards.<sup>5</sup>

The first section of this report details the lack of understanding of the offence of trafficking by judges, prosecutors, and the police. The OSCE has observed a widespread lack of knowledge of the elements of trafficking among these actors. As a consequence, cases are often wrongly classified as trafficking, or actual cases of trafficking are not recognized as such.

The second section analyses the failure of prosecutors and judges to properly investigate alleged trafficking cases, and investigate trafficking-related offences. The OSCE has noted a lack of proactivity on the part of investigative authorities in prosecuting suspects of trafficking and/or trafficking-related crimes (such as obtaining sexual services from and rape of victims of trafficking).

The third and fourth sections focus on the role of trafficking victims in criminal proceedings against the alleged perpetrators. The OSCE has observed the same systematic failure to protect and assist witnesses and victims in trafficking cases that has been previously noted in other types of cases.<sup>6</sup> Assistance and protection for victims of trafficking is essential because the victims themselves are particularly vulnerable. Adequate support is also crucial to the victims' willingness to cooperate with

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<sup>3</sup> Based on official figures provided to OSCE monitors by the Kosovo court employees. Of these 41 cases, 22 are from Prishtinë/Priština, eight from Prizren, five from Mitrovicë/Mitrovica, five from Gjilan/Gnjilane, and only one from the Pejë/Peć region. The OSCE knows of no reason why the Pejë/Peć region should have less trafficking-related criminality or trafficking cases. This may suggest that in the Pejë/Peć region the competent authorities have failed to adequately investigate and prosecute suspected traffickers.

<sup>4</sup> Pursuant to its mandate, the Legal System Monitoring Section, part of the Department of Human Rights, Decentralization and Communities of the OSCE Mission in Kosovo, monitors the justice system in Kosovo for compliance with domestic and international human rights standards, and recommends sustainable solutions to ensure that these standards are respected. Please see the Annex for a table summarizing the total number of trafficking cases in Kosovo, trafficking cases monitored by the OSCE, and the total number of trafficking convictions in Kosovo.

<sup>5</sup> For questions or matters related to other aspects of this issue (such as the causes of trafficking, prevention, and victims' rehabilitation) please refer to the report of the OSCE Mission in Kosovo Anti-Trafficking Unit within the Department of Human Rights, Decentralization and Communities, *National Referral Mechanisms*, to be published in October 2007.

<sup>6</sup> See Legal System Monitoring Section, Review of the Criminal Justice System, The protection of witnesses in the criminal justice system, the administration of justice in the Minor Offences Courts, Juveniles in criminal proceedings (December 2006).

investigative authorities and testify against alleged perpetrators. Therefore, section three addresses the lack of appropriate treatment of victims by the relevant authorities, while section four focuses on the failure to provide adequate protective measures for victims and witnesses.

Finally, the report concludes that very little progress has occurred in the past few years with respect to the handling of trafficking cases, and addresses a number of recommendations to the relevant authorities.

## **I. FAILURE TO UNDERSTAND THE REQUIRED ELEMENTS OF THE OFFENCE OF TRAFFICKING**

The OSCE notes with concern that judicial authorities (judges and prosecutors) often fail to fully understand the criminal offence of trafficking, as envisaged in Article 139 of the Provisional Criminal Code of Kosovo (PCCK).<sup>7</sup>

Article 139 of the PCCK is largely inspired by UNMIK Regulation 2001/4, *On the prohibition of trafficking in persons in Kosovo*.<sup>8</sup> This Regulation itself draws most of its elements from the First Additional Protocol to the United Nations Convention Against Transnational Organized Crime (“Palermo Convention”) of 2000.<sup>9</sup>

Article 139 of the PCCK criminalizes the activity of “trafficking in persons”, carrying a possible sentence of two to twelve years of imprisonment. The law foresees harsher punishments for the organizer of a group of persons who engages in trafficking (seven to twenty years imprisonment), or if the victim is a juvenile (three to fifteen years imprisonment).<sup>10</sup>

The PCCK also punishes those who use or procure the sexual services of a person with the knowledge that he/she is a victim of trafficking. In such cases, the perpetrator is subject to a punishment of three months to five years,<sup>11</sup> which increases to two to ten years if the victim is under-age.<sup>12</sup> Moreover, Article 139 of the PCCK criminalizes negligent facilitation of trafficking, establishing a punishment of six months to five years.<sup>13</sup> Finally, the law provides for further aggravated punishments if the above mentioned offences are committed by an official person.<sup>14</sup>

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<sup>7</sup> UNMIK Regulation No. 2003/25, *On the Provisional Criminal Code of Kosovo*, 6 July 2003.

<sup>8</sup> UNMIK Regulation 2001/4, *On the Prohibition of Trafficking in Persons in Kosovo*, 12 January 2001.

<sup>9</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the Convention against Transnational Organized Crime, Palermo, 15 November 2000 (“Palermo Protocol”).

<sup>10</sup> Art. 139(2), PCCK.

<sup>11</sup> Art. 139(5), PCCK.

<sup>12</sup> Art. 139(6), PCCK.

<sup>13</sup> Art. 139(4), PCCK. In addition, Art. 140 PCCK foresees the separate offence of “withholding identity papers” of victims of trafficking.

<sup>14</sup> Art. 139(7) and 140(2), PCCK.

## A. The three elements of the crime of trafficking

Article 139 of the Provisional Criminal Code of Kosovo (PCCK) defines trafficking in persons consisting of three required elements:

- 1) the recruitment, transportation, transfer, harbouring or receipt of persons;
- 2) by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person;
- 3) for the purpose of exploitation. Exploitation is defined as “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>15</sup>

These three distinct elements may be viewed as an “act” element (“recruiting, transporting, transferring, harbouring or receiving persons”), a “means” element (“threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person”), and a “mental” element (the purpose of exploitation).<sup>16</sup> The first two elements impose particular *actus reus* requirements, whereas the third imposes a *mens rea* requirement. These three elements are examined in the following paragraphs.

### 1) The “acts” element

The first *actus reus* element, the “acts” element, can be satisfied through one of the following five acts: (i) recruitment; (ii) transportation; (iii) transfer; (iv) receipt; or (v) harbouring of a person.<sup>17</sup>

- (i) “Recruitment” means to hire somebody; it does not require that the recruiter has the intention to pay this person. The recruitment can happen abroad as well as in the victim’s hometown or village.<sup>18</sup>
- (ii) “Transportation” means physically moving a person from one location to

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<sup>15</sup> Art. 139(8)(2), PCCK. Although most of the alleged trafficking cases monitored by the OSCE involved allegations of sexual exploitation of females, trafficking can involve labour exploitation, sexual exploitation of males, the removal of organs, and forms of slavery.

<sup>16</sup> See also Art. 3(a), Palermo Protocol.

<sup>17</sup> These terms are not defined under Kosovo law. To provide guidance to the Kosovo courts, it would be helpful for the Kosovo Supreme Court to issue a decision that clarifies the appropriate definitions of these and other undefined terms in Kosovo’s anti-trafficking law.

<sup>18</sup> According to the report of the United Nations Special Rapporteur on Human Rights, *Aspects of Victims of Trafficking in Persons, specially Women and Children, Integration of the human rights of women and a gender perspective*, E/CN.4/2006/62, of 20 February 2006 (“2006 Report of the Special Rapporteur”), “[t]rafficking is just as much trafficking even when it occurs in the victim’s own home village, town or city” (para. 44).

another. This does not necessarily mean crossing a border/boundary: a person can be also trafficked within Kosovo.<sup>19</sup>

- (iii) “Transfer” means the act of giving control over a person to another person, who then is “receiving” the trafficking victim (see below). While payment of money may be evidence that trafficking has taken place, it is not a requisite element of the crime of trafficking.
- (iv) “Receipt” is taking control over a victim of trafficking (typically from someone who has previously “recruited” or “transferred” the victim).<sup>20</sup>
- (v) “Harbouring” means providing a room or other location for a person, but without receiving him/her as a victim (otherwise, there would be a “receipt”).

## 2) The “means” element

The second *actus reus* element of the crime of trafficking is the so called “means” element. This requirement applies only if the victim of trafficking is an adult.<sup>21</sup> In particular, Article 139 Provisional Criminal Code of Kosovo (PCCCK) requires that the perpetrator carry out the “acts” (recruitment, transportation, transfer, harbouring or receipt of persons) in relation to the victim “by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability<sup>22</sup> or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”<sup>23</sup> Therefore, the mere transfer, receipt, harbouring, recruitment or transportation of a person does not itself entail the crime of trafficking.

## 3) The “mental” element

The last component of the offence of trafficking is a mental requirement, i.e. the intended exploitation of the victim. As expressly foreseen by Article 139 PCCCK, exploitation includes, but is not limited to: prostitution, other sexual services, forced labour, slavery, servitude, or removal of organs.

The “purpose of exploitation” is a *dolus specialis* mental element.<sup>24</sup> In other words, the “acts” and “means” of the perpetrator must *aim* to exploit the victim. It is not therefore

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<sup>19</sup> Id.

<sup>20</sup> This means that a single act of transfer can entail the responsibility of both the seller and the receiver. Similarly, both the person who transports and the person who receives are responsible for trafficking.

<sup>21</sup> As explained below, if the victim is a child, it is not required that any of the means set forth in Art. 139 PCCCK are used. The “acts” element and the purpose of exploitation are sufficient to fulfill all the elements of the offence of trafficking if the victim is a child.

<sup>22</sup> According to the European Union’s Framework Decision on combating trafficking in human beings, the “abuse of authority” or “of a position of vulnerability” exists when “the person has no real and acceptable alternative but to submit to the abuse involved” (Council of the European Union, Framework Decision No. 2002/629/JHA, *On combating trafficking in human beings*, 19 July 2002, Art. 1(1)).

<sup>23</sup> Art. 139(8), No. 1, PCCCK.

<sup>24</sup> *Dolus specialis* can be defined as the purpose aimed at by the perpetrator when committing the material acts of the offence. It is the purpose that matters, not the practical result attained by the perpetrator. Thus, the fulfillment of the *dolus specialis* element does not require that the aim be actually achieved.

necessary that the perpetrator actually exploits the victim.

Thus, if the “acts” and the “means” carried out by the perpetrator (e.g. transferring by means of force, receiving by means of deception, etc.) are committed with a purpose other than that of exploiting the victim (e.g. for the purpose of obtaining money from the victim), the offence of trafficking has not been committed. However, even if the mental element of the crime of trafficking is not met, the defendant may still be prosecuted for other crimes (e.g. facilitating prostitution, or smuggling of migrants).

## **B. Trafficking of children**

The PCCK sets a lower threshold of proof for child trafficking than for adult trafficking. Article 139 of the PCCK makes it clear that “[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means [...]”<sup>25</sup>

Thus, when juveniles are recruited, transported, transferred, harboured or received, it is not necessary to show that the child was deceived, threatened, etc. While it is logically impossible to have a case of *adult* trafficking under the definition of Article 139 PCCK in which one or more of the “means” has *not* been used, when the victim of trafficking is a child, the “means” element does not need to be fulfilled. Therefore, the simple recruitment, transport, transfer, harbouring or reception of a child for the purpose of exploitation always fulfils all the elements of the criminal offence of trafficking.

## **C. The issue of the victim’s consent**

An issue in adult trafficking cases may be whether the victim consented to the alleged exploitation – i.e., prostitution or forced labour. However, if the “consent” is obtained through any of the methods listed in the second element – i.e. threats or the use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or taking advantage of the social, physical or psychological condition of the victim, or of the giving or receiving of payments to achieve the consent of a person having control over another person – then the victim’s consent is irrelevant and not valid.

Kosovo law codifies this interpretation. According to Article 139(8)(1) of the PCCK, “[t]he consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth in subparagraph (1) of the present paragraph have been used against such victim.”<sup>26</sup>

The PCCK is silent regarding consent and child trafficking cases. However, it can be interpreted as irrelevant because there are only two elements in child trafficking: the “acts” and the *mens rea*. It is enough to show the “recruitment, transportation, transfer, harbouring, or receipt” of a child “for the purpose of exploitation.” Whether or not the child “consented” to the exploitation is irrelevant to the legal analysis of whether the

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<sup>25</sup> Art. 139(8)(4), PCCK.

<sup>26</sup> Art. 139(8)(3), PCCK.



offence has been committed.<sup>27</sup>

Even if the defendant is not guilty of trafficking, he may be guilty of other crimes, such as facilitating prostitution or smuggling of migrants.

#### **D. Trafficking in persons compared with facilitating prostitution and smuggling of migrants**

The offence of trafficking is distinct from the less serious crimes of “facilitating prostitution”<sup>28</sup> and “smuggling of migrants.”<sup>29</sup>

Regarding “facilitating prostitution”, Article 201(1) of the Provisional Criminal Code of Kosovo (PCCK) makes it an offence to “knowingly recruit, organize or assist another person or provide premises to another person for the purpose of prostitution.” Article 201(3) of the PCCK punishes everyone who “by use of force, threat of force, or holding another person in a situation of personal or economic dependency compel such person to engage in prostitution.”

Under Article 138(7)(1) of the PCCK, “smuggling of migrants” is defined as “the procurement, in order to obtain [...] a financial benefit of the illegal entry of a person into Kosovo.” Under the same article, it is illegal to “produce[...], procure[...], provide[...], or possess[...] a fraudulent travel or identity document [...] to enable the smuggling of migrants.”<sup>30</sup> The same provision also makes it an offence to assist someone to illegally enter and remain in Kosovo.<sup>31</sup>

The crime of trafficking can be distinguished from facilitating prostitution and smuggling of migrants in that the latter offences do not require an intent to exploit the victim. Moreover, the crime of facilitating prostitution does not imply the use of the “acts” foreseen in Article 139 PCCK. The crime of smuggling of migrants does not require that any of the “means” are used.

#### **E. Observed failure to adequately identify the required trafficking elements**

Despite the legal requirements set forth in the law, the OSCE has observed cases where prosecutors and/or judges classified situations as trafficking which lacked one or more of the elements required by Article 139 of the PCCK.

In a case in Gjilan/Gnjilane, on 21 April 2006 the District Prosecutor filed an indictment against two persons charging them with the offence of trafficking. However, nothing in the indictment alleged that the accused had the intent to exploit the alleged victims, who were simply requested to pay money to be sent to

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<sup>27</sup> See Art. 139(8)(4), PCCK.

<sup>28</sup> Art. 201, PCCK.

<sup>29</sup> Art. 138, PCCK.

<sup>30</sup> Art. 138(1), PCCK.

<sup>31</sup> Art. 138(3), PCCK.

Italy for work-related reasons. In addition, the indictment did not suggest that the defendant used the required “means.”

In another case of alleged trafficking, on 5 April 2006 the Mitrovicë/Mitrovica District Court confirmed an indictment, charging a defendant with trafficking. However, the indictment failed to allege that any of the “acts” occurred, or that the defendant had the intent to exploit the two alleged victims.

The OSCE believes that judges and prosecutors should analyse the facts of potential trafficking cases more carefully. Prosecutors should refrain from bringing charges for trafficking against alleged perpetrators where there is no evidence that one or more of the elements has been satisfied.

The OSCE has also monitored cases where the prosecutor failed to recognize actual cases of trafficking as such.

In a case in Prishtinë/Priština, the District Prosecutor on 21 March 2006 received a police criminal report stating that a man had recruited a woman from Albania by deceiving her, and then forcibly kept her for 15 days in his house.<sup>32</sup> He allegedly beat her and demanded that she pay him 3.000 Euro. If she refused, he would sell her as a prostitute to someone in Macedonia. Despite the presence of the “acts”, the “means” and the quite apparent intent to exploit the victim, the District Prosecutor forwarded the case file to the Ferizaj/Uroševac Municipal Prosecutor, as he believed that the case did not contain elements of trafficking.

In another case before the Prizren District Court, on 8 April 2003 the District Prosecutor filed an indictment against a defendant for “intermediation in the exercise of prostitution.”<sup>33</sup> During the trial, the prosecutor established all of the elements of the trafficking offence.<sup>34</sup> However, the under-qualification of the offence by the prosecutor prevented the court from convicting the defendant of trafficking.<sup>35</sup> On 5 July 2007 the Prizren District Court found the defendant guilty

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<sup>32</sup> Of note, the alleged victim reported that an Ukrainian woman also lived in his house.

<sup>33</sup> Art. 251 (1) and (2), Criminal Code of the Socialist Federal Republic of Yugoslavia, 28 September 1976, in Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 44, 8 October 1976.

<sup>34</sup> For example, the reasoning part of the verdict reads “because from October 2000 until 31 May 2002 in Prizren the accused [...] hired as strippers the injured parties [...], then forced them into prostitution by threatening them that he would report them to police.” The verdict also acknowledges that the defendant had “paid 1500 DM for each of them, an amount which they were obliged to compensate by which they brought the latter to a state of financial dependency.”

<sup>35</sup> Art. 386(2) of the Provisional Criminal Procedure Code of Kosovo (PCPCK), states that the court shall *not* be bound by the legal qualification of the offence given by the prosecutor. However, a human rights compliant interpretation of the norm should prevent the judge from re-qualifying the offence in the verdict and finding the defendant guilty of a crime substantially different from that he was charged with in the indictment. This would impair the defendant’s right to be informed of the charges against him, and to have adequate time to prepare his defence (see e.g. European Court of Human Rights, *Dallos v. Hungary*, 29082/95, Judgment, 1 March 2001, para. 47), ultimately resulting in an unfair trial. Article 6(3) European Convention on Human Rights, in fact, affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is

of facilitating prostitution,<sup>36</sup> and sentenced him to six months of imprisonment.<sup>37</sup>

In a third case, on 18 November 2004 the Prizren District Prosecutor filed an indictment against a defendant for trafficking. In his closing argument, the prosecutor amended the indictment and instead charged the defendant with facilitating prostitution. Therefore, while acknowledging in the 6 October 2006 verdict that all the elements of trafficking had been established, the District Court convicted the defendant for the lesser crime of facilitating prostitution. The court sentenced the defendant to seven months imprisonment.

In the above cases, clear evidence existed that all the elements of the offence of trafficking were met. However, none of them resulted in a conviction for trafficking.

## **II. FAILURE TO ADEQUATELY INVESTIGATE OR PROSECUTE TRAFFICKING AND TRAFFICKING-RELATED OFFENCES**

The OSCE is concerned that authorities have failed to properly investigate and bring charges against individuals reportedly involved in trafficking activities or other crimes (e.g. such as rape) committed against victims of trafficking.

International law requires that prosecuting authorities thoroughly investigate violations of human rights,<sup>38</sup> including those committed by private persons.<sup>39</sup> A general legal

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based, but also, in detail, of the legal characterization given to those acts (see European Court of Human Rights, *Pélissier and Sassi v. France*, 5444/94, Judgment, 25 March 1992, para. 51). If the prosecutor finds that the evidence presented at trial would support a different legal characterization of the criminal offence, he or she should amend the indictment at the trial, in accordance with Art. 376 PCPK (Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, of 6 July 2003).

<sup>36</sup> Art. 201(3), PCCK.

<sup>37</sup> If the defendant had been charged and convicted for trafficking, the sentence would have likely been much higher.

<sup>38</sup> The UN Human Rights Committee, in its General Comment No 3, held that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities.” Thus, States must “take appropriate measures [and] exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities” (General Comment No. 31, replacing General Comment No. 3, concerning the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004). Moreover, both the European Convention on Human Rights and the International Covenant on Civil and Political Rights foresee the right to an effective remedy as an essential corollary of the framework for the protection of human rights (see Art. 13, European Convention on Human Rights, and Art. 2(3)(a), International Covenant on Civil and Political Rights).

<sup>39</sup> See UN Human Rights Committee, General Comment No. 20 paragraph 13. The European Court of Human Rights has made it clear that in regard to Article 3 violations, there is a positive obligation on States to take measures “to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. [This] requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the

prohibition of torture or inhuman and degrading treatment or punishment,<sup>40</sup> despite its fundamental importance, is ineffective in practice in the absence of a proper investigation capable of leading to the identification and punishment of those responsible for ill-treatment.<sup>41</sup> Governments that leave private violations of human rights unaddressed breach their duty under international law to protect human rights.<sup>42</sup>

Despite these legal requirements, the OSCE has monitored several cases where police or prosecutors failed to adequately investigate or prosecute individuals allegedly involved in trafficking or trafficking-related activities. More specifically, the OSCE has observed cases where prosecutors failed (a) to conduct thorough factual investigations to ascertain the existence of all the elements of the crime of trafficking, (b) to prosecute individuals who obtained sexual services from victims of trafficking, or (c) to bring separate charges for non-trafficking crimes (e.g. rape) committed against trafficking victims.

### **A. Failure to initiate or expand trafficking investigations**

According to the UN Guidelines on the Role of Prosecutors, prosecutors shall perform an active role in criminal proceedings, including the initiation of prosecution.<sup>43</sup> When serious human rights violations occur, public authorities must conduct investigations “capable of leading to the identification and punishment of those responsible.”<sup>44</sup>

With specific reference to trafficking cases, the High Commissioner for Human Rights has stated that public authorities “have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers.”<sup>45</sup>

However, the OSCE has monitored several cases in which prosecutors failed to initiate or expand investigations against persons suspected of trafficking.

In an alleged case of trafficking investigated by the Prishtinë/Priština District

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authorities had or ought to have had knowledge” (European Court of Human Rights, *Z. and Others v. United Kingdom*, 29392/95, Judgment, 10 May 2001, para. 73).

<sup>40</sup> The conditions that trafficking normally entails (use of force, sexual exploitation, etc.) can easily amount to inhuman or degrading treatment prohibited by Art. 3 of the European Convention on Human Rights.

<sup>41</sup> See European Court of Human Rights, *Assenov and others v. Bulgaria*, 24760/94, judgment, 28 September 1998, para. 102. Although the occurrence of inhumane or degrading treatment must be assessed on a case by case basis, it can be easily argued that the majority of trafficking victims suffer treatment (such as forced prostitution, rape, beatings, segregation) which amounts to a violation of Art. 3 of the European Convention on Human Rights.

<sup>42</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, *Integration of the human rights of women and the gender perspective violence against women*, Doc. No. E/CN.4/1999/68/Add.4, 21 January 1999, paras. 46 and 47. With specific reference to women, the *Convention on the Elimination of All Forms of Discrimination against Women*, of 18 December 1979, prescribes that all States Parties take appropriate measures to promote the rights of women through the suppression of trafficking and exploitation of prostitution (Art. 6).

<sup>43</sup> Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

<sup>44</sup> European Court of Human Rights, *Assenov v. Bulgaria*, para. 102, and *Kaya v. Turkey*, 22729/93, Judgment, 19 February 1998, para. 107.

<sup>45</sup> High Commissioner for Human Rights Recommended Principles, Principle No. 2.

Prosecutor in October 2006, the Kosovo Police Service failed to initiate an investigation against a known person who was involved in the airport pick-up of a number of alleged Moldovan victims.<sup>46</sup> The reason the prosecutor cited for not investigating was that this latter person was “no longer in business” with the defendant. In the same case, the prosecutor failed to investigate the possible involvement in trafficking activities of a lawyer, in whose office the defendants signed “labour” contracts with the victims.

In a case investigated by the Prizren District Prosecutor, in her statement of 12 February 2007, an alleged trafficking victim mentioned having worked in a bar – other than that of the defendant – where several Bulgarian women worked as prostitutes. Another trafficking victim mentioned the name of the same bar owner in a separate case. Despite these two corroborating testimonies, the prosecutor failed to investigate this bar or its owner.

In other monitored cases, the prosecutors failed to diligently investigate and collect all information needed to support a trafficking case in court. As a consequence, the court did not convict the main suspects in the cases of trafficking.

In a case investigated by the Prizren District Prosecutor involving the possible crime of trafficking, several Moldovan women working as dancers or prostitutes in a bar near Prizren stated that one of the defendants had recruited them in Moldova. However, the prosecutor failed to investigate further and omitted this information in the indictment filed on 12 December 2006. Thus, despite credible evidence meeting all the elements of trafficking, the alleged perpetrators were charged with the less serious offence of facilitating prostitution.<sup>47</sup>

In another case of possible trafficking investigated by the Prishtinë/Priština District Prosecutor in October 2006, the prosecutor failed to determine if the Moldovan injured parties (waitresses and alleged victims of trafficking) had been forced to have sexual relations with clients. He also never questioned why they came to Kosovo to work as waitresses, asked about their past, or sought information on their relationship with the defendants.

The cases described above show a lack of diligence by prosecutors in investigating whether evidence exists establishing all the essential elements to prove the offence of trafficking. As a result, the court did not convict the defendants of trafficking in either case, despite credible evidence of all the elements of the criminal offence. Diligent investigations might include wire-tapping phones of suspects, video surveillance, obtaining financial documents (such as receipts for payments of salaries or bank statements of the defendants), or obtaining medical reports indicating abuse suffered by the victims.

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<sup>46</sup> The negligent facilitation of the crime of trafficking is also punished (see Art. 139(4), PCKK).

<sup>47</sup> Art. 201, PCKK. Of note, the fact that the indictment contained no factual allegations related to the recruitment of the victims prevented the judge from re-qualifying the offence as trafficking at trial.

## **B. Failure to prosecute persons who obtain sexual services from trafficking victims**

The OSCE is also concerned about the repeated failure of prosecutors to investigate persons known to have obtained sexual services from victims of trafficking.<sup>48</sup>

Individuals who obtain sexual services from trafficked persons must be prosecuted, as they create demand for sexual exploitation of trafficked persons. In fact, traffickers of women or children for sexual purposes would have no interest in engaging in such activities if there were no persons to use the sexual services they provide. Moreover, users of sexual services knowingly contribute to the exploitation of the victim of trafficking. It is therefore of the utmost importance that police and prosecutors act with due diligence in investigating and prosecuting them.

However, although in many trafficking cases monitored by the OSCE alleged victims reported names of persons (e.g. customers of bars and motels) who used their sexual services, in the vast majority of these cases the authorities failed to investigate or prosecute the alleged perpetrators.

In a case investigated by the Prishtinë/Priština District Prosecutor, three alleged victims of trafficking reported to the police, on 9 October 2006, and then to the prosecutor, on 16 and 17 November 2006, the names of two men who obtained sexual services from them. The police interviewed the men, who admitted having sexual relations with the victims at a motel for money. However, the police and the prosecutor failed to prosecute them.

In another case, before the Mitrovicë/Mitrovica District Court, on 27 June 2005 and 19 July 2005 three alleged victims of trafficking provided the names of men who obtained sexual services from them in exchange for money. During the trial session of 29 July 2005, the alleged victims physically identified three of these individuals, who were called to testify as witnesses. However, the prosecutor failed to initiate investigations or bring charges against them. The case is currently pending re-trial before the Mitrovicë/Mitrovica District Court.

In a third case before the Prizren District Court, both the District Court's verdict of 20 July 2005, and the Supreme Court's verdict of 28 May 2007 which convicted the defendants of trafficking, acknowledged that a Kosovo Police Service officer made contacts with one of the victims, a woman from Moldova, who previously worked in the bar owned by the defendants. The officer agreed to a price for sex. According to the two judgments, the officer "had no personal knowledge relating to the crimes perpetrated by the defendants in this case." However, arguably the police officer should have known that the woman was a potential victim of trafficking and should have been prosecuted for obtaining sexual services from a trafficked person.

In the cases described above, the investigating authorities ignored allegations and

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<sup>48</sup> Art. 139(5) of the PCKK makes it a criminal offence to use the sexual services of a person with the knowledge that he or she is a victim of trafficking.

evidence which could and should have led to the identification and prosecution of potential perpetrators of the crimes, foreseen by Article 139(5) and (6) of the PCKK.<sup>49</sup> The failure to investigate and prosecute crimes not only breaches the due diligence standard required in the prosecution of human rights violations, but also contributes to the spread of the trafficking problem as punishment of offenders serves as a deterrent.

### **C. Failure to prosecute traffickers for other crimes committed against trafficking victims**

The OSCE is also concerned that in several monitored cases the relevant authorities failed to prosecute persons allegedly involved in trafficking for other crimes committed against the victim. In particular, the OSCE observed a worrying tendency of the judicial authorities to consider acts such as assault, battery and rape, when committed in the context of the exploitation of the victim, as part of the main offence of trafficking, and not as separate offences.

In a case of alleged trafficking before the District Court in Prizren, a panel of international judges acknowledged in the verdict of 20 July 2005 that one of the traffickers ordered the injured party to accompany a Kosovo Police Service officer to a hotel where the officer had sexual intercourse with her against her will.<sup>50</sup> The Supreme Court's verdict of 28 May 2007 confirmed that this occurred. However, the alleged rapist was never prosecuted, and still works as a police officer.

In another case of alleged trafficking tried before the Prishtinë/Priština District Court, a juvenile victim of trafficking on 5 October 2006 stated before the District Prosecutor that the alleged traffickers had raped her. In the verdict of 16 April 2007, the trial panel acknowledged the existence of evidence (a medical report) that confirmed the rape allegations. However, the defendants were never prosecuted for this crime.

In a case of possible trafficking before the Pejë/Peć District Court, an alleged victim on 4 August 2004 reported to the prosecutor that she had been sexually abused by her alleged trafficker. However, the prosecutor did not initiate a separate investigation for the crime of rape. The defendant was eventually convicted for forced marriage on 29 November 2006.<sup>51</sup>

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<sup>49</sup> A precondition of Art. 139(5) and (6) PCKK is the user's knowledge of the trafficked status of the victim. The proof of such element may involve evidentiary difficulties. However, the standard of proof is met if the prosecutor shows that a normal person would be aware that a woman *could* be a victim of trafficking. This "eventual intent", according to Art. 15(3) PCKK, is sufficient. Therefore, for instance, a prosecutor could convincingly argue that a person who uses the sexual services of a (juvenile) foreign woman in a motel thereby accepts that she may be a victim of trafficking.

<sup>50</sup> According to the European Court of Human Rights, the offence of rape does not require physical resistance by the victim: "requiring proof of physical resistance in all circumstances risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy." (European Court of Human Rights, *M.C. v. Bulgaria*, 39272/98, Judgment, 4 December 2003, paras. 165-166).

<sup>51</sup> Art. 207(1), PCKK. In the indictment of 28 September 2004, the prosecutor charged the defendant with trafficking. However, at the trial session of 29 November 2006, the prosecutor amended the indictment and

While trafficking can be committed for the purpose of sexual exploitation, the rape of the victim is not a necessary element of trafficking. Thus, an individual can commit trafficking for the purpose of sexual exploitation without raping the victim. Moreover, while trafficking is an offence against personal liberty,<sup>52</sup> rape is an offence against sexual integrity.<sup>53</sup> Thus, trafficking in human beings and rape are two distinct crimes which should be prosecuted separately and cumulatively.<sup>54</sup>

In summary, prosecutors should investigate and prosecute individuals (including traffickers) who force victims of trafficking into non-consensual sexual acts during the course of trafficking. Failure to do so amounts to a breach of the international standards which require that serious human rights violations – such as those foreseen by Article 3 of the European Convention on Human Rights (including rape) – be effectively prosecuted.<sup>55</sup>

### III. TREATMENT OF VICTIMS IN TRAFFICKING CASES

All authorities involved in the prosecution of the offence of trafficking should be committed, as a matter of priority, to addressing and securing the safety and well being of trafficking victims. They have a responsibility under international law to act with due diligence to assist and protect trafficked persons.<sup>56</sup> The proper treatment of victims of trafficking is important both in order to “meet the needs and to safeguard the interests of the victim”, and to “enhance the confidence of the victim[s] in criminal justice and to encourage [their] cooperation, especially in [their] capacity as witness[es].”<sup>57</sup> UNMIK Regulation 2001/4 expressly requires law enforcement officers to advise and promote the rights of trafficked victims.<sup>58</sup> Moreover, the victim’s co-operation is crucial for the purpose of prosecution, because victims of trafficking can provide the investigating authorities with key witness testimony.

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charged the defendant with forced marriage. The defendant pled guilty and was only sentenced to 40 days of imprisonment.

<sup>52</sup> While the PCKK lists trafficking in the general Chapter of “offences against international law”, other codes (see Swiss Criminal Code, Art. 186; Italian Criminal Code, Art. 601*bis*) list the offence under “crimes against personal liberty.” The French Criminal Code (Art. 225-4-1) includes trafficking among the “offences against the dignity of persons”.

<sup>53</sup> See Art. 193, PCKK.

<sup>54</sup> On a positive note, the OSCE acknowledges that, in the first case mentioned above, the Kosovo Supreme Court on 28 May 2007 upheld the first instance judgment – rendered by a panel of international judges – convicting two defendants for the crimes of both trafficking and rape.

<sup>55</sup> “In accordance with contemporary standards and trends in that area, the Member States’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act.” (European Court of Human Rights, *M.C. v. Bulgaria*, 39272/98, Judgment, 4 December 2003, para. 166).

<sup>56</sup> See High Commissioner for Human Rights Recommended Principles, Principle No. 2.

<sup>57</sup> Committee of Ministers of the Council of Europe, Recommendation No. R (85) 11, *On the position of the victim in the framework of criminal law and procedure*, 28 June 1985.

<sup>58</sup> Section 10, UNMIK Regulation 2001/4.



However, the OSCE has observed a continued failure of police, prosecutors and judges to understand the role and position of trafficking victims. Several areas of concern have emerged. First, the OSCE is aware that relevant authorities often fail to recognize victims of trafficking, or grant them the status of victims only if they provide evidence against the alleged traffickers. Second, the OSCE has monitored cases of unlawful prosecution of (likely) trafficked victims for prostitution or illegal stay in Kosovo. Third, the OSCE has noted a widespread failure to inform victims of their rights in the criminal proceedings, and to appoint defence counsel or an authorized representative. Finally, the OSCE has monitored instances of improper and/or insensitive questioning of trafficking victims by the judicial authorities.

### **A. Failure to identify victims of trafficking**

Victim protection naturally begins with the identification and recognition of victims.

According to the Council of Europe Convention on Action Against Trafficking in Human Beings,<sup>59</sup> “if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence [...] has been completed and that person [shall] receive the assistance provided for [in the Convention].”<sup>60</sup>

Although not foreseen explicitly in domestic law, the duty to determine and recognize the status of a trafficked person implicitly stems from the obligation (incumbent on all actors involved in the proceedings, and especially on police and prosecutors) to protect victims and prevent trafficking.<sup>61</sup>

Without the identification of a victim, all rights to which victims are entitled become void. Consequently, all authorities involved in the prosecution of trafficking cases should act with special attention and care when dealing with potential victims of trafficking.

However, the OSCE has monitored cases where the police failed to identify possible victims of trafficking.

In a case of possible trafficking in Pejë/Peć, on 3 July 2007 the Kosovo Police Service arrested a woman from Moldova (who was working as a waitress in a bar) for illegal stay in Kosovo.<sup>62</sup> The police asked the woman if she had suffered any abuse and if she considered herself a victim of trafficking. Since she replied in the negative, the police took her to the Pejë/Peć Minor Offences Court the same day.

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<sup>59</sup> Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005 (“Council of Europe Convention”).

<sup>60</sup> Council of Europe Convention, Art. 10(2) and Art. 12.

<sup>61</sup> See the general principles enshrined in Art. 2 of the Palermo Protocol.

<sup>62</sup> Section 23(1), UNMIK Regulation 2005/16, *On the Movement of Persons into and out of Kosovo*, of 8 April 2005.

She was immediately tried and expelled from the territory of Kosovo.<sup>63</sup> Remarkably, in October 2006 she had been interrogated as a victim of trafficking in a separate case investigated by the Prishtinë/Priština District Prosecutor.

Clearly, the police did not use the required diligence to determine whether the woman might be a victim of trafficking. The previous involvement of an individual in a case of possible trafficking should create a rebuttable presumption that the individual is a victim.<sup>64</sup> Therefore, the police should not limit their investigation to interviewing the victim, and should not necessarily discontinue an investigation if the victim denies that she has been trafficked. Moreover, the police should not rely solely on the victim's opinion to determine whether she or he should be treated as a victim of trafficking.

In a case investigated by the Prishtinë/Priština Prosecutor in June 2006, a victim from Moldova was asked if she considered herself as a victim of trafficking. She replied in the negative. Subsequently, she privately asked the interpreter what the term "victim" actually means. When she was given examples of circumstances and abuses that would make her a victim, she replied that she had suffered much worse treatment.<sup>65</sup>

Here, the victim did not understand the concept of victim or its implications. In other cases, individuals may deny that they are victims because of fears of retaliation by the traffickers against herself or her family, or even the spread of negative opinions about her.

Police and prosecutors, especially those involved in the early stages of the proceedings, should therefore exercise due diligence in ascertaining the status of trafficked victims. They should conduct additional investigation and not rely solely on statements by the victim.

## **B. Failure to treat victims as victims of trafficking unless they cooperate**

Since it is the duty of public authorities to identify likely victims of trafficking, victims should be granted the maximum protection and care regardless of their level of cooperation with police and prosecutors.

However, the OSCE has monitored a worrying tendency of the police to unduly detain possible victims of trafficking and/or to threaten them with charges, unless they provide incriminating evidence against the alleged traffickers.

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<sup>63</sup> Several elements in the case file suggest that the woman may have been a victim of trafficking, including the fact that despite having a job and stating that she liked living in Kosovo, she immediately asked to be repatriated. Moreover, the police failed to collect important information that could identify her as a trafficking victim. Such information includes the bars where the woman worked, the employers who recruited her, or the documents (e.g., work permit or passport) that she claimed to possess.

<sup>64</sup> To this end, the creation of a Kosovo-wide database of victims of trafficking is of vital importance.

<sup>65</sup> The OSCE did not monitor the interrogations directly. The source of this information asked to remain anonymous.

In May 2006, the Prizren Kosovo Police Service Trafficking in Human Beings Section interviewed a sixteen year-old girl from Albania suspected of having been trafficked. However, she was not identified as a presumed victim of trafficking because she refused to provide the police with information about her traffickers. The police officers detained the girl for 72 hours to allow her ‘some time to reconsider her statement’. Eventually, she was charged with illegal stay in Kosovo and deported to Albania.

In another case investigated by the Kosovo Police Service in Prizren in October 2006, the police asked several women from Moldova to provide incriminating evidence against their alleged exploiters. Despite substantial evidence (including undercover police investigations) showing the likely occurrence of trafficking, the police told the victims that, in the absence of statements showing their involvement in trafficking activities as victims, they would face charges of prostitution.<sup>66</sup>

While intended to “persuade” victims to testify against traffickers, the police practice of detaining possible victims or threatening them with prosecution violates human rights standards.<sup>67</sup> According to the High Commissioner for Human Rights, the protection and care that public authorities must grant victims “shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.”<sup>68</sup> Victims should be provided with assistance and protection, as opposed to threats of prosecution.<sup>69</sup> Moreover, victims may be unwilling to testify because their exploiters have pressured or threatened them.

Therefore, when other evidence suggests that a person may be a victim of trafficking, regardless of the victim’s statements, he or she should be treated as a victim and enjoy the appropriate legal protections.

### **C. Illegal prosecution of trafficking victims for prostitution or illegal entry**

According to the High Commissioner for Human Rights, law enforcement efforts should “not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.”<sup>70</sup> The Committee on the Elimination of Discrimination

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<sup>66</sup> Prostitution is a minor offence against public peace and order foreseen by Art. 18(1), point 6 of the Law on Public Peace and Order (Official Gazette of the Socialist Autonomous Province of Kosovo, No. 13/1981).

<sup>67</sup> The police justify this practice with the rationale that if a woman who works as a prostitute or who is illegally present in Kosovo is not a victim of trafficking, then she should be charged with prostitution and/or illegal stay. Section 8 of UNMIK Regulation 2001/4 states that the alleged victim must provide evidence that he or she is a victim of trafficking to obtain the legal rights of trafficking victims. However, as described above, it should be the investigative authorities’ duty to identify presumed victims of trafficking, regardless of whether the victims do so themselves. An amendment to the law could be crucial to clarify this point and shift the burden of proof from the victim to the police.

<sup>68</sup> See High Commissioner for Human Rights Recommended Principles, Principle No. 8.

<sup>69</sup> Such practices not only fail to control trafficking, but also violate Section 8 of UNMIK Regulation 2001/4, which provides that a victim of trafficking is not criminally liable for prostitution or illegal entry, work or presence in Kosovo.

<sup>70</sup> High Commissioner for Human Rights Recommended Principles, Guideline No. 5.

against Women urged “States” to “change the mental attitude that condemns the victims of trafficking and prostitutes”<sup>71</sup> and “take steps to ensure that victims of trafficking are not penalized and that all those who exploit prostitutes are punished and prosecuted.”<sup>72</sup> Lastly, the European Convention on Action against Trafficking in Human Beings provides that member states should not impose penalties on victims “for their involvement in unlawful activities, to the extent that they have been compelled to do so.”<sup>73</sup>

UNMIK Regulation 2001/4 protects alleged victims of trafficking from prosecution. Section 8 states that “[a] person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking.”<sup>74</sup>

Despite this clear provision, the OSCE has monitored cases where likely victims of trafficking were prosecuted for prostitution or illegal stay in Kosovo.

In a case of alleged trafficking in Prizren, the police initiated charges of prostitution before the Rahovec/Orahovac Minor Offences Court against two women who previously had been interrogated by the Prizren District Prosecutor as possible victims of trafficking. Notably, on 21 November 2006 the court “cancelled the legal procedure” against the two victims for lack of evidence, and not because of lack of possible liability.<sup>75</sup>

On 27 July 2005, after a hotel raid, the Prishtinë/Priština Kosovo Police Service arrested three men on trafficking and four women on prostitution charges. Immediately thereafter, the Prishtinë/Priština District Prosecutor filed a request to initiate a minor offence procedure against the four women before the Ferizaj/Uroševac Minor Offences Court.<sup>76</sup> Two days later, on 29 July 2005, the Minor Offences Court heard the women as suspects, found them guilty of prostitution, and sentenced them to 20 days of imprisonment.<sup>77</sup> However, the same

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<sup>71</sup> Committee on the Elimination of Discrimination against Women, Press Release, “*Principle of Equality, Customary Law, Human Trafficking Addressed, as Albania responds to Women’s Anti-Discrimination Committee*”, 24 January 2003.

<sup>72</sup> Committee on the Elimination of Discrimination against Women, Concluding comments of the Committee on Albania, Doc. No. A/58/38, 20 March 2003, para. 71.

<sup>73</sup> Council of Europe Convention, Art. 26.

<sup>74</sup> In addition, UNMIK Regulation 2005/16, requires that suspected victims of trafficking cannot be prosecuted for the minor offences related to the entry and stay of persons in Kosovo listed in the Regulation (see Art. 23(1) and (3), UNMIK Regulation 2005/16). Of note, Section 11 of UNMIK Regulation 2001/4 states that a conviction for prostitution or illegal entry, presence or work in Kosovo shall not be the basis for deportation if the person is a victim of trafficking.

<sup>75</sup> If there had been sufficient evidence, the women would have been tried and eventually convicted. Of concern, the police officers in charge of the case requested that the OSCE take action against the “unlawful” dismissal of the case.

<sup>76</sup> Of note, the women (three Albanians and one Bulgarian) were kept in detention on remand throughout the minor offences proceedings.

<sup>77</sup> Of note, on 5 August 2005, the Kosovo High Court for Minor Offences upheld the Minor Offences Court’s verdict.

day, the women were heard as injured parties/witnesses in the case against the alleged traffickers, in an extraordinary investigative opportunity before the Prishtinë/Priština District Court.<sup>78</sup> On 15 August 2005 the Prishtinë/Priština District Prosecutor filed an indictment against the three men for trafficking. On 23 November 2006 the Kosovo Supreme Court entered a final conviction against the men for facilitating prostitution.<sup>79</sup>

Under UNMIK Regulation 2001/4, Section 8, the police should not have brought charges for prostitution against the likely victims of trafficking. Clearly, in the presence of trafficking evidence, the courts should have dismissed the case.

#### **D. Failure to provide defence counsel and/or an authorized representative to trafficking victims**

Legal assistance to victims of trafficking is an essential means to ensure that their rights are upheld. UNMIK Regulation 2001/4 requires that trafficking victims shall receive the free assistance of a counsel.<sup>80</sup> Moreover, the PCPCK requires that an authorized representative<sup>81</sup> assist victims of trafficking “from the initiation of the criminal proceedings.”<sup>82</sup> Victim advocates of the Victim Assistance and Advocacy Division (VAAD) can act as authorized representatives.<sup>83</sup> The police must inform the VAAD whenever they interrogate a person who is a (suspected) victim of trafficking.<sup>84</sup>

The rationale behind the requirement of legal assistance is that victims of trafficking should receive “[a]ssistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.”<sup>85</sup> Consequently, not only must judicial authorities appoint a representative for the victim, but such representative must also actively protect the rights of the victim. Regrettably, the OSCE has monitored cases of lack of compliance with both obligations.

The OSCE has monitored cases where the authorities conducting the proceedings failed to appoint an authorized representative to likely victims of trafficking.<sup>86</sup>

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<sup>78</sup> Of note, on 27 June 2007 one of the women testified as a witness in a new case of alleged trafficking before the Prishtinë/Priština District Court.

<sup>79</sup> Nevertheless, the existence of an indictment for trafficking indicates that there was a grounded suspicion that they were involved in trafficking. Of note, on 9 October 2006 one of the defendants was re-arrested on trafficking charges in a separate case.

<sup>80</sup> Section 10(1)(b), UNMIK Regulation 2001/4.

<sup>81</sup> According to Art. 151(7), PCPCK, “[t]he term ‘authorized representative’ means a person who [...] acts in the name and interest of the injured party”.

<sup>82</sup> Art. 82(1), No. 3, PCPCK.

<sup>83</sup> Art. 81(4), PCPCK.

<sup>84</sup> See Art. 206(1) and Art. 82, PCPCK.

<sup>85</sup> See Art. 6(2)(b), Palermo Protocol.

<sup>86</sup> Art. 82(2) of the PCPCK provides that “[i]n cases provided for in paragraph 1 of the present article, if the injured party or his or her legal representative does not engage an authorized representative, the president of the court or the competent authority conducting the proceedings in the pre-trial phase shall appoint ex-officio an authorized representative at public expense.”

In a case of alleged trafficking investigated by the Gjilan/Gnjilane District Prosecutor, involving a group of seven defendants, on 17 May 2007 the injured party testified during an investigative hearing. The prosecutor failed to ensure that the victim was assisted by a lawyer or an authorized representative.<sup>87</sup>

In a case investigated by the Prishtinë/Priština District Prosecutor, two defendants suspected of trafficking testified before the prosecution on 15 March 2007. Neither a lawyer nor an authorized representative for the injured party had been appointed or was present.

In a case involving a defendant accused of trafficking before the Pejë/Peć District Court, the trial session of 29 November 2006 occurred in the absence of the injured party. Moreover, the victim was not represented by a lawyer or an authorized representative. Initially court-appointed counsel was present, but she left the courtroom shortly after realizing that “the victim was not a juvenile when the alleged acts occurred.”

In the cases described above, the judges or prosecutors failed to appoint *ex officio* a lawyer or an authorized representative to assist the victims.<sup>88</sup> This not only violates the law, but also leaves trafficking victims vulnerable to psychological harm and inappropriate treatment and questioning.<sup>89</sup>

The OSCE is also concerned that in the vast majority of monitored cases, the representative of the VAAD, when present, did not actively assist the victim.<sup>90</sup>

In a case of alleged trafficking before the Gjilan/Gnjilane authorities, a victim advocate assisted the victim throughout the proceedings as an authorized representative. However, she did not propose evidence or question a witness. At the trial session of 26 September 2007, the presiding judge did not ask for the injured party’s closing statements. Nor did the victim advocate ask to do so. As a result, the injured party did not have an opportunity to “sum up their arguments” as foreseen by Article 378 of the PCPCK.

In another case of alleged trafficking before the Prishtinë/Priština District Court, at the hearing of 29 June 2007, a victim advocate was appointed as the authorized representative for the victim. However, the victim advocate failed to actively assist and represent the victim during the court proceedings. Of note, she did not intervene when the defendant interfered with the victim during her testimony.

Victim advocates are in the best position to provide effective assistance to trafficking

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<sup>87</sup> According to Article 81(4) of the PCPCK, victim advocates shall assist injured parties in safeguarding their rights, including, where appropriate, as authorized representatives.

<sup>88</sup> See Art. 82(2), PCPCK.

<sup>89</sup> See paragraph F below.

<sup>90</sup> Victim advocates, when acting as authorized representatives, can exercise all of the rights that the law affords to injured parties (i.e., file property claims, propose evidence, question the defendant and witnesses, make comments, and file motions). See Art. 80 and 81, PCPCK.

victims, as they maintain close contact with them and understand their needs. Unfortunately, the frequent passive attitude of victim advocates leaves victims devoid of effective assistance and protection.

### **E. Failure to inform trafficking victims of their rights**

For victims to effectively enjoy their legal rights,<sup>91</sup> they must be aware of them.<sup>92</sup> In cases of trafficking, the often low level of education of most victims makes it even more important that the authorities actively make victims aware of their rights.<sup>93</sup>

The Palermo Protocol<sup>94</sup> stipulates that “victims of trafficking in persons [shall have] information on relevant court and administrative proceedings and assistance.”<sup>95</sup> Accordingly, Section 10(3) of UNMIK Regulation 2001/4 requires law enforcement officers to advise persons who are suspected victims of trafficking at the earliest available opportunity of their right to request services and facilities and to contact the appropriate persons to arrange the requested assistance.<sup>96</sup> In addition, the PCPCK obliges all authorities conducting criminal proceedings to inform injured parties about their rights in criminal proceedings.<sup>97</sup>

Despite these clear legal provisions, the OSCE has observed cases in which alleged victims of trafficking received incomplete or no information about their legal rights.

In a case before the Prishtinë/Priština District Court involving five defendants suspected of trafficking, four alleged victims were heard in the course of an extraordinary investigative opportunity held on 16 October 2006.<sup>98</sup> No victim advocates were present at the session. Nor did the prosecutor inform the victims of their right to have the assistance of an authorized representative. In addition, the victims were not informed of the possibility of pursuing a property claim,<sup>99</sup> and of

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<sup>91</sup> In addition to the rights foreseen by Article 80 of the PCPCK for any victim, Section 10(1) of UNMIK Regulation 2001/4 provides a set of specific rights for victims of trafficking, such as “(a) free interpreting services in the language of their choice; (b) free legal counsel in relation to trafficking issues (criminal or civil); and (c) temporary safe housing, psychological, medical and social welfare assistance as may be necessary to provide for their needs.”

<sup>92</sup> While some rights (such as free assistance of legal counsel, or translation) need simply be afforded by the judicial system, victims must be educated about other rights (such as the right to propose evidence, to question the defendant, or to file a property claim) so they can exercise them.

<sup>93</sup> As described above, some victims do not even understand what the term “victim” means.

<sup>94</sup> Art. 6, item 2, Palermo Protocol.

<sup>95</sup> Moreover, the Declaration of Basic Principles of the Rights of the Victim requires that “[v]ictims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them” (*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the United Nations General Assembly with Resolution 40/34 of 29 November 1985, para. 15).

<sup>96</sup> Section 10(3), UNMIK Regulation 2001/4.

<sup>97</sup> See Art. 17 and Art. 80(5), PCPCK.

<sup>98</sup> See Art. 238 ff., PCPCK.

<sup>99</sup> Art. 165(7), PCPCK. The injured party can file a property claim to obtain compensation for damage suffered as a consequence of the criminal offence (see Art. 107 ff., PCPCK).

other rights as injured parties.<sup>100</sup>

In another case before the District Prosecutor in Mitrovicë/Mitrovica, on 19 January 2007, the prosecutor interrogated an injured party. Not only did the prosecutor fail to appoint an authorized representative for the victim, the prosecutor also did not instruct the victim of her rights under UNMIK Regulation 2001/4.

In the examples described above, the victims were not properly informed of their rights as injured parties, in breach of the applicable law. This, along with the frequent lack of effective assistance by an authorized representative, makes it virtually impossible for victims of trafficking to exercise their rights in criminal proceedings involving alleged traffickers.

#### **F. Inappropriate questioning of trafficking victims**

According to the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, “[v]ictims should be treated with compassion and respect for their dignity”.<sup>101</sup> The Committee of Ministers of the Council of Europe recommended that “[a]t all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity.”<sup>102</sup>

However, the OSCE is concerned that in several monitored cases, judicial authorities exhibited insensitive and inappropriate attitudes towards alleged victims of trafficking.

During a trial session of a trafficking case before the District Court in Mitrovicë/Mitrovica on 6 March 2007, the presiding judge allowed the defence counsel to ask the injured party about her prior problems with marijuana. The injured party refused to answer this question.

In a case of alleged trafficking investigated by the Prizren District Prosecutor, on 2 February 2007 the prosecutor interrogated the alleged victim, a woman from Albania. He asked her questions in an accusatory manner and insensitive to the trauma she likely recently suffered. Due to the prosecutor’s conduct, the victim was defensive and would not co-operate.

Inappropriate interrogation techniques and lack of sensitivity by police, prosecutors and judges towards victims of trafficking<sup>103</sup> often discourage victims from cooperating or providing clear, detailed and honest testimony. Instead, victims fear prosecution and hesitate to cooperate with judicial authorities. This conduct also violates the right of victims to be treated with full respect for their dignity.

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<sup>100</sup> Art. 80, PCPCK.

<sup>101</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 4.

<sup>102</sup> Committee of Ministers of the Council of Europe, Recommendation No. R (85)11 to Member States, *On the position of the victim in the framework of criminal law and procedure*, 28 June 1985.

<sup>103</sup> Of note, in both described cases, the victim advocates who were present did not intervene to stop the inappropriate questioning.



## **IV. FAILURE TO PROTECT VICTIMS AND WITNESSES IN TRAFFICKING CASES**

### **A. Legal framework related to protection of witnesses**

According to case-law of the European Court of Human Rights, the life, liberty or security of witnesses must not be “unjustifiably imperilled.”<sup>104</sup> Thus, public authorities have a duty to protect witnesses and their close relatives against interference, threats and danger, prior, during and after the trial.<sup>105</sup> Effective protection of witnesses is crucial for the legal system to function properly.<sup>106</sup>

This is especially important in trafficking cases, where the defendants may be members of organized crime and the victim may also be a key witness who is vulnerable to threats and intimidation. Without adequately protecting victims and witnesses in trafficking cases, prosecutors will not obtain necessary evidence to lead to convictions of traffickers and victims and witnesses may suffer further harm. Article 6(5) of the Palermo Protocol foresees that public authorities shall “endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.”

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

The PCPCK allows for concealing the identity of witnesses,<sup>107</sup> non-public hearings, temporary removal of the defendant from the court-room during witness testimony, distance testimony (e.g. through videoconferencing or closed circuit TV), or videotaped examination prior to the court hearing with the defence counsel present.<sup>108</sup>

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<sup>104</sup> European Court of Human Rights, *Van Mechelen and Others v. the Netherlands*, 21363/93, 21364/93, 21427/93, 23 April 1997, para. 53. See also *Doorson v. the Netherlands*, 20524/92, 26 March 1996, para. 70, and *P.S. v. Germany*, 33900/96, 20 December 2001, para. 22.

<sup>105</sup> “While respecting the rights of the defence, the protection of witnesses, collaborators of justice and people close to them should be organized, where necessary, before, during and after trial.” (Committee of Ministers to Member States of the Council of Europe, Recommendation (2005)9 *On the Protection of Witnesses and Collaborators of Justice*, 20 April 2005, Article II(2)).

<sup>106</sup> “[...] it is unacceptable for the criminal justice system to fail to bring defendants to trial and obtain a judgement because witnesses have been effectively discouraged from testifying freely and truthfully.” *Id.*, Preamble.

<sup>107</sup> However, the use of anonymous testimony (especially without relocation) can be problematic. First, the defendant can often guess the true identity of the anonymous witness based on the nature or specifics of the testimony. In addition, according to the PCPCK, a conviction which is based “solely” or “to a decisive extent” on anonymous testimony is not admissible, as it can raise concerns regarding compliance with international fair trial standards (see Art. 157(3), PCPCK).

<sup>108</sup> Art. 168-174, PCPCK. Prior to the enactment of the PCPCK, UNMIK Regulation No. 2001/20 *On Protection of Injured Parties and Witnesses in Criminal Proceedings*, of 20 September 2001, and Administrative Direction No. 2002/25, of 13 November 2002, provided for measures to conceal the identity of witnesses while providing testimony.

In addition, the Witness Protection Programme provides for the physical protection of witnesses before, during and after trial by a specialized police unit, known as the UNMIK Witness Protection Unit. Justice Circular No. 2003/5 *on the Witness Protection Programme* briefly describes the procedures for enrolment in the Witness Protection Programme. It is aimed at protecting witnesses in the most serious criminal cases such as organized crime, trafficking in persons and war crimes.<sup>109</sup> Unfortunately, there is currently no detailed law or procedure in Kosovo for entering witnesses into the witness protection programme, changing their identities, and relocating them outside Kosovo after the trial. The Witness Protection Programme is based on a brief Justice Circular which is not sufficient. A draft Witness Protection Regulation has been circulated for comment, and its enactment and implementation should be top priorities.

## **B. Observed failure to protect victims or witnesses of trafficking**

Despite these legal requirements, the OSCE has observed that prosecutors and judges continue to disregard measures intended to protect trafficking victims and witnesses and to facilitate successful prosecution of traffickers. Protection measures such as witness relocation, visual or voice distortion, or physical separation of the defendant from the victims and witnesses were not used in any of the cases monitored by the OSCE. The use of a pseudonym for a victim/witness occurred in only one case monitored by the OSCE.

In the vast majority of the monitored trafficking cases, the OSCE noted either incidents of direct intimidation or threats to victims/witnesses, or evidence (such as victims/witnesses changing statements) that witness or victim intimidation may have occurred.<sup>110</sup>

In a case of alleged trafficking in Pejë/Peć, on 5 April 2006 a woman stated to the police that a man first took her to his place and then attempted to sell her to other people.<sup>111</sup> Moreover, he allegedly forced her to have sexual intercourse with various clients. On 3 May 2006, she substantially changed her prior statement in new testimony to the District Prosecutor. In addition, she stated that “she is very afraid” of the defendant.

In a case of trafficking investigated by the Prizren District Prosecutor, a juvenile victim from Albania gave three corroborating statements between 1 July 2004 and

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<sup>109</sup> The provisions for protecting witnesses in the PCCK (such as separating the defendant from the witness, distance testimony, and non-public hearings) should be used in the majority of cases where witnesses may be intimidated but are not enrolled in the Witness Protection Programme.

<sup>110</sup> Witness intimidation and protection is a topic which will be addressed in the forthcoming OSCE/United States Department of Justice joint report *Witness Security and Protection in Kosovo: Assessment and Recommendations* (expected November 2007). The topic has already been covered in previous OSCE reports. See OSCE Mission in Kosovo, *Review of the Criminal Justice System, The protection of witnesses in the criminal justice system; the administration of justice in the Minor Offences Courts; juveniles in criminal proceedings* (December 2006, p. 8-18); *The Response of the Justice System to the March 2004 Riots* (December 2005, pp. 8-21); *Review of the Criminal Justice System: Crime, Detention and Punishment* (December 2004, pp. 74-77); *Review of the Criminal Justice System: Protection of witnesses in the criminal justice system* (May 2003).

<sup>111</sup> Art. 139, PCCK, read with Art. 20 PCCK, makes attempted trafficking a punishable offence.

30 December 2004. She provided incriminatory evidence against the defendants, showing that they had trafficked and raped her. She also reported that the defendants threatened to “kill her, her only brother and then her whole family”, “make all her extended family disappear”, and to “behead her” if she turned them in to the police. Nevertheless, she was given no protective measures. When she testified at trial on 23 May 2005, she was accompanied by the parents and an uncle of one of the defendants. She substantially changed her statement, retracting all incriminatory statements she had given previously. On a positive note, both the Prizren District Court on 20 July 2005 and the Kosovo Supreme Court on 28 May 2007, characterized her new version of events as “preposterous”.

In another alleged case of trafficking, on 27 June 2007 the Prishtinë/Priština District Court heard the testimony of two victims during an extraordinary investigative opportunity. Since the hearing took place in a very small room, the victims were forced to sit next to the defendant. The defendant constantly interfered while the victims testified. The pre-trial judge only warned the defendant not to interfere once, and did not remove him from the courtroom. The two victims substantially changed their statements and gave a new and contradictory version of the facts at this hearing.

It is possible that threats or intimidation by the defendant have occurred when victims substantially change their statements, refuse to testify against the alleged perpetrators, or appear reticent. In such cases, the police, prosecutors, and judges have a duty to provide the victim/witness with the maximum available protection. Failure to do so not only jeopardizes the safety of the victim or witness, but also decreases the possibility of obtaining incriminatory evidence against the traffickers.

The following examples further reveal that Kosovo judicial authorities fail to adequately protect victims of trafficking who assume significant risk when testifying against their exploiters.

At the trial session of 27 June 2005, in a trafficking case before the Mitrovicë/Mitrovica District Court, a victim informed the panel that she had received phone threats. In particular, a phone text message warned her that if the defendants are not acquitted, “she will have problems”. The presiding judge disregarded these threats and did not order any protective measures.

In a case of alleged trafficking investigated by the Prizren District Prosecutor, on 31 January 2007 a woman from Albania reported to the police that she had been forced into prostitution by two individuals, who were arrested shortly thereafter. She showed the police visible signs of physical mistreatment that supported her allegations. However, in the course of the investigative hearing held on 2 February 2007 before the district prosecutor, the woman substantially changed her statement. She apologized for the allegations she made to the police which she allegedly gave

in a “state of shock.”<sup>112</sup> While testifying, the injured party appeared to look towards defence counsel for acceptance of her statements.<sup>113</sup> The prosecutor did not request and the court did not order any witness protection measures.

In an alleged trafficking case before the Prishtinë/Priština authorities, on 6 October 2006 the police arrested several women from Moldova and placed them in a shelter house. Despite the reasonable suspicion that at least one of the women was involved in trafficking, she was not separated from the likely victims.<sup>114</sup> Moreover, no protective measures were requested for or granted to the alleged victims.

It is often difficult to prove witness intimidation, as other factors may account for changes in testimony. However, even in some of the monitored cases, the OSCE observed direct evidence of witness intimidation. While it is alarming that witnesses and/or victims are threatened, intimidated and subjected to family pressure, of greater concern is that prosecutors failed to request and judges failed to order basic witness protective measures. This violates domestic law and international human rights standards, jeopardizes the health and safety of victims and witnesses, and hampers prosecutors from ensuring that traffickers face justice.

Finally, it is understandable that victims and witnesses are hesitant to testify about threats or against traffickers. Therefore, aside from requesting protective measures, the investigative authorities should develop proactive investigative techniques to reduce reliance on victim testimony.<sup>115</sup> Such measures, which were used in a small percentage of the monitored trafficking cases, could include undercover investigations,<sup>116</sup> telephone wire-tapping, covert monitoring of conversations, email and internet monitoring (as allowed under Kosovo law), or covert photographic or video surveillance.<sup>117</sup>

## CONCLUSION

The OSCE has reported on the issue of trafficking on five occasions prior to this report. Consequently, it is troubling to note that the previously identified concerns persist in Kosovo. The police, prosecutors, judges, victim advocates, and the legislature have

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<sup>112</sup> While at the police station she said that she had been raped, forced into prostitution, and wounded on her chest with a knife. Before the prosecutor she said that the three alleged traffickers did her no harm and the scar on her chest with a knife was there because one of the suspects “was just playing”.

<sup>113</sup> Of note, upon her request and at the order of the prosecutor, the alleged victim was repatriated to her country of origin.

<sup>114</sup> Of note, the suspected victims subsequently refused to cooperate with the prosecutor.

<sup>115</sup> See High Commissioner for Human Rights Recommended Principles, Guideline No. 5, point 3.

<sup>116</sup> On a positive note, the OSCE monitored cases where the Prishtinë/Priština and Prizren District Prosecution Offices successfully used undercover investigations. These prosecution offices prosecuted and (in 2006 and 2007) obtained convictions (five and three respectively) in a higher number of trafficking cases than the prosecution offices in other regions. Mitrovicë/Mitrovica and Gjilan/Gnjilane courts issued convictions for trafficking in only one case, and in Pejë/Peć not a single court issued a conviction for trafficking during this time period.

<sup>117</sup> See Art. 256 ff., PCPK.

simply failed to adequately address the problems in trafficking cases.

In past reports (2001 to 2004) the OSCE noted the following concerns in trafficking cases:

- Intimidation of and lack of protective measures for victims and witnesses (three times);<sup>118</sup>
- Inadequate investigation in trafficking-related cases (two times);<sup>119</sup>
- Lack of adequate translation (two times);<sup>120</sup>
- Misinterpretation of the criminal offence of trafficking (two times);<sup>121</sup>
- Failure to ensure victim's testimony in court;<sup>122</sup>
- Passive role of victim advocates;<sup>123</sup>
- Low punishments for traffickers;<sup>124</sup>
- Arrests of trafficking victims instead of traffickers;<sup>125</sup>
- Possible involvement of police officers in trafficking activities;<sup>126</sup>
- Need to distribute UNMIK Regulation 2001/4 in the Courts.<sup>127</sup>

All of the concerns listed above (with the exception of the need to distribute UNMIK Regulation 2001/4) are noted in the present report, and observed by the OSCE in the monitoring of trafficking cases in Kosovo.

Perhaps the continuing intimidation of witnesses and victims is the most alarming and urgent problem that must be addressed. Prior to the enactment of UNMIK Regulation 2001/20<sup>128</sup> and the PCPCK, prosecutors and judges claimed to lack the legal instruments to adequately protect witnesses/victims. Despite the availability of protective measures, it is particularly troubling that in the most recent trafficking cases, victims have received little, if any, protection. In addition, there is an urgent need for the enactment of a witness relocation programme that has adequate funding, and the development of ties with other countries who will accept protected witnesses.

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<sup>118</sup> See Third Review of the Criminal Justice System (October 2001); Fourth Review of the Criminal Justice System (February 2002); and Fifth Review of the Criminal Justice System (April 2003).

<sup>119</sup> See First Review of the Criminal Justice System (July 2000), and Third Review of the Criminal Justice System (October 2001).

<sup>120</sup> See Third Review of the Criminal Justice System (October 2001), and Fifth Review of the Criminal Justice System (April 2003).

<sup>121</sup> See Third Review of the Criminal Justice System (October 2001), and Fourth Review of the Criminal Justice System (February 2002).

<sup>122</sup> See First Review of the Criminal Justice System (July 2000).

<sup>123</sup> See First Review of the Criminal Justice System (July 2000).

<sup>124</sup> See Sixth Review of the Criminal Justice System (October 2004).

<sup>125</sup> See Third Review of the Criminal Justice System (October 2001).

<sup>126</sup> See Third Review of the Criminal Justice System (October 2001).

<sup>127</sup> See Third Review of the Criminal Justice System (October 2001).

<sup>128</sup> See UNMIK Regulation 2001/20, and Administrative Direction No. 2002/25.

## RECOMMENDATIONS

### **To the Legislature:**

- Adopt a new witness protection law establishing a formal witness relocation programme that allows for the enrolment of trafficking victims and witnesses.
- Amend UNMIK Regulation 2001/4, Section 8 such that the victim need not give evidence that she is a victim of trafficking to avoid prosecution for prostitution, illegal border crossing, or illegal stay.
- Since prostitution is illegal in Kosovo, adopt a law which makes it a criminal offence to obtain sexual services from a prostitute.

### **To the Kosovo Supreme Court:**

- Issue a decision giving clear guidance to the lower courts in Kosovo interpreting Article 139 of the PCCK and what types of factual situations do and do not constitute the offence of trafficking.

### **To the Kosovo judges:**

- Only issue convictions for trafficking when the prosecution provides evidence establishing all the necessary elements of Article 139 of the PCCK.
- Order witness protection provisions available under the PCCK in trafficking cases, such as physically separating the victim and witnesses from the defendants, use of face or voice distortion, or distance testimony.
- Ensure that all victims of trafficking are represented by a lawyer and/or an authorized representative.
- In accordance with Section 8 of UNMIK Regulation 2001/4, dismiss criminal charges against trafficking victims for the crimes of illegal border crossing or the minor offences of prostitution or illegal stay.

### **To the Kosovo prosecutors:**

- Do not prosecute defendants for trafficking in cases where the necessary elements under Article 139 of the PCCK cannot be established. If the facts do not support a case of trafficking, consider charging defendants with lesser crimes such as facilitating prostitution or smuggling of migrants.
- Conduct thorough investigations in trafficking cases that do not rely solely on victim testimony. Make more frequent use of undercover investigations, wiretapping, covert monitoring of conversations, covert photographic or video surveillance, or interception of communications by a computer network.
- Prosecute all people (including users of sexual services under Article 139(5) of the PCCK) who have committed crimes in the context of the trafficking offence.
- Treat trafficking victims as such, regardless of whether they co-operate or provide information.
- Question victims in a sensitive manner that does not violate their dignity.

- Request protection for trafficking victims and witnesses from the court and any future entities involved in witness protection (such as a witness protection commission that decides on requests for enrolment in a relocation programme).

**To the Kosovo Police Service (particularly the Trafficking in Human Beings Section):**

- Carefully investigate whether a person may be a trafficking victim.
- At the earliest available opportunity inform victims of trafficking of their rights in criminal proceedings under the PCCK and UNMIK Regulation 2001/4.
- Provide protection to persons if there is a reasonable suspicion that they are or have been trafficking victims.
- Do not withhold assistance to a possible victim of trafficking because he or she refuses to co-operate or to provide information.
- Refrain from arresting or initiating minor offences proceedings such as prostitution or illegal stay against persons who may be victims of trafficking (whether or not they co-operate).

**To the Chamber of Advocates:**

- Instruct lawyers to appeal trafficking decisions where the required elements under Article 139 of the Provisional Criminal Code of Kosovo (PCCK) have not been established.
- Instruct lawyers to appeal decisions convicting trafficking victims for prostitution or illegal stay, on the grounds of violation of Section 8 of UNMIK Regulation 2001/4.
- Instruct lawyers who represent trafficking victims to proactively assist them.
- Instruct lawyers to object to or refrain from questions which violate the dignity of trafficking victims.

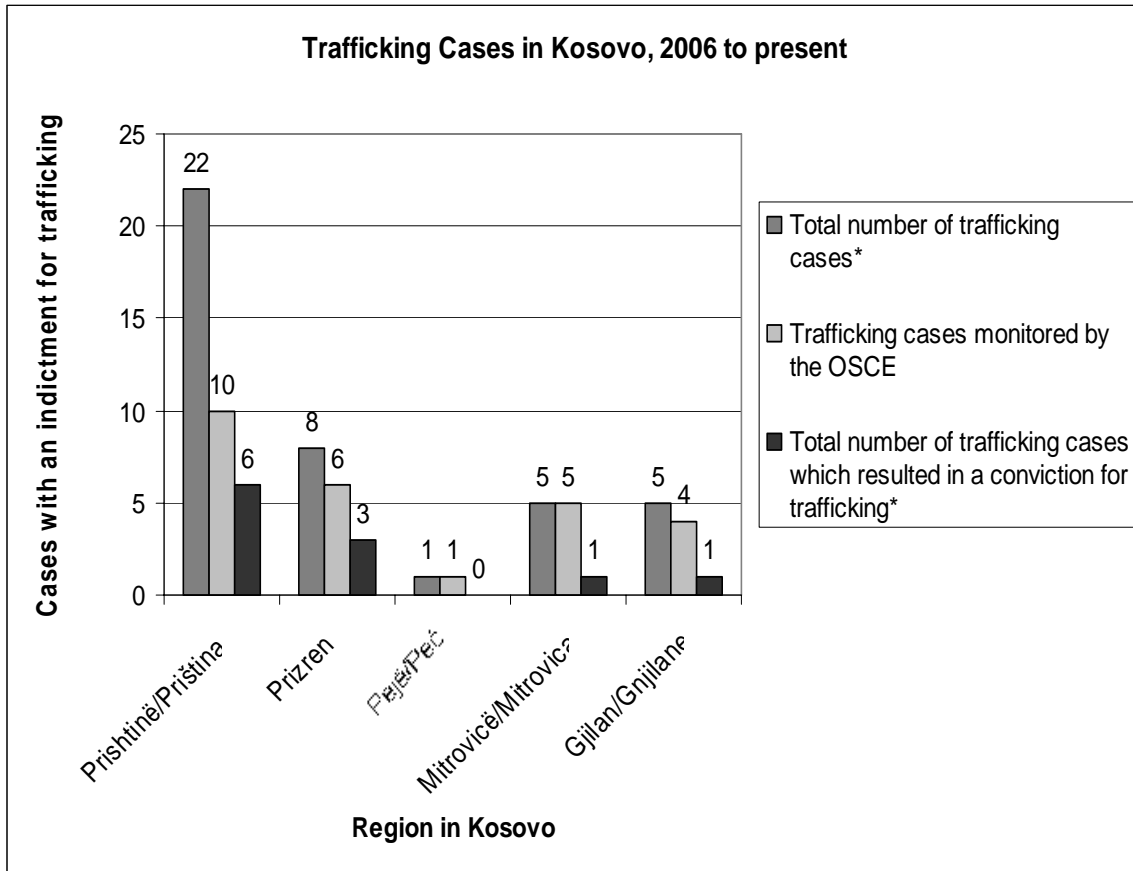
**To the Victim Assistance and Advocacy Unit:**

- Proactively assist victims of trafficking in criminal proceedings and inform them of their rights.
- Object to improper and/or indiscrete questioning of trafficking victims.

**To the Kosovo Judicial Institute:**

- Train judges and prosecutors, including the Kosovo Special Prosecutor's Office, on the requirements of Article 139 of the PCCK, available witness protection methods, and covert investigation techniques (such as wiretapping and undercover investigation).

**ANNEX**



\* Based on information provided to the OSCE by employees of the Kosovo courts