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The Fragile Triangle

Police, judges and prosecutors coordination
during criminal proceedings response in Kosovo

Prishtina, February 2010

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List of Abbreviations

BIRN	Balkan Investigative Reporting Network
CSP	Comprehensive Status Settlement (the Ahtisaari Plan)
DOJ	Department of Justice (UNMIK)
EC	European Commission
EU	European Union
EULEX	EU Rule of Law Mission in Kosovo
EUR	Euro, the currency
IJPC	Independent Judicial and Prosecutorial Commission
JAU	Judicial Audit Unit
KIPRED	Kosovar Institute for Policy Research and Development
KJC	Kosovo Judicial Council
MJ	Ministry of Justice
MIA	Ministry of Internal Affairs
ODC	Office of the Disciplinary Counsel
OSCE	Organisation for Security and Co-operation in Europe
SPO	Special Prosecutor's Office
UNDP	United Nations Development Program
UNMIK	United Nations Interim Administration Mission in Kosovo

I. INTRODUCTION

Rule of law remains the weakest area of governance in Kosovo and one of the biggest challenges for the full consolidation of country's statehood. The UN mission in Kosovo (UNMIK) did not succeed on establishing an efficient justice system, which would be able to fight crime and to ensure a safe and secure environment. UNMIK's Department of Justice (DOJ) that administered the justice system until Kosovo's declaration of independence in February 2008 has been the most criticised pillar of the UN mission, by media, civil society and also international organisations. UNMIK prosecutors and judges were part of a political and administrative mission, further lacking clear division between legislative, executive and judicial powers. In terms of efficiency, an UNMIK judge has resolved averagely 1.5 cases a year.

Law and order were identified to remain key issues even during Kosovo's political transition and were identified as priorities in the Comprehensive Status Proposal (CSP) drafted by UN Special Envoy Martti Ahtisaari. After declaring independence based on the CSP, Kosovo authorities invited the EU to assist country authorities with a rule of law mission, EULEX, which deployed its personnel to Kosovo in December 2008. Despite their continuous efforts to distinguish themselves from the nature of work and performance of UNMIK, EULEX is still fighting to decide in between its political mandate and practicing its rule of law mandate as required.¹

Following EULEX deployment, a Joint Advisory Board between this mission and the Kosovo government was set up. It has yet to develop cohesive policies and adequate strategies in the area of rule of law. In the meantime, cases of serious crimes such as murders remain unresolved for years, while organised crime and political crimes are hardly tackled.

Kosovo courts are overloaded with civil and criminal cases, which they have neither human nor technical resources to resolve. Kosovo has very low number of judges, who are overloaded with cases in all levels of the judiciary. The current number leaves some 14 judges per 100,000 citizens, which is very low compared to the countries in the region, but also to some new EU

¹ Judges and prosecutors of EULEX have no clear stance on what laws are applicable in Kosovo

member countries. In neighbouring Montenegro, the number of judges per capita (100,000) is 51, in Croatia 41, while in Czech Republic and Hungary 27.

The number of prosecutors in Kosovo is even lower compared to the number of judges with only 94 prosecutors pressing charges against criminals among a population of 2.1 million. For 100,000 citizens Kosovo has only 3.7 prosecutors, whereas the neighbouring Montenegro has 13.4, Bosnia and Herzegovina 7.3, Hungary 17.3, Denmark 10.3 and only France having less, namely 2.9.

Number of prosecutors in five District Prosecutors' Offices corresponds with the number of judges in 5 District Courts.² However, in the municipal level, there are 126 judges and only 51 prosecutors. Furthermore, 7 Municipal Prosecutors' Offices have to cover 23 Municipal Courts, which, when taking into consideration the low number of prosecutors and the geographical distance between these offices, is practically impossible.

The vetting and reappointing process is scheduled to end in February 2010, however, it will not increase the number of judges and prosecutors, despite the fact that this has been identified as one of the key problems in the judiciary. Representatives of the Kosovo Judicial Council have addressed the issue of the lack of staffing and overloaded courts continuously, but so far no actions towards this phenomenon have been taken. Lack of institutional support in increasing the number of judges and prosecutors be it by Kosovo government and the international community supporting the process, will remain a worrying fact that will further hamper the development of a functional and effective rule of law system in Kosovo.

In order to inspect the current state of the rule of law institutions, this research focuses on the efficiency and cooperation between Kosovo Police, public prosecutors and courts. The research focused on the communication channels between these three main pillars of rule of law, but also on the coordination and the quality of their work.

Gaps have been identified in the criminal justice and judiciary performance in conducting and exercising an independent investigation and court ruling of cases. All three institutions face the problem of overseeing the performance of their staff. Police and prosecutors lack good coordination and joint response

² There are 31 prosecutors and 48 judges

during the investigation phase and in follow-up of cases, while there is no joint platform to store the data regarding criminal cases. Police often fail to respond to requests made by prosecutors and judges during investigations. Prosecutors dismiss criminal reports without notifying the police and often based on assumptions only. Judges issue verdicts without being aware whether certain defendants are recidivists.

As a consequence, many criminals are set free in the pre-trial proceedings of criminal cases, while there is a public perception that judiciary is the most corrupt institutional sector³. Inability of this institutional triangle to ensure the rule of law portrays Kosovo as a weak and fragile state, preventing the overall development and building of a functional state based on rule of law.

II. LEGAL FRAMEWORK OVERVIEW

The justice system in Kosovo is managed by the Kosovo Judicial Council (KJC), an independent body in charge of ensuring independence and impartiality of the judicial system.⁴ The KJC is responsible for transfer and disciplinary proceedings of judges, conducting judicial inspections, judicial administration, developing court rules in accordance with the law, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction and making recommendations for the establishment of new courts⁵. The KJC is also in charge of the prosecutors, as Kosovo authorities have yet not established the Kosovo Prosecutorial Council, a body that is foreseen in Kosovo's constitution. Kosovo's Ministry of Justice (MJ) manages the administration of the prosecutor's offices.

The highest judicial body in Kosovo is the Supreme Court, while the Constitutional Court is the final authority for interpretation of the constitution and compliance of laws with the constitution.⁶ The regular court system is

³ See UNDP Early Warning Reports 2007, 2008 and 2009

⁴ Constitution of Republic of Kosovo, Article 108

⁵ Ibid

⁶ Constitution of Republic of Kosovo, Articles 108 and 112

composed of 23 Municipal Courts, 5 District Courts, and one Commercial Court. The minor offenses court system is consisted of 24 Municipal Courts and one High Court for minor offenses.

The State Prosecutor's Office manages one Special Prosecutor's Office, 5 District and 7 Municipal Prosecutors' Offices.

The Criminal Code and Criminal Procedure Code⁷ regulate the criminal procedure in Kosovo. According to the law, criminal proceedings can only be initiated upon the request of the authorized prosecutor, based on a motion of an injured party or ex officio.⁸ The prosecutor directs and supervises the work of the police in the pre-trial phase of the criminal proceeding, while the police are in charge of investigating criminal offences.⁹ Police is obliged to file a criminal report or to inform the prosecutor in some alternative form as soon as they obtain knowledge of a suspected criminal offence.¹⁰ The legislation defines the prosecutor as leader and supervisor of all criminal investigations.

The Criminal Procedure Code defines that any person that is deprived from freedom by law enforcement agencies should be brought to a judge within a period of 72 hours.¹¹ The constitution, however, defines this time to be 48 hours.¹² Although police, prosecutors and courts, respect the constitutional definition, an amendment to the current Criminal Procedure Code that would make it in compliance with the constitution would avoid any further confusion.

The current Criminal Procedure Code determines that any person can file a criminal report to the police or to the prosecutor.¹³ The police submit criminal

⁷ The Provisional Criminal Procedure Code entered into force on April 6, 2004, as UNMIK regulation, and was amended by the Kosovo Assembly on November 6, 2008.

⁸ Kosovo's Criminal Procedure Code, article 6

⁹ Kosovo's Criminal Procedure Code, article 200

¹⁰ Ibid

¹¹ Kosovo's Criminal Procedure Code, article 14

¹² Constitution of Republic of Kosovo, article 29

¹³ Kosovo's Criminal Procedure Code, article 197

reports to the prosecutors upon finishing investigations.¹⁴ Prosecutors can then require additional information from the police (interviews, evidences, reports), by proceeding with the case by filing an indictment to a proceeding judge, or can decide to dismiss the criminal report.¹⁵ In case of a dismissal, prosecutors are obliged to immediately inform the police about this decision.¹⁶ Prosecutors are in charge of supervising and instructing the police investigative activities while the police are obliged to respond immediately to prosecutors' requests and demands. After completing investigations, the prosecutors file indictments to proceeding judges. These judges can then proceed the indictment to a trial, or can dismiss it, after having analysed the evidences, heard the plea of the defended and heard arguments of both the prosecutors and the defence attorneys.

The Criminal Procedure Code refers to the police with the term 'judicial police'. In Kosovo, there is no such special police institution. According to the Law on Police,¹⁷ judicial police means any police officer who in addition to other police duties, is authorized to perform investigations and similar duties under the supervision of the prosecutor.¹⁸ With other words, the entire police may play the duty of the judicial police in case the prosecutors request them to, until, and if, a separate judicial police force is set up.

III. THE FRAGILE TRIANGLE

Intensive communication and qualitative cooperation between police investigators, prosecutors and judges are necessary to achieve efficient and functional rule of law. The institutional triangle can be fully functional only if there is a strong coordination of work between the three institutions. The workload of the rule of law institutions is dependant equally on all three

¹⁴ Kosovo's Criminal Procedure Code, article 207

¹⁵ Kosovo's Provisional Criminal Code, article 208

¹⁶ Ibid

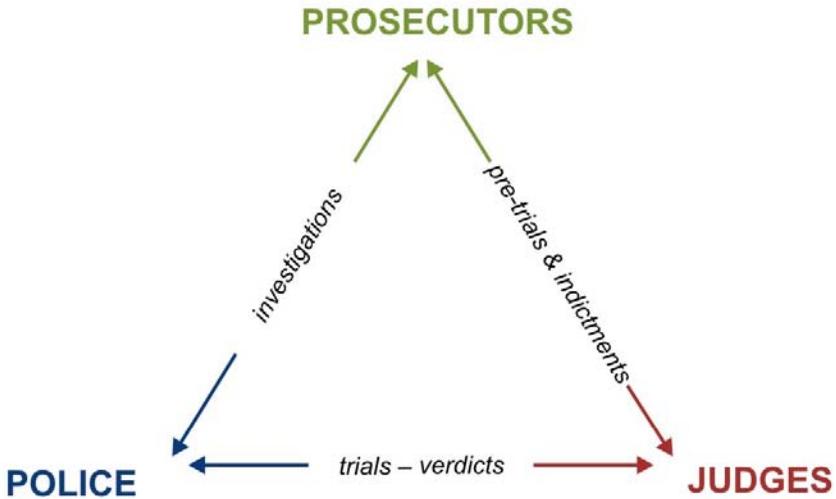
¹⁷ Law on Police Nr. 03/L-035, approved by Kosovo Assembly on February 20, 2008

¹⁸ Law on Police, article 3 and 10

vertices of the triangle. In other words, if one of these institutions fails, the entire rule of law triangle will fail too.

However, in Kosovo there is overall lack of communication between Kosovo Police, offices of Municipal and District Prosecutors and Kosovo Courts. Police investigators, but especially prosecutors and judges have to deal with a workload that exceeds their capabilities. As a consequence, they are often pushed to proceed with criminal cases rapidly.

Kosovo lacks mechanisms for storing and tracking cases of criminal offenses. There are no joint databases shared between the police, prosecutors and judges, on which they could base the coordination of their work. Hence, it is impossible to track and coordinate criminal proceedings. The police often fails to respond to prosecutors' requests for additional evidences or interviews in the investigation process. Prosecutors fail to keep the track of their cases and so do the proceeding judges. As the final consequence, criminal cases are investigated poorly, and often dropped even before charges are pressed.



Graph 1 – The institutional rule of law triangle

Gaps in the functionality of this institutional triangle directly impacts on the criminal investigations, pre-trial proceedings, trials and verdicts of criminal proceedings in Kosovo. These three institutions have very weak communication with each other and their coordination in processing criminal cases is very poor. A case in example of how uncoordinated work affects effective delivery of justice in Kosovo, can be seen when analysing trails of defendants who are known recidivists. Prosecutor's Offices and the Courts lack an electronic database where they would store information about recidivists.¹⁹ The police on the other hand have a database but often fail to mention in criminal reports whether certain perpetrators have been involved or even judged for criminal activities in their past.²⁰ As a consequence, recidivism is often not taken into account by judges upon making a verdict for a criminal activity. Hence, this institutional triangle becomes inefficient on prosecuting and judging those who have been involved in repeated criminal activities.

a) Communication during criminal investigations

The criminal investigations in Kosovo are not conducted properly due to poor coordination of work between prosecutors and the police. Kosovo Police and Offices of Public Prosecutors do not have regular meetings where they would exchange their views, discuss issues and coordinate their joint efforts in combating crime.²¹ Furthermore, the hierarchy of accountability is not functional between these two institutions. Although prosecutors are supposed to be leading the investigations, in accordance with law, it is not the case in practice.

As stated, the Kosovo Police and public prosecutors do not have a joint database system for storing and tracking criminal cases that they are

¹⁹ KIPRED interviews with two judges, Prishtina, December 2009

²⁰ Ibid

²¹ KIPRED interviews with two police investigators in Gjilan, November 2009, one police investigator in Prishtina, December 2009, two prosecutors in Prishtina, December 2009, Driton Muharremi, Proceeding Judge, Prishtina Municipal Court, Prishtina, December 10, 2009, and Hilmi Zhitia, Kosovo's Chief State Prosecutor, Prishtina, January 12, 2010

investigating.²² This means that prosecutors and investigators are not up to date with each other's work constantly. In order to inform each other about the investigation process, police and prosecutors communicate through formal written memorandums, which are usually sent in hard copies, and mobile phones.²³ None of these methods is traceable and neither the police, nor the prosecutors, are fully aware of the status of their cases.

Further, prosecutors may require from the police to come up with new evidences for a specific case that is months or even years old.²⁴ The police database system for criminal cases, although doesn't meet the international standards, is still very useful for the investigation process.²⁵ Prosecutors, on the other hand, have no electronic database and no access to the police database. In order to receive the data from the police database, prosecutors have to request the police to provide them with this data. This lack of coordination makes criminal investigations in Kosovo weak and shallow. In combination with the load of work that prosecutors have to deal with, it becomes impossible for them to carry on satisfactory investigations that would results with strong indictments against criminals.

While performing their daily activities, police investigators and prosecutors communicate through mobile telephones.²⁶ Usage of mobile telephones is necessary when rapid coordination of work is needed, such as in the cases when police need prosecutor's order to detain suspects. Such communication, however, does not meet the standards of formal communication, leaving space for misinterpretations and misunderstandings, but also manipulation.

²² KIPRED interviews with two police investigators in Gjilan, November 2009, one police investigator in Prishtina, December 2009, two prosecutors in Prishtina, December 2009, Driton Muharremi, Proceeding Judge, Prishtina Municipal Court, Prishtina, December 10, 2009, and Hilmi Zhitia, Kosovo's Chief State Prosecutor, Prishtina, January 12, 2010

²³ Ibid

²⁴ KIPRED interviews with two police investigators in Gjilan, November 2009, and one police investigator in Prishtina, December 2009.

²⁵ Ibid

²⁶ KIPRED interviews with two police investigators in Gjilan, November 2009, one police investigator in Prishtina, December 2009, two prosecutors in Prishtina, December 2009, and Hilmi Zhitia, Kosovo's Chief State Prosecutor, Prishtina, January 12, 2010

Police and prosecutors often put the blame on each other for open cases that remain under investigations for years. There are cases when police would put the suspects in detention and claim it was done by the order of the prosecutor, without consulting the prosecutor at all.²⁷ This action of the police represents a violation of the criminal procedure and violation of human rights.²⁸

Even in cases where there is telephone communication between the police and prosecutors, there are many breaches and violations of procedures, as prosecutors cannot be completely informed on cases through telephone. This especially happens in cases of the so-called 'light criminal offenses' related to domestic violence cases. There are many cases when police responds to a domestic violence report when violence is ongoing and takes the domestic violence perpetrator into custody, preventing further violence. Not being fully aware of the details of the cases and without interviewing the defendants at all, prosecutors order the police, through telephone, to release the defendants on what is called 'standard procedure'.²⁹ Many such cases conclude with repetition of the offense, once the defendants are set free.³⁰ This behaviour also represents a criminal offense, as according to the Criminal Procedure Code, prosecutors are obliged to carefully analyse all the cases before making any decisions and in accordance to the applicable law in cases of light bodily injury should conduct ex officio prosecution. So far no cases of such prosecution have been identified in Kosovo.³¹ This fact, not only that shows gaps in the rule of law institutional triangle, but is also an indicator of an improper behaviour by these institutions.

Often poor coordination of work leads to the poor results in criminal investigations in Kosovo. As the final consequence, many cases remain open. In 2007, there were 67,170 criminal cases that were reported to the police, out

²⁷ KIPRED interviews with Tome Gashi, lawyer and a legal expert, Prishtina, December 14, 2009, and Kujtim Kerveshi, legal expert, Prishtina, November 6, 2009

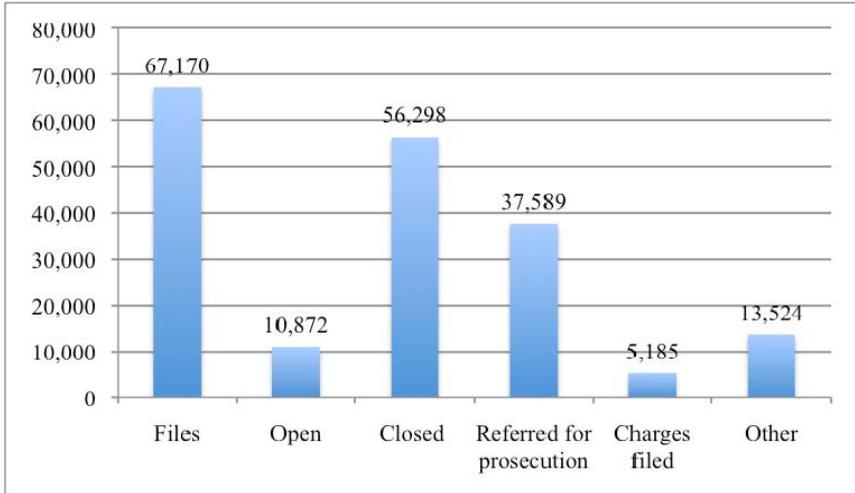
²⁸ ECHR, article 13

²⁹ KIPRED interviews with two police investigators in Gjilan, November 2009, one police investigator in Prishtina, December 2009

³⁰ Ibid

³¹ See also "More than words on paper? The response of judicial authorities in cases of domestic violence in Kosova" -UNDP Publication of the Kosovo Women's Network Report, Chapter on Prosecution, Prishtina, November 2009

of which 10,872 cases remained open³². The high number of open cases comes as a direct consequence of weak coordination of work between the police and prosecutors.



Graph 2 – Criminal cases for 2007, according to Kosovo Police

Out of 56,298 cases that are labelled as ‘closed’, only 5,185 have ended with charges being pressed against perpetrators, whereas 37,589 of them have the status ‘referred to prosecutors.’³³ This means that these files have been going back and forth from prosecutors to police investigators with no substantial progress in the investigations.

Although the number of the resolved cases is quite high, consisting 84% of the total number of the police cases, the method how they are resolved is not satisfactory. Kosovo police and public prosecutors blame each other for failures in investigating criminal cases. Police officials claim their percentage of resolved criminal cases is high and that it is the prosecutors and corrupt judges

³² Statistics obtained by the Kosovo Police

³³ Ibid

who are letting the criminals free, by dismissing the criminal reports submitted by the police.³⁴ Prosecutors deny this allegation, saying that police investigators often file poor criminal reports, based on which they cannot press charges, and consider these cases as resolved.³⁵

Kosovo's Criminal Procedure Code obliges prosecutors to inform the police regarding the status of submitted criminal reports, especially about those reports that they decide to dismiss.³⁶ In addition, upon dismissing a criminal report, prosecutors are obliged to give a detailed explanation why that specific case is being dropped.³⁷ In criminal proceedings in Kosovo, this is not the case. Using the workload that exceeds their capabilities as an excuse, prosecutors dismiss criminal reports without providing a justification for such an action or when they do issue explanation in writing they do not provide sufficient information.

For example, in three separate written decisions obtained by KIPRED, prosecutors had decided to dismiss criminal reports submitted by the police, by claiming there are no grounds to press charges against the defendants, without specifying any other details regarding the case. Furthermore, the text used in these decisions, by three different prosecutors, is very similar, general and vague. Such decisions made by prosecution represent violation of their code of conduct but also multiple violations of Kosovo's Criminal Procedure Code.

Even though the Kosovo Police remains one of the most praised institutions in Kosovo, prosecutors in Kosovo complain on the work of the police, arguing they file shabby criminal reports just in order to claim they resolve most of criminal cases.³⁸ Such reports are submitted without proper

³⁴ KIPRED interviews with two police investigators in Gjilan, November 2009, one police investigator and one police official in Prishtina, December 2009.

³⁵ KIPRED interviews with three prosecutors in Prishtina, December 2009, January 2010.

³⁶ Kosovo's Criminal Proceeding Code, Article 208

³⁷ KIPRED interviews with two lawyers and legal experts, Prishtina, December 14, 2009, and November 6, 2009

³⁸ KIPRED interviews with three prosecutors in Prishtina, December 2009, January 2010

investigation, and lack substantial evidences.³⁹ KIPRED obtained three such reports submitted by the police to the prosecutors, which were dropped due to improper investigation of the case. Prosecutors complain that such a performance by the police just hardens their work.⁴⁰ On the other hand, legal experts say that law determines the prosecutors to be on top of the investigation, and it is their responsibility to ensure the quality of criminal reports submitted by the police.⁴¹ One of the issues that could resolve this exchange of allegations would be the clear status of the judiciary police, which is not defined equally in the Criminal Procedure Code as it is in the Law on Police.

b) Judicial Police

The number of criminal reports submitted to the prosecutors, almost match the number of crimes. However, the number of charges that are pressed by the prosecutors is much lower, as the prosecutors dismiss many criminal reports. Number of indictments is even lower as pre-trial judges often dismiss charges of the prosecutors as they contain insufficient proof for a criminal case.

Kosovo prosecutors are supposed to lead every criminal investigation carried on by the Kosovo Judicial Police. The Kosovo Criminal Procedure Code clearly states that “the public prosecutor shall direct and supervise the work of the judicial police in the pre-trial phase of the criminal proceedings”.⁴² However, this is not the case. Lack of appointment of judicial police foreseen by the Kosovo Criminal and Criminal Procedure Code as well rigid channels of communications between police and prosecutors, have lead to prosecutors failing to be on top of the criminal investigations.

³⁹ KIPRED interviews with three prosecutors in Prishtina, December 2009, January 2010

⁴⁰ Ibid

⁴¹ KIPRED interviews with a lawyer and a legal expert, Prishtina, December 14, 2009, and Kujtim Kerveshi, legal expert, Prishtina, November 6, 2009

⁴² Article 200, paragraph 3. See also <http://www.unmikonline.org/regulations/2003/RE2003-26.pdf>

Further, the duties of the judicial police are defined in Kosovo's Criminal Procedure Code.⁴³ This force would conduct criminal investigations, would assist the prosecutors and judges in performing their duties, and would be accountable to the prosecutors in different levels.

However, according to the Law on Police, judicial police means any police officer who in addition to other police duties, is authorized to perform investigations and similar duties under the supervision of the prosecutor.⁴⁴ With other words, the entire police are obliged to play the duty of the judicial police in case the prosecutors request them to, until a separate judicial police force will be set up. Furthermore, as soon as the police obtain knowledge of a suspected criminal offence prosecuted *ex officio*, they shall without delay inform the public prosecutor and thereafter provide the prosecution with reports and other relevant information⁴⁵.

Differently, the prosecutors say they cannot function properly unless a special police unit, the judicial police, is formed.⁴⁶ Prosecutors claim such a police unit must be set up, otherwise they have no tools or mechanisms that they would use to force the Kosovo Police to be more efficient in their performance and to coordinate investigations, as they are not accountable to the prosecutors.⁴⁷

Chief State Prosecutor, Hilmi Zhitia, claims there is a clear conflict between the Kosovo's Criminal Proceeding Code and the Law on Police, regarding the existence of Kosovo's Judicial Police, and that this was an intentional plan of the Kosovo Government to leave as less direct competences to the State Prosecutor.⁴⁸

Furthermore, he says:

⁴³ Kosovo's Criminal Procedure Code, Article 151

⁴⁴ Law on Police Nr. 03/L-035, article 3 and 10

⁴⁵ Kosovo Criminal Procedure Code, Article 200, paragraph 2

⁴⁶ KIPRED interviews with two prosecutors in Prishtina, December 2009, and Hilmi Zhitia, Kosovo's Chief State Prosecutor, Prishtina, January 12, 2010

⁴⁷ Ibid

⁴⁸ Ibid

“Prosecutors can order the police to undertake certain actions. However, they cannot hold them accountable, as police investigators are accountable to Kosovo Police hierarchy and structures, meaning police investigators are accountable to their supervisors and not to prosecutors. If we would have the Judicial Police that would not be in the current structures of the Kosovo Police but would rather be accountable to the State Prosecutor’s Office, there would be a much better coordination during criminal investigations.”⁴⁹

Legal experts and lawyers have a different interpretation of the legal framework, which basically puts the entire Kosovo Police in disposal of the prosecutors. In accordance to the law on police, prosecutors can give orders to the police, and if orders are not fulfilled, prosecutors can hold them accountable, through the hierarchy of Kosovo Police, or even press charges against particular officers who violate the law.⁵⁰ Such a divided interpretation of the legal framework only serves as a justification for the prosecutors not to respond in accordance to their mandate and as envisioned under the law. This can be clarified in the new law on public prosecution that is on governmental legislative agenda for 2010.

c) Proceedings and Trials

The interpretation regarding communication and coordination between police and prosecutors affects pre-trial proceedings as well. Prosecutors and proceeding judges claim that the police fail to obey their orders and fulfil their demands, both during pre-trial proceedings and during trials.⁵¹ KIPRED obtained five emergency orders issued to the police by a proceeding judge in

⁴⁹ KIPRED interviews with two prosecutors in Prishtina, December 2009, and Hilmi Zhitia, Kosovo’s Chief State Prosecutor, Prishtina, January 12, 2010

⁵⁰ KIPRED interviews with a lawyer and a legal expert, Prishtina, December 14, 2009, and Kujtim Kerveshi, legal expert, Prishtina, November 6, 2009

⁵¹ KIPRED interviews with two judges, Prishtina, December 2009, January 2010, and two prosecutors, Prishtina, December 2009, January 2010

Prishtina Municipal Court, none of which was executed.⁵² In all five cases, the judge's orders were given to bring the defendants into the court.

Judges in different courts claim to have no information why the police are not performing their duties in accordance to the applicable law. The Prishtina Municipal Court complains that the police in Prishtina assign insufficient number of officers to serve to the courts.⁵³ Hence, courts' invitations are not delivered on time, defendants are not brought to courtrooms and the overall criminal proceeding is delayed.⁵⁴ For the already overloaded judicial system in Kosovo, such a performance by the police is not justified. Especially since, differing from judges and prosecutors, there are sufficient police officers in Kosovo and the Kosovo Police has the needed human resources to conduct the duty of the judicial police according to the law.⁵⁵

Further, work relations of prosecutors vis-à-vis judges are very similar to their work relations with the police. Judges and prosecutors of the same district do not meet on regular basis in order to coordinate their work.⁵⁶ Furthermore, there are no standard consultations between proceeding judges and prosecutors regarding criminal cases.⁵⁷ As a consequence, proceeding judges are overloaded with charges that prosecutors submit to them, which are often written without substantial legal basis. In three cases, files of which were obtained by KIPRED, prosecutors had filed charges against perpetrators without providing any evidences for the committed crime.

In one case, a prosecutor proposed charges for one person alleged in stealing a vehicle in Novi Sad, Serbia, with the only evidence being that the police had

⁵² Orders issued by a proceeding judge for cases with ID number P893/04, P1147/04, P1223/04, P1286/04 and P1927/04, Prishtina, January 2010.

⁵³ KIPRED interview with Driton Muharremi, Proceeding Judge, Prishtina Municipal Court, Prishtina, December 10, 2009

⁵⁴ Ibid

⁵⁵ Kosovo has the lowest number of judges and prosecutors per capita compared to other countries in the region. See EULEX Programme Report, Prishtina, July 2009

⁵⁶ KIPRED interviews with two judges, Prishtina, December 2009, January 2010, and two prosecutors, Prishtina, December 2009, January 2010

⁵⁷ Ibid

confiscated the car from that person. In the draft indictment, the prosecutor argues even the technical details of the criminal act. “The defendant broke the window of the car that was parked in Novi Sad, managed to turn the engine on and drove to Prishtina where it was caught by the police,” read the proposed charges. The prosecutor had failed to supply the proceeding judge with a statement from the defendant, who, as it was revealed later, did not commit the crime. In the pre-trial hearings, the judge interviewed the defendant and after having heard his side of the story, that he had purchased the stolen vehicle from another person, without being aware that it was stolen, the proposed charges were dismissed and no trial was initiated.

Furthermore, prosecutors do not consult proceeding judges before pressing charges for criminal cases.⁵⁸ As a consequence, proceeding judges dismiss a considerable number of cases.⁵⁹ If there was a better coordination between proceeding judges and prosecutors, such cases could have been further investigated. But upon dismissal by proceeding judges, it happens often that due to the insufficient number of prosecutors and large number of criminal reports that they are loaded with, prosecutors do not get back to the same files any more to investigate the cases further.

Judges and police investigators are not satisfied with the way prosecutors run the investigations. Being overloaded with high number of cases, prosecutors often fail to show up at the crime scene, even in cases of heavy criminal offenses such as homicides.⁶⁰ Judges claim they receive criminal files where prosecutors failed to interview the defendants and pressed charges based on the interview that was conducted by the police only.⁶¹ There are also cases where prosecutors would interview the defendants, but they would do this without the presence of defence counsels.⁶² As a consequence, many

⁵⁸ KIPRED interviews with three judges in Prishtina, December 2009, January 2010

⁵⁹ Ibid

⁶⁰ KIPRED interviews with one police investigator in Gjilan, November 2009, one police investigator in Prishtina, December 2009, and one proceeding judge, Prishtina, December 2009

⁶¹ Ibid

⁶² European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 13, Kosovo’s Criminal Procedure Code, Article 69, KIPRED interviews with a lawyer and a legal expert, Prishtina, December 14, 2009, and Kujtim Kerveshi, legal expert, Prishtina, November 6, 2009

perpetrators that committed criminal offenses are let free due to violations in procedures. In such cases, it happens that the perpetrators would be identified but they would be let free due to poor investigations by prosecutors, respectively the police.

d) Hastened verdicts

Insufficient number of judges and prosecutors causes a series of human rights violations in Kosovo courts. In a recent report published by the OSCE mission in Kosovo it is stated that rights which are violated by Kosovo judiciary most often are the right to a trial within a reasonable time, the right to an effective remedy, the right to a hearing before a tribunal established by law, and the right to a reasoned court decision.⁶³ Such violations are against international regulations that are applicable in Kosovo such as the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶⁴.

Further, KIPRED has observed that the number of criminal cases that make it to the trials is much lower than the committed criminal acts. Kosovo judicial system has no unique statistical data that would show the percentage of the cases that are dropped. From twenty interviews with officials, judges, prosecutors and police investigators, there seems to be an overall impression and agreement of the institutions that the percentage of unresolved cases is higher than the considered norm. On the other hand, judges and prosecutors complain that even this number of cases that made it to trails is still high, considering the insufficient number of judges and prosecutors in Kosovo courts today.

Further, there seems to be an overall tendency to pressure judges to resolve as many cases as possible leading judges very often to make verdicts based on assumptions.⁶⁵ This leads to an overall impression amongst judiciary

⁶³ Human Rights and Communities Department, OSCE Mission in Kosovo, Prishtina, June 2009

⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 5, 6 and 13

⁶⁵ KIPRED interviews with a senior representative of the KJC, Prishtina, January 14, 2010, a lawyer and a legal expert, Prishtina, December 14, 2009, and a Prishtina District Judge, Prishtina, December 10, 2009

representatives that verdicts in Kosovo courts are made in a rush, without proper consideration of all the evidences, and without respecting procedures.⁶⁶

The clear examples proving the case in matter are cases of illegal weapon possession, which according to Kosovo's Criminal Code are criminal acts punishable from 1 to 8 years imprisonment, or with a fine of up to 7,500 EUR.⁶⁷ Lawyers and prosecutors claim there are hardly ever cases when somebody is put in prison for a possession of a fire-weapon. Instead, judges, who try to reach their norm of resolved cases, make verdicts and punish the defendants with fines by rarely ordering imprisonment.⁶⁸ Often, as it left upon the judges discretion to rule on the fine the sentencing with fines are often minimal.

In four cases observed by KIPRED, the fines varied between 250 EUR and 700 EUR. Even though the variation offenses are left upon the discretion of the judge to decide and the circumstances in which the illegal weapons were confiscated by the police, such minimal fines are worrying as they are affordable for most criminals carrying weapons. This tendency of issuing low fines for illegal possession of weapons has lead to often recidivism of such crimes. Further, as there are no joint databases for criminal records as stated earlier, judges apply the same fines for perpetrators who are recidivists.⁶⁹ Police often fails to mention in their criminal reports whether a certain perpetrator is a recidivist or not, and so do the prosecutors.⁷⁰ Overloaded prosecutors do not complain to such verdicts.

⁶⁶ KIPRED interviews with a senior representative of the KJC, Prishtina, January 14, 2010, a lawyer and a legal expert, Prishtina, December 14, 2009, and a Prishtina District Judge, Prishtina, December 10, 2009

⁶⁷ Kosovo's Criminal Code, Article 328

⁶⁸ KIPRED interviews with two prosecutors, Prishtina, December 2009, January 2010, and a lawyer and a legal expert, Prishtina, December 14, 2009

⁶⁹ Ibid

⁷⁰ KIPRED interview with a lawyer and a legal expert, Prishtina, December 14, 2009

IV. INSTITUTIONAL QUALITY CONTROL

The current state of the judicial system in Kosovo is poor as a direct consequence of insufficient number of judges and prosecutors, weak investigations, poor coordination of work between police, prosecutors and courts, and poor communication between these three institutions. However, what adds to the current poor state of the rule of law system in Kosovo is the absence of an institutional mechanism that would control the quality of performance of these three institutions.

The KJC is responsible for conducting judicial inspections, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction and making recommendations for the establishment of new courts⁷¹. The KJC has its organs, namely the Office of the Disciplinary Counsel (ODC) and the Judicial Audit Unit (JAU) that are tasked to ensure the quality of work of prosecutors and judges. However, both of these institutions work upon complaints and only in a low number of cases, less than 10%, initiate *ex officio* investigations.⁷² This means that the KJC has no particular mechanisms to track down the efficiency and the quality of work of judges and prosecutors on permanent basis.

As a consequence, the KJC has never taken any steps to punish any prosecutor or a judge for their unprofessional behaviour or any violation they could have made, without having complaints submitted to them.⁷³ This limits the KJC mandate to supervise judges and prosecutors based on their own reports that they submit to the KJC.⁷⁴ The JAU is a mechanism that occasionally audits the work of judges and prosecutors based on samples.⁷⁵ This mechanism has, however, neither capacity nor resources to be on top of

⁷¹ Ibid

⁷² KIPRED interviews with representatives of KJC and ODC

⁷³ KIPRED interview with Halit Muharremi, Director of the KJC Secretariat, Prishtina, January 13, 2010, and Kadri Begolli, Coordinator of the Office of the Disciplinary Counsel in Kosovo's Judicial Council, Prishtina, January 14, 2009

⁷⁴ Ibid

⁷⁵ Ibid

the quality control of judges and prosecutors' performance.⁷⁶ The primary level of supervision of judges should be the presidents of the specific courts, while for prosecutors it should be the chief prosecutors. Due to overloaded agenda, judges and prosecutors openly admit there is no supervision of their work.⁷⁷ This means that the primary level of the supervision is not functional either.

The quality of prosecutors' work is not supervised by their direct supervisors. Chief State Prosecutor and Chief Municipal and District Prosecutors, although are directly supervising the work of prosecutors, claim no responsibility over the quality of their performance.⁷⁸ Their supervising duty is exercised based on the reports that prosecutors submit. The records that are kept regarding the number of cases when prosecutors would press charges based on criminal reports or decide to dismiss such reports, are kept in hard copy books, and as such, cannot be used to control the quality of prosecutors' work.⁷⁹ Chief State Prosecutor cannot tell the number of criminal reports that one prosecutor decided to dismiss, let alone other qualitative data such as reasons and clarifications on particular decisions of prosecutors.

Inefficiency of the control mechanisms in the judiciary has been spotted by international organisations as well. In October 2009, in its annual Progress Report, The EC criticised Kosovo authorities for not being able to fight misconduct and corruption in the judicial system. The report says, "...Allegations of corruption and misconduct in the judiciary have not been adequately investigated. The Office of the Disciplinary Counsel responsible for this activity is not fully functional. The Judicial Audit Unit has issued

⁷⁶ KIPRED interview with Halit Muharremi, Director of the KJC Secretariat, Prishtina, January 13, 2010, and Kadri Begolli, Coordinator of the Office of the Disciplinary Counsel in Kosovo's Judicial Council, Prishtina, January 14, 2009

⁷⁷ KIPRED interviews with two prosecutors, Prishtina, December 2009, and one judge, Prishtina, January 2010.

⁷⁸ KIPRED interviews with Hilmi Zhitia, Chief State Prosecutor, Prishtina, January 12, 2010 and Aleksander Lumezi, Chief Municipal Prosecutor in Prishtina, January 13, 2010

⁷⁹ KIPRED interview with Hilmi Zhitia, Chief State Prosecutor, Prishtina, January 12, 2010

recommendations regarding the functioning of the courts that have not been properly taken into account by the Kosovo Judicial Council.⁷⁸⁰

According to officials from the ODC, the current system allows quality control through reports submitted by the presidents of the courts. Each president is obliged to provide the ODC with reports regarding the performance of the judges. These reports, however, are shallow, formal and general, containing no specific information about individual judges' performance.⁸¹ The ODC is limited in their actions, as there is an overall 'solidarity' between judges and court presidents, but also between judges themselves, not to report on each other's unprofessional behaviour or inefficiency.

This phenomenon of 'solidarity' is also present in cases of criminal procedures against prosecutors and judges.⁸² The judicial system is regulated in such a form that prosecutors and judges who have potentially violated the law, will be prosecuted and judged by their colleagues from another district. For example, judges and prosecutors from Prishtina may be prosecuted and judged by the Prizren District Court and Prosecutor's Office there, and vice versa. This is regulated in order to avoid conflict of interest that is having prosecutors and judges being prosecuted by their colleagues from the same district. Although this system has been designed in order to be more efficient, this is not the case, as there is still a dose of 'solidarity' between judges from different districts.⁸³ The mechanisms of legal prosecution against judges and prosecutors who are suspected for misconducts is not functional, as only a very low number of cases of corruption and unprofessionalism in courts have been prosecuted.

Unlike in other countries, in Kosovo there are no standards set, which prosecutors and judges have to meet in their performance, in order to be

⁸⁰ KOSOVO UNDER UNSCR 1244/99 2009 PROGRESS REPORT, Commission of the European Communities, Brussels, October 14, 2009

⁸¹ KIPRED interviews with KJC and ODC officials

⁸² KIPRED interviews with two prosecutors, Prishtina, December 2009, a lawyer and a legal expert, Prishtina, December 14, 2009, and Kujtim Kerveshi, legal expert, Prishtina, November 6, 2009

⁸³ Ibid

positively evaluated by the KJC.⁸⁴ This means that judges are evaluated based on the quantitative reports they submit. Based on the monitoring reports from the courts, different judges have accomplished different numbers of cases within one year.⁸⁵ However, the quality of the given verdicts is not monitored systematically.

As a direct consequence, there are many judges and prosecutors, who are corrupt or unprofessional, and whose work and performance passes by unnoticed.⁸⁶ A representative case of what this phenomenon brings is the fact that one municipal judge in Drenas/Glogovc, had up to 70% of the cases annulled by the District Court upon appeal, and faced no consequences.⁸⁷ Such cases, according to KIPRED interviews, are present elsewhere.

Neither judges, nor prosecutors, have any assigned norm of the cases they should be dealing with on monthly or annual basis. The current system allows significant difference between judges in terms of the quantity of cases they resolve per year, but also allows an obscure situation where the quality of judges' work is neither monitored, nor controlled. The final consequence is a jumble of resolved and unresolved criminal cases throughout the rule of law institutional triangle.

⁸⁴ KIPRED interviews with a KJC official, Prishtina, January 13, 2010, two judges, Prishtina, December 2009, January 2010, one prosecutor, Prishtina, December 2009,

⁸⁵ Monitoring the Courts, BIRN, Prishtina, June 2009

⁸⁶ KIPRED interview with a legal expert, Prishtina, November 2009

⁸⁷ KIPRED interview with a Proceeding Judge, Prishtina, November 8, 2009

V. RECOMMENDATIONS

KIPRED recommends the following actions to be taken in order to improve the current performance of the police, prosecutors and judges in Kosovo:

1. The Government of Kosovo should draft and enact urgently a Kosovo Strategy and Action Plan on Rule of Law.
2. The Strategy should include a detailed plan on adequate human and financial resources to address needs of the Kosovo judiciary system.
3. The Kosovo Judicial Council (KJC) and the Kosovo Police (KP) should create a joint database that would be used to store and coordinate all the criminal cases in Kosovo. This database should be accessible to all three institutions, the police, prosecutors and courts.
4. The KJC, in cooperation with the Ministry of Justice and Ministry of Internal Affairs (MIA), should build a communication platform to be used between police and prosecutors.
5. Cases of suspected corruption and mismanagement in the judiciary should be handed by the Special Prosecutor's Office (SPO).
6. The KJC should empower the role of the ODC and the JAU. ODC and JAU should increase the number of their ex-officio investigations on cases of suspected mismanagement and corruption in Kosovo judicial system.
7. The Ministry of Justice (MJ) should regularly raise and bring to the attention the urgency of the adoption of the Law on Public Prosecution of Kosovo, which should contain clarifications regarding the existence of the judicial police and the role of public prosecution in investigating criminal offences.

