



**Organization for Security and Co-operation in Europe
MISSION IN KOSOVO**

**Adjudication of petitions for protection orders
in domestic violence cases in Kosovo**

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LIST OF ABBREVIATIONS

CoE	Council of Europe
CEDAW	Committee UN Committee on the Elimination of Discrimination against Women
CSW	Centre for Social Work
DEVAW	Declaration on the Elimination of Violence against Women
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
KJI	Kosovo Judicial Institute
LPDV	Law on Protection against Domestic Violence
OSCE	Organization for Security and Co-operation in Europe Mission in Kosovo
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo

EXECUTIVE SUMMARY

Domestic violence against women in Kosovo remains a serious problem. Such violence constitutes not only a crime, but also a form of gender-based discrimination and a violation of women's human rights. Although the Assembly of Kosovo has enacted the Law on Protection against Domestic Violence (LPDV)¹ to regulate the process for granting civil protection orders to victims of domestic violence, there are systemic shortcomings in the implementation of the law by the courts. In particular, petitions for protection orders in domestic violence cases are being adjudicated in a manner that is not consistent with the provisions of this legislation. Deficiencies in the adjudication of applications for protection orders can have a profound effect on women's right to physical security and well-being, and on their access to justice and the right to an effective remedy. Furthermore, these deficiencies indicate that Kosovo institutions are failing to meet the due diligence standard required under international law in responding to cases of domestic violence.

Shortcomings in implementation of the LPDV include failures to adjudicate petitions for protection orders within mandated time limits, and to adequately distinguish between protection orders and emergency protection orders. There are also deficiencies in the form and content of the protection orders issued by the courts. Of particular concern is the role taken by courts in facilitating reconciliation between victims and perpetrators; doing so can effectively deny the victim the relief and protection sought. A further concern arises out of the gender-neutrality of the LPDV; in its current form it fails to include any acknowledgement that domestic violence affects women in particular, and that it constitutes a form of discrimination and a violation of women's human rights. Overall, Kosovo institutions are failing to meet the requisite standard of due diligence in the implementation of the legislation on a case-by-case basis. In all too many cases, the observed shortcomings are sufficiently serious that victims of domestic violence cannot be said to have had access to an effective court remedy.

In order to bring the adjudication of petitions for protection orders into line with the requirements of both domestic law and international human rights standards, several steps should be taken by the relevant institutions. The Assembly of Kosovo should consider amending the LPDV to remedy the deficiencies identified by the Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE). Presidents of municipal courts should, *inter alia*, take immediate steps to bring their courts into strict compliance with the legislation, and judges should refrain, when adjudicating petitions for protection orders, from encouraging reconciliation between the victim and the perpetrator.

¹ Law No. 03/L – 182 on Protection against Domestic Violence (the LPDV), 1 July 2010.

1. INTRODUCTION

This report assesses the adjudication by courts in Kosovo of petitions for protection orders in domestic violence cases. The OSCE is concerned that, despite the enactment of a new normative framework for the protection of victims of domestic violence in Kosovo, systemic shortcomings in the implementation of the legislation are impeding the access of victims of domestic violence to an effective court remedy.

The United States Department of State, in its *2010 Human Rights Report: Kosovo*, identifies violence and discrimination against women as a form of abuse prevalent in Kosovo, and notes that domestic violence against women, including spousal abuse, remains “a serious and persistent problem”.² During 2010, a total of 944 incidents of domestic violence were reported to Kosovo police.³ In six of these incidents, the victim was killed by the perpetrator. An additional four incidents were sufficiently serious to warrant charges of attempted murder. An overwhelming majority – 81 per cent – of victims of domestic violence during this period were women or girls.⁴

Domestic violence is also a worldwide phenomenon. The World Health Organization has estimated that the “lifetime prevalence of physical violence by an intimate partner ranged between 13 per cent and 61 per cent.”⁵ The United States Center for Disease Control and Prevention has estimated that 5.3 million non-fatal incidents of intimate partner violence are committed against women each year in the United States.⁶ Thorbjørn Jagland, Secretary General of the Council of Europe (CoE) has noted that “every day, seven women in Europe are beaten to death” by intimate partners, and that “many more are hurt, physically and psychologically, and marked for life”.⁷

It is widely acknowledged that, although men can also be victims, domestic violence is a phenomenon which affects women disproportionately because of the “historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of

² U.S. Department of State, *2010 Human Rights Report: Kosovo*, 8 April 2011, p32. <http://www.state.gov/documents/organization/160196.pdf> (accessed 1 March 2012).

³ Preliminary statistics for 2011 indicate a total of 1046 incidents of domestic violence were reported to Kosovo police during that year, an increase of just over 10% from the previous year. However, it should be pointed out that these numbers most likely under-represent the total incidence of domestic violence in Kosovo during 2010 and 2011. It is widely acknowledged that domestic violence is a crime that is both under-recorded and under-reported; see UNICEF, *Domestic Violence against Women and Girls*, Innocenti Digest No. 6, June 2000, p. 4 and UN Women, *Progress of the World's Women 2011-2012: In Pursuit of Justice*, 2011, p. 14, <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf> (accessed 1 March 2012).

⁴ All statistics provided to the OSCE by Kosovo police.

⁵ World Health Organization, *Multi-Country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses*, Geneva, 2005, pp. xii–xiii. Estimates were based on interviews with 24,000 women in ten countries (Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Serbia and Montenegro, Samoa, Thailand and Tanzania.). http://www.who.int/gender/violence/who_multicountry_study/Introduction-Chapter1-Chapter2.pdf (accessed 1 March 2012).

⁶ National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States*, United States Center for Disease Control and Prevention, Atlanta, GA, March 2003, p. 1. <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf> (accessed 1 March 2012).

⁷ Thorbjørn Jagland, Speech to the Parliamentary Assembly of the Council of Europe (CoE), 11 April 2011, available online at <http://assembly.coe.int/Main.asp?link=/Documents/Records/2011/E/1104111500E.htm> (accessed 1 March 2012). This speech announced the opening for signature of the CoE Domestic Violence Convention in April 2011.

women”.⁸ The United Nations (UN) Special Rapporteur on Violence against Women has noted that “despite the apparent neutrality of the term, domestic violence is nearly always a gender-specific crime, perpetrated by men against women.”⁹ As such, domestic violence constitutes not only a crime, but also a form of gender-based discrimination and a violation of women’s human rights.

The European Court of Human Rights (ECtHR) has often noted that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) “is intended to guarantee not theoretical or illusory, but practical and effective rights”.¹⁰ Similarly, international human rights law requires that domestic authorities exercise due diligence to prevent domestic violence, protect victims, and investigate and prosecute perpetrators. To meet this due diligence standard, such authorities must, *inter alia*, enact legislation to protect women from incidents of domestic violence. The UN Division for the Advancement of Women has noted that all too often, however, domestic legislation penalizing violence against women is not effectively implemented due to a multiplicity of factors, including attitudes of law enforcement officers which discourage women from reporting incidents of domestic violence, high rates of dismissal of reported cases by police, prosecutors and judges, high rates of withdrawal of complaints by victims, the “failure of courts to apply uniform criteria, particularly in relation to measures to protect [victims]”, and the “use of reconciliation proceedings between a perpetrator and a [victim] of violence in criminal and divorce cases to the detriment of the [victim].”¹¹

The OSCE is concerned that, notwithstanding the enactment of the LPDV, Kosovo institutions are failing to exercise the requisite due diligence when it comes to the implementation of the LPDV on a case-by-case basis. This implementation gap manifests itself most acutely in four areas, which will each be examined in this report: firstly, in the failure to adjudicate petitions for protection orders within the time limits mandated by the legislation; secondly, the failure to distinguish between protection orders and emergency protection orders; thirdly, deficiencies in the form and content of the protection orders issued by the courts and fourthly, the role of the courts in facilitating reconciliation between the

⁸ Preamble, CoE Convention on preventing and combating violence against women and domestic violence (CoE Domestic Violence Convention), CM (2011) 49 final, 7 April 2011. <https://wcd.coe.int/ViewDoc.jsp?id=1772191> (accessed 1 March 2012). See also the decisions of the Inter-American Commission on Human Rights in *Lenahan et al v. the United States*, 21 July 2011, para. 163, and *Maria da Penha Maia Fernandes v. Brazil*, 16 April 2001, para. 47.

⁹ UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission of Human Rights Resolution 1995/85*, E/CN.4/1996/53, 5 February 1996, paras. 22–23. <http://www.awf.or.jp/pdf/h0001.pdf> (accessed 1 March 2012).

¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 87 UNTS 103, ETS 5; adopted by the Council of Europe 4 November 1950, entry into force 3 September 1953. See, *inter alia*, the judgment of the ECtHR in the case of *Opuz v. Turkey*, 9 June 2009, para. 165. In that case, the ECtHR found Turkey in violation of its obligations to protect women from domestic violence, and for the first time held that gender-based violence is a form of discrimination under the ECHR.

¹¹ UN Division for the Advancement of Women, *Report of the Expert Group Meeting on Good Practices in Legislation on Violence against Women* (Expert Group Report), Vienna, 26–28 May 2008, p. 7. [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAV%20\(final%201.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAV%20(final%201.11.08).pdf) (accessed 1 March 2012). Concerning the use of reconciliation, see also the UN General Assembly report *Ending violence against women: from words to action; Study of the Secretary-General*, A/61/122/Add. 1 and Corr. 1, 2006, p. 97, which notes that UN treaty bodies have expressed concern about the “use of reconciliation proceedings between a perpetrator and a victim of violence” and have expressed particular concern that such proceedings are to “the detriment of the victim.” <http://www.un.org/womenwatch/daw/vaw/publications/English%20Study.pdf> (accessed 1 March 2012).

victim and the perpetrator. An additional deficiency examined in this report concerns the gender-neutrality of the new Law.¹²

1.1 Previous OSCE reporting on domestic violence

The OSCE has previously reported on the issue of domestic violence and its treatment before courts in Kosovo.¹³ In June 2011, it issued a report on emergency protection orders in domestic violence cases.¹⁴ That report was prepared in reaction to the violent death by shooting of a victim of domestic violence, allegedly by her estranged husband. Three-and-a-half weeks before her death, the victim had petitioned the municipal court for an emergency protection order. Despite a clear legal requirement that such a petition be adjudicated within 24 hours of being filed with the court, her case had yet to be adjudicated at the time she was killed. The OSCE identified this case as an example of a systemic pattern of delays in the hearing of petitions for emergency protection orders in domestic violence cases.

1.2 Methodology and Structure of the Report

The methodology used in the preparation of this report included observation of court hearing sessions, analysis of case files and other court records. Over the course of a 12-month period between October 2010 and October 2011, OSCE court monitors observed court proceedings involving a total of 55 petitions for protection orders and emergency protection orders. From these 55 petitions, the OSCE selected 11 case examples illustrating particular issues relating to compliance with the legal framework and international human rights standards. In addition, OSCE monitors conducted interviews with civil judges, representatives from the Centre for Social Welfare, Victims' Advocates, lawyers and other justice system stakeholders throughout Kosovo. The OSCE also reviewed relevant documents including international and regional conventions and treaties, declarations, resolutions, recommendations, reports, and the jurisprudence of regional courts and treaty bodies, as well as all relevant legislation in Kosovo.

The present report is divided into five sections. Section 2 canvasses both the international human rights standards and the domestic normative framework relevant to the adjudication of petitions for protection orders in domestic violence cases. Section 3 then analyses, in terms of their compliance with those standards, 11 examples from among the protection order cases monitored by the OSCE. These case examples examine each of the four key problematic areas where the OSCE has observed a gap in the implementation of the LPDV. The report concludes with a number of recommendations to the Assembly of Kosovo, the courts and the Kosovo Judicial Institute (KJI).

¹² *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, Yakin Erturk, Addendum: 15 Years of the United Nations Violence against Women, its causes and consequences (1994–2009) – A Critical Review; UN General Assembly A/HRC/11/6/Add. 5, 27 May 2009, para. 68, which notes that laws regulating domestic violence do “not fulfil the requirement of due diligence if [they] are gender-neutral” <http://www.unhcr.org/refworld/docid/4a3f5fc62.html> (accessed 1 March 2012).

¹³ See OSCE *Report on Domestic Violence Cases in Kosovo*, July 2007. <http://www.osce.org/kosovo/26468> (accessed 1 March 2012); OSCE *Report Judicial Proceedings Involving Domestic Violence*, November 2009. <http://www.osce.org/kosovo/40398> (accessed 1 March 2012); OSCE *Catalogue of Advice and Assistance for Domestic Violence Victims*, March 2012 <http://www.osce.org/kosovo/88708> (accessed 1 March 2012).

¹⁴ OSCE report *React Report: Emergency Protection Orders in Domestic Violence Cases*, (June 2011).

2. NORMATIVE FRAMEWORK

2.1 International and regional human rights standards

2.1.1 Comprehensive human rights instruments

A number of comprehensive human rights instruments at both the international and regional level contain rights and prohibitions of particular relevance to cases of domestic violence. The Universal Declaration of Human Rights¹⁵ guarantees the right to life, liberty and security of the person¹⁶ and prohibits torture as well as “cruel, inhuman or degrading treatment or punishment.”¹⁷ It guarantees equal protection before the law “without any discrimination”¹⁸ and an “effective remedy by the competent national tribunals for acts violating the fundamental rights granted [...] by the constitution or by law”. Everyone “is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations”.¹⁹ The International Covenant on Civil and Political Rights²⁰ echoes and strengthens these guarantees²¹, as does the ECHR at the regional level.²² The ECtHR has produced a body of jurisprudence dealing specifically with the implications of ECHR guarantees for domestic violence cases; this body of jurisprudence will be discussed further below.²³

2.1.2 Specialized human rights instruments

Several specialized human rights instruments at the international and regional level, together with a body of decisions issued by regional human rights courts and UN treaty bodies, form an international human rights legal framework regulating the area of violence against women, including domestic violence. Under this legal framework, domestic violence against women in Kosovo constitutes not only a crime, but also a form of gender-based discrimination and a violation of women’s human rights. The last 20 years have seen the gradual articulation of a due diligence standard to be used in assessing the adequacy of the response of domestic authorities to cases of domestic violence. This due diligence standard is now recognized as an emerging rule of customary international law.²⁴

¹⁵ Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, 217 A (III).

¹⁶ Ibid, Article 3.

¹⁷ Ibid, Article 5.

¹⁸ Ibid, Article 7.

¹⁹ Ibid, Article 10.

²⁰ International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), adopted 16 December 1966, entry into force 23 March 1976.

²¹ See in particular Article 2(3) (right to an effective remedy), Article 6(1) (right to life), Article 7 (prohibition against torture and cruel, inhuman or degrading treatment), Article 9(1) (right to liberty and security of the person), Article 14(1) (right to a fair and public hearing by a competent, independent and impartial tribunal) and Article 26 (right to equality before the law and to the equal protection of the law, without discrimination).

²² See ECHR, in particular Article 2 (right to life), Article 3 (prohibition on torture and inhuman or degrading treatment or punishment), Article 5(1) (right to liberty and security of person), Article 6(1) (right to a “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”), Article 8 (right to respect for private and family life) Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

²³ Eight enumerated standards of international human rights, including the ECHR, along with the body of case law under each of the eight standards, are directly applicable in Kosovo and in case of conflict, have priority over the Kosovo legal framework: see UNMIK Regulation 1999/24 on The Applicable Law in Kosovo, section 1.3(b) and articles 22(2) and 53 of the constitution.

²⁴ *Lenahan et al. v. the United States*, note 8, *supra*, paras. 123 and 124 and Judgment of the European Court of Human Rights (ECtHR) in the case of *Opuz v. Turkey*, 9 June 2009, para. 79. See also L. Hasselbacher, *State*

The UN General Assembly, in adopting the Declaration on the Elimination of Violence against Women (DEVAW) in 1993²⁵, affirmed that “violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms”. The UN General Assembly expressed its concern over “the long-standing failure to protect and promote those rights and freedoms in the case of violence against women”.²⁶ DEVAW calls on domestic authorities to “pursue by all appropriate means and without delay a policy of eliminating violence against women”²⁷ by, *inter alia*, exercising due diligence to prevent, investigate and, in accordance with domestic legislation, punish acts of violence against women, “whether those acts are perpetrated by the State or by private persons”.²⁸ Such authorities should ensure that women who are subjected to violence are “provided with access to the mechanisms of justice” and, as provided for by domestic legislation, “to just and effective remedies for the harm that they have suffered” and must “inform women of their rights in seeking redress through such mechanisms”.²⁹ Authorities should also “[t]ake measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women”.³⁰

In 2004, the UN General Assembly adopted a Resolution on the elimination of domestic violence against women.³¹ This Resolution recognized that domestic violence “is of public concern and calls on States to take serious action to protect victims and prevent domestic violence”³², and to “ensure greater protection for women, *inter alia*, by means of, where appropriate, orders restraining violent spouses from entering the family home, or by banning violent spouses from contacting the victim”.³³

Earlier this year, the CoE adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (the CoE Domestic Violence Convention)³⁴ which recognizes that “the realisation of *de jure* and *de facto* equality between men and women is a

Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection, Northwestern Journal of International Human Rights, Vol. 8, Issue 2 (Spring 2010), paras. 27–32.

²⁵ Declaration on the Elimination of Violence against Women (DEVAW), UN General Assembly Resolution 48/104, 20 December 1993. DEVAW has been described by the UN Secretary General as a “landmark” document which “provides the framework for analysis and action at the national and international levels.” See UN General Assembly, *In-depth study on all forms of violence against women: Report of the Secretary-General*, A/61/122/Add. 1, 6 July 2006, paragraph 5. http://www.unescap.org/esid/gad/issues/Violence/S-G_study_VAW_2006.pdf (accessed 1 March 2012).

²⁶ Ibid, preamble.

²⁷ Ibid.

²⁸ Ibid, Article 4(c).

²⁹ Ibid, Article 4(d).

³⁰ Ibid, Article 4(i).

³¹ UN General Assembly Resolution 58/147 on the Elimination of domestic violence against women, A/RES/58/147, 19 February 2004. <http://www.worldlii.org/int/other/UNGARsn/2003/185.pdf> (accessed 1 March 2012).

³² Ibid, Article 1(d).

³³ Ibid, Article 7(e).

³⁴ Council of Europe (CoE) Convention on preventing and combating violence against women and domestic violence, CM (2011) 49 final, 7 April 2011, opened for signature 11 May 2011. To date, 16 member states have signed the Convention. As Kosovo institutions are outside of the COE, the Convention is best viewed as persuasive rather than binding on Kosovo institutions. However, the restatement of the due diligence standard in the context of a regional human rights treaty should be viewed as a further strengthening of the due diligence standard as an emerging rule of customary international law.

key element in the prevention of violence against women”.³⁵ The Domestic Violence Convention applies “to all forms of violence against women, including domestic violence, which affects women disproportionately.”³⁶ The Convention requires member states “to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors.”³⁷ Member states must “protect all victims from any further acts of violence”³⁸ and must also “take the necessary legislative or other measures to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand.”³⁹

In addition to remedies in criminal law, the Convention requires member states to “provide victims with adequate civil remedies against the perpetrator.”⁴⁰ Concerning restraining or protection orders, member states must ensure that such orders are “available for immediate protection and without undue financial or administrative burdens placed on the victim”, are “issued for a specified period or until modified or discharged” and are “where necessary, issued on an *ex parte* basis which has immediate effect”.⁴¹ Further, member states shall “ensure that breaches of restraining or protection orders issued [...] shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions.”⁴² Member states must “protect the rights and interests of victims [of domestic violence], including their special needs as witnesses, at all stages of investigations and judicial proceedings”⁴³ and must protect victims “from intimidation, retaliation and repeat victimisation”.⁴⁴

There is a growing body of jurisprudence from regional human rights courts, including the ECtHR and the Inter-American Court of Human Rights, and from UN treaty bodies, including the UN Human Rights Commission and the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), which has articulated the due diligence standard in the context of domestic violence cases. Two recent ECtHR judgments have found domestic authorities liable for failing to exercise due diligence to adequately protect victims of domestic violence. In the first case, decided in 2008, the ECtHR held that the positive obligations of domestic authorities “may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.”⁴⁵ The ECtHR noted “the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection”.⁴⁶

In the second case, decided the following year, the ECtHR found that domestic authorities failed in their positive obligation to protect the right to life of a woman who was shot to death by her son-in-law. Domestic authorities, the Court ruled, are required “to take appropriate steps to safeguard the lives of those within [their] jurisdiction”. The ECtHR held that there

³⁵ Ibid, preamble.

³⁶ Ibid, Article 2(1).

³⁷ Ibid, Article 5(2).

³⁸ Ibid, Article 18(1)

³⁹ Ibid, Article 19.

⁴⁰ Ibid, Article 29(1).

⁴¹ Ibid, Article 53(2).

⁴² Ibid, Article 53(3).

⁴³ Ibid, Article 56(1).

⁴⁴ Ibid, Article 56(1)(a). This protection must also be provided to families of victims and to witnesses.

⁴⁵ *Bevacqua and S v. Bulgaria*, ECtHR Judgment of 12 June 2008, para. 65.

⁴⁶ Ibid.

exists, in appropriate circumstances, “a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.⁴⁷ The ECtHR found that it was “obvious” that the perpetrator had a history of domestic violence toward the victim and that “there was therefore a significant risk of further violence”, and held that “a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”.⁴⁸

These ECtHR judgments underscore the need for domestic authorities to put in place effective protection measures for victims of domestic violence. Further, they establish the principle that the failure of domestic authorities to exercise due diligence to protect women who are victims of domestic violence constitutes gender-based discrimination and violates women’s right to the equal protection of the law.

The CEDAW Committee has also observed⁴⁹ that the UN Convention on the Elimination of All Forms of Discrimination against Women⁵⁰, which is directly enforceable in Kosovo courts, requires authorities to act with due diligence to prevent, investigate, prosecute and punish cases of domestic violence.

The UN Special Rapporteur on Violence against Women, its Causes and Consequences, in her 2009 report to the UN General Assembly, noted that a domestic violence law “does not fulfil the requirement of due diligence if it [...] is gender-neutral”.⁵¹ In a 2007 critique of the gender-neutrality of the domestic violence legislative and policy framework in the Netherlands, the Special Rapporteur had noted that a gender neutral approach to domestic violence “fails to acknowledge that the vast majority of domestic violence cases concern violence committed by men against their current or former female partners.”⁵² The domestic legal framework in Kosovo, discussed below, should be re-evaluated in this light.

2.2 Domestic legal framework

In 2010, the Assembly of Kosovo enacted the LPDV.⁵³ The LPDV defines “domestic violence” as “one or more intentional acts or omissions when committed by a person against another person with whom he or she is or has been in a [family] relationship”⁵⁴ and includes, but is not limited to, the “use of physical force or psychological pressure”⁵⁵, inflicting or

⁴⁷ *Opuz v. Turkey*, ECtHR Judgment of 9 June 2009, para. 128.

⁴⁸ *Ibid*, paragraphs 134–136. See also *Lenahan et al v. the United States*, *supra*, note 8.

⁴⁹ Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (11th session, 1992), UN Doc. A/47/38, para. 9; *A. T. v. Hungary*, Views of the Committee on the Elimination of Discrimination against Women, adopted on 26 January 2005, Communication No.: 2/2003, paras. 9.2 *et seq.*

⁵⁰ Convention on the Elimination of All Forms of Discrimination against Women, UN General Assembly Resolution 34/180, 19 December 1979, entered into force 3 September 1981.

⁵¹ See note 12, *supra*. See also the Expert Group Report, note 11, *supra*, which recommends, at p. 15, that legislation which concerns violence against women “be gender-sensitive, not gender-blind.”

⁵² *Implementation to General Assembly Resolution 60/251 of 16 March 2006 entitled “Human Rights Council”*: Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Erturk, Addendum: Mission to the Netherlands; Human Rights Council A/HRC/4/34/Add. 4, 7 February 2007, para. 40. <http://www2.ohchr.org/english/bodies/hrcouncil/4session/reports.htm> (accessed 1 March 2012).

⁵³ LPDV, note 1, *supra*. Pursuant to Article 29, this LPDV “abrogates the previous UNMIK Regulation No. 2003/12 on Protection against Domestic Violence.”

⁵⁴ *Ibid*, Article 2(1)(2).

⁵⁵ *Ibid*, Article 2(1)(2.1).

threatening to inflict “physical pain or psychological suffering”⁵⁶, “causing the feeling of fear, personal dangerousness or threat of dignity”⁵⁷, “physical assault regardless of consequences”⁵⁸, “insult, offence, calling by offensive names and other forms of violent intimidation”⁵⁹, “repetitive behaviour with the aim of derogating [the victim]”⁶⁰, “non-consensual sexual acts and sexual ill-treatment”⁶¹, “unlawfully limiting [the victim’s] freedom of movement”⁶², “property damage or destruction or threatening to do this”⁶³, “causing [the victim] to fear for his or her physical, emotional or economic wellbeing”⁶⁴, forcibly entering and/or violently removing the victim from “a common residence or [the victim’s] residence”⁶⁵ and kidnapping.⁶⁶

The primary aim of the LPDV is to “prevent domestic violence, in all its forms”.⁶⁷ It is noteworthy that the LPDV does not anywhere acknowledge that women are the disproportionate victims of domestic violence; it does, however, provide for “paying special attention to the children, elders and disabled persons”. The LPDV contemplates fulfilling the aim of prevention by issuing protection orders which impose specified “protection measures” on perpetrators of domestic violence.⁶⁸ Such protection measures can include “psycho-social treatment”⁶⁹, “prohibition on approaching the domestic violence victim”⁷⁰, “prohibition of harassment to persons exposed to violence”⁷¹, “removal [of the perpetrator] from apartment, house or other living premises”⁷², “accompanying victim of violence” to retrieve personal items⁷³, “medical treatment from alcohol dependency and dependency from psychotropic substances”⁷⁴, “confiscation of item” used in the commission of the act or acts of domestic violence⁷⁵ and “property protection measures”⁷⁶.

⁵⁶ Ibid, Article 2(1)(2.2).

⁵⁷ Ibid, Article 2(1)(2.3).

⁵⁸ Ibid, Article 2(1)(2.4).

⁵⁹ Ibid, Article 2(1)(2.5).

⁶⁰ Ibid, Article 2(1)(2.6).

⁶¹ Ibid, Article 2(1)(2.7).

⁶² Ibid, Article 2(1)(2.8).

⁶³ Ibid, Article 2(1)(2.9).

⁶⁴ Ibid, Article 2(1)(2.10).

⁶⁵ Ibid, Article 2(1)(2.11).

⁶⁶ Ibid, Article 2(1)(2.12).

⁶⁷ Ibid, Article 1(1). Article 1(2) lists “treatment for perpetrators” and “mitigation of consequences” as additional “aims” of the LPDV.

⁶⁸ Ibid, Article 3(4). The LPDV contemplates that these protection measures will “protect a person who is exposed to [domestic] violence, by removing the circumstances which impact or may impact in committing other acts.”

⁶⁹ Ibid, Article 4. It is notable however that this protection measure cannot be implemented in the absence of secondary legislation from the Ministry of Labour and Social Welfare. Article 28 mandates the issuance of all necessary secondary legislation within six months of the LPDV coming into force. However, as of the date of this report’s publication, no such secondary legislation had been issued.

⁷⁰ Ibid, Article 5.

⁷¹ Ibid, Article 6(1). When a protective measure is ordered pursuant to Article 6(1), Article 6(2) provides that “child custody shall be entrusted temporarily to the victim of domestic violence, while the parental right temporary shall be removed from the perpetrator of domestic violence.”

⁷² Ibid, Article 7.

⁷³ Ibid, Article 8.

⁷⁴ Ibid, Article 9. It is notable however that this protection measure cannot be implemented in the absence of secondary legislation from the Ministry of Health. Article 28 mandates the issuance of all necessary secondary legislation within six months of the LPDV coming into force. However, as of the date of this report’s publication, no such secondary legislation had been issued.

⁷⁵ Ibid, Article 10.

⁷⁶ Ibid, Article 11.

A municipal court may issue either a protection order or an emergency protection order.⁷⁷ Petitions for either type of order may be filed by the victim⁷⁸, the victim's lawyer⁷⁹, a Victims' Advocate⁸⁰ or, in cases where the victim is a minor, a Centre for Social Work (CSW) representative⁸¹. A petition for an emergency protection order may also be filed by either "a person with whom the [victim] has a domestic relationship"⁸² or "a person with direct knowledge of an act or acts of domestic violence against the [victim]"⁸³. A petition must contain "a detailed description of the subject matter" and, where possible, should attach "evidence [...] as well as the reasons for petitioning".⁸⁴

Petitions for protection orders must be decided within 15 days of being filed with the court.⁸⁵ Petitions for emergency protection orders, however, have a much shorter turnaround time: they must be decided within 24 hours of being filed.⁸⁶ In reviewing either type of petition, the court "shall hold a hearing"⁸⁷ at which the victim⁸⁸ and the perpetrator⁸⁹ "may be heard". The

⁷⁷ Ibid, Articles 13–18. The LPDV also contemplates, in Article 22, the issuance by Kosovo police of a "temporary emergency protection order". Pursuant to Article 22(1), a petition for such an order may be submitted to Kosovo police "outside working hours of courts".

⁷⁸ Ibid, Articles 13(1)(1) and 13(2)(1).

⁷⁹ Ibid, Articles 13(1)(2) and 13(2)(2).

⁸⁰ Ibid, Articles 13(1)(3) and 13(2)(3). The Victims' Advocate must have the consent of the victim prior to filing a petition on his or her behalf. Victims' Advocates work under the auspices of the Victims' Advocacy and Assistance Division of the Ministry of Justice. Their responsibilities to victims of domestic violence are not well articulated in the LPDV; they may, as indicated above, file petitions on behalf of victims. Pursuant to Article 15 or 16, they may also, at the court's discretion, be summoned to testify at the hearing of the petition. However, the *de facto* role they have taken on in domestic violence cases is more that of an advocate than a witness. In cases observed by OSCE monitors, Victims' Advocates often present evidence and make closing arguments in place of (and occasionally in addition to) the victim's lawyer. This role is not contemplated in the LPDV. OSCE monitoring reveals that from one municipal court region to another within Kosovo – and even within each region – there is a considerable discrepancy in the role played by Victims' Advocates in the hearing of these petitions. This discrepancy in practice as observed might well derive from the lack of clear legal provisions on the responsibilities of the Victims' Advocates in domestic violence protection order cases.

⁸¹ Ibid, Articles 13(1)(4) and 13(2)(5). The Centres for Social Work (CSW) are government bodies operating in each municipality in Kosovo under the auspices of the Department of Labour and Social Welfare. Their role is set out at Article 7 of the Law on Social and Family Services. As above indicated above, where the victim is a minor, a CSW may file the petition. Further, pursuant to Articles 15 and 16, where the petitioner is under the age of 18, or alternatively, where the alleged acts of domestic violence impact on a person who is under the age of 18, the CSW representative may, at the court's discretion, be summoned to testify at the hearing of the petition. CSWs also have responsibilities under the Family Law of Kosovo (Family Law of Kosovo, No. 2004/32, as promulgated by UNMIK Regulation 2006/7, 16 February 2006) and the Law on Family and Social Services (Law No. 02/L-17 on Social and Family Services, promulgated by UNMIK Regulation No. 2005/46 of 14 October 2005) which may intersect, or even come into conflict with, their responsibilities in domestic violence cases.

⁸² Ibid, Article 13(2)(4).

⁸³ Ibid, Article 13(2)(6). Additionally, pursuant to Article 13(3), a petition for either a protection order or an emergency protection order may be filed "by NGOs that are familiar with problem of the victim and are well informed for their treatment."

⁸⁴ Ibid, Article 14(1)(1.4). Pursuant to Article 14(1)(1.5), the petition should also contain a "proposal" for the protection measure or measures the victim seeks.

⁸⁵ Ibid, Article 15(1).

⁸⁶ Ibid, Article 16(1).

⁸⁷ Ibid, Articles 15(2) and 16(2).

⁸⁸ Ibid, Articles 15(2)(1) and 16(2)(1). Alternatively, the court may hear the victim's lawyer or Victims' Advocate.

⁸⁹ Ibid, Articles 15(2)(2) and 16(2)(2). Alternatively, the court may hear the perpetrator's lawyer.

court may also hear from the petitioner⁹⁰, if this is someone other than the victim. Where the petition under review is for a protection order, and where the petitioner is under the age of 18 or lacks legal capacity, or alternatively where “the alleged acts of domestic violence impact upon a person who is under the age of 18 or lacks capacity to act”, a CSW representative may be heard.⁹¹ Further, “any witness deemed necessary by the court” may be heard. Where the petition under review is for an emergency protection order, “any witness who knows about the domestic violence” may be heard.⁹²

Where the petition under review is for a protection order, the court may hold the hearing and issue the order in the absence of the perpetrator “where such individual was properly summoned and the petition is supported by sufficient evidence.”⁹³ However, where the petition under review is for an emergency protection order, the requirement under the LPDV is somewhat different: the court may hold the hearing and issue the order in the absence of the perpetrator “where appropriate”⁹⁴.

The test for the issuance of either a protection order or an emergency protection order is the same: the court is required to issue the order “where it suspects that the perpetrator shall unavoidably risk the health, safety or wellbeing of the [victim]”.⁹⁵ Both types of orders must state the protection measure or measures ordered by the court; as well, both must contain a statement that any violation of the order will constitute a criminal offence.⁹⁶ The decision to issue the protection order or emergency protection order must be a reasoned one; it must link the facts of the case to the particular protection measures ordered.⁹⁷

An emergency protection order is “issued temporarily”⁹⁸ and must contain a date for its confirmation, “which shall be within eight (8) days of the issuance of the emergency protection order”⁹⁹. A protection order shall be issued for a period not exceeding 12 months, and may be extended for a period not exceeding 24 months.¹⁰⁰ An emergency protection order expires at the end of the hearing for its confirmation.¹⁰¹ Where the emergency protection order is confirmed, the court shall issue a protection order.¹⁰² Once issued, either order is immediately executable; and must be sent to the perpetrator, as well as to Kosovo police (the police).¹⁰³

⁹⁰ Ibid, Articles 15(2)(3) and 16(2)(3).

⁹¹ Ibid, Article 15(2)(4). Note, however, that there is no corresponding provision where the petition under review is for an emergency protection order.

⁹² Ibid, Article 16(2)(4).

⁹³ Ibid, Article 15(3).

⁹⁴ Ibid, Article 16(3). In such circumstances, the court may apply “other alternative measures including electronic ones.”

⁹⁵ Ibid, Article 17(1).

⁹⁶ Ibid, Articles 18(1)(2) and 18(3)(2). Additionally, both types of orders must notify the parties of the right to appeal, and of the right to be assisted by counsel.

⁹⁷ Law No. 03/L-006 on Contested Procedure (LCP), 20 September 2008, which courts in Kosovo began applying on 6 October 2008, Article 160.

⁹⁸ LPDV, note 1, *supra*, Article 2(1)(10).

⁹⁹ Ibid, Article 18(1)(3)(4).

¹⁰⁰ Ibid, Article 18(2).

¹⁰¹ Ibid, Article 18(4).

¹⁰² Ibid, Article 18(5)(2).

¹⁰³ Ibid, Article 17(2). The order should also be sent to the CSW and to “other parties in [the] procedure.”

The “competent body for the execution of protection measures” is the police.¹⁰⁴ The police must “respond to any report for acts or threats to commit acts of domestic violence or a violation of a protection order or emergency protection order, regardless of who reports.”¹⁰⁵ Where there exist “grounds for suspicion that a crime involving domestic violence was committed, [the] police shall arrest the alleged perpetrator according to the law.”¹⁰⁶ The police must “use reasonable means to protect the victim and prevent further violence”.¹⁰⁷ Such means include “informing the victim [of his or her] rights pursuant to [the] Law”¹⁰⁸ and “removing the perpetrator from the [...] residence of the [victim] or a portion thereof, where [this] measure is imposed by means a protection order or emergency protection order as per [the] Law”.¹⁰⁹

The violation of a protection order or emergency protection order “in whole or in part” is a criminal offence punishable by “a fine of two hundred (200) to two thousand (2000) euro or imprisonment of up to six (6) months.”¹¹⁰ Repeated violations of a protection order or emergency protection order “shall be considered aggravating circumstances.”¹¹¹ A violation of a protection order or emergency protection order “shall be immediately prosecuted *ex officio*.”¹¹²

3. SHORTCOMINGS IN THE IMPLEMENTATION OF THE LAW ON PROTECTION AGAINST DOMESTIC VIOLENCE

The OSCE has observed a number of serious shortcomings in the procedure for adjudicating petitions for protection orders and emergency protection orders in domestic violence cases before courts in Kosovo. These shortcomings include a failure to adjudicate petitions within the timeframes contemplated in the LPDV, a failure to adequately distinguish between protection orders and emergency protection orders, deficiencies in the form and content of orders issued pursuant to the LPDV, and the role of the courts *vis-à-vis* reconciliation between the parties.

3.1 Failure to adjudicate petitions within the legally-mandated timeframes

The OSCE has previously noted that delays in the resolution of civil cases are a systemic problem in Kosovo courts.¹¹³ Such delays, however, are of particular concern when they occur in the context of adjudicating petitions for protection orders in domestic violence cases. These petitions, by their very nature, are urgent matters; further, the LPDV mandates time

¹⁰⁴ Ibid, Article 3(6).

¹⁰⁵ Ibid, Article 24(1).

¹⁰⁶ Ibid, Article 24(2). It should be noted that this provision deals only with incidents of domestic violence perpetrated after the issuance of a protection order. Domestic criminal legislation contains further provisions of relevance to crimes involving domestic violence; however, a discussion of these is beyond the scope of this report.

¹⁰⁷ Ibid, Article 24(3).

¹⁰⁸ Ibid, Article 24(3)(2).

¹⁰⁹ Ibid, Article 24(3)(8).

¹¹⁰ Ibid, Article 25(1).

¹¹¹ Ibid, Article 25(2).

¹¹² Ibid, Article 26(1).

¹¹³ For instance, see OSCE report *Adjudication of family law cases in Kosovo: Case management issues*; (February 2011), <http://www.osce.org/kosovo/75768?download=true> (accessed 1 March 2012).

limits for their hearing and resolution. As noted earlier in this report¹¹⁴, petitions for protection orders must be heard and decided within 15 days of being filed, and petitions for emergency protection orders must be heard and decided within 24 hours of being filed. Despite these mandatory timeframes, the OSCE has monitored numerous cases where petitions for protection orders and even emergency protection orders have remained unresolved for many weeks and in some instances many months, as seen in the case examples detailed below.

On 24 May 2011, the victims – a woman and her brother – filed a petition seeking a protection order against the perpetrator, the woman’s husband. The petition detailed years of physical and psychological violence toward the woman, culminating in an assault on 3 May 2011 in which she received a number of serious injuries, including facial fractures. The petition appended hospital records detailing the victim’s injuries, a police report, photographs of the injuries, and documentation relating to criminal proceedings against the perpetrator arising out of the assault. Subsequent to this assault, the perpetrator had also threatened the woman’s brother; separate criminal proceedings had been instituted against the perpetrator in respect of that incident. On 27 July 2011, the court convened a hearing session; this session, however, was immediately adjourned when it emerged that neither the Victims’ Advocate nor the CSW representative were present, despite having been duly summoned. The court ruled that, in the absence of these two officials, conditions for holding the hearing session were not met. On 5 August 2011, when the hearing session re-convened, the CSW representative once again failed to appear. However, the court on this occasion ruled that, since there was no suggestion that violence had been perpetrated against the couple’s minor children, the hearing session could proceed despite the absence of this official. The court heard evidence from the victims and the perpetrator, and representations from the victims’ lawyer and the Victims’ Advocate. Following the hearing session, the court issued the protection order.

The protection order in the above-detailed case example was issued 75 days after victims had filed their petition. This is five times as long as the timeframe allowed by the LPDV. A delay of more than two months between the filing of the petition and the convening of the first hearing session is simply not contemplated under the provisions of the LPDV, and it should not have occurred. The subsequent delay due to the non-appearance of the Victims’ Advocate and the CSW representative is also not contemplated. The LPDV makes the hearing of these officials discretionary rather than mandatory; when they failed to appear despite having been duly summoned, the hearing session should have continued in their absence. Once summoned in a case, these officials are obliged to appear before the court; as a result of their failure to appear, they may face consequences, including fines. However, this is a separate matter, one between the court and the summoned witness, and it should not have been permitted to affect the continuation of the hearing session and the resolution of the petition within the timeframe mandated in the LPDV.

The following case example, which involved a petition for an emergency protection order, presents an even more egregious delay in hearing and deciding the petition:

On 11 January 2011, the victim filed a petition seeking an emergency protection order against the perpetrator, her husband. The petition detailed episodes of physical and

¹¹⁴ See p. 12, *supra*.

psychological violence perpetrated on the victim over the course of the couple's 22-year marriage, culminating in an assault the previous month which had left the victim unable to get out of bed for two days. Following this assault, which the victim had reported to the police, she left the perpetrator, taking three of their minor children with her. The first hearing session was convened on 29 March 2011; this session, however, was immediately adjourned when it became apparent that neither the victim nor the perpetrator had been duly summoned to appear, and that neither the Victims' Advocate nor the CSW representative, although both duly summoned, were present. Subsequent hearing sessions were convened on 8 April, 27 April, 13 May and 31 May 2011; however, on each of these dates the session was immediately adjourned due to failures of the parties and the ancillary officials to appear. At each of these hearing sessions, the same fact scenario was repeated: there was a lack of evidence in the court file that either the victim or the perpetrator had been duly summoned, and both the Victims' Advocate and the CSW representative failed to appear at hearing after hearing, despite having been duly summoned. On 1 June 2011 the victim appeared before the court – without having received due summons – to request that her petition be withdrawn because she had, since filing it, reconciled with the perpetrator. The court then ruled that the petition was to be “considered withdrawn”.

In the above-detailed case example, a total of 77 days elapsed between the filing of the petition and the convening of the first hearing session. This was a petition for an emergency protection order, and, as such, the court was obliged to hear and issue a ruling on it within 24 hours of its being filed. The difficulties in issuing summons which were apparently responsible for the remaining portion of the delay – another 64 days – cannot excuse such a lengthy delay. Faced with continued difficulty in summoning the parties, the court was obliged to take a more proactive role in managing the summons process by, for instance, seeking the assistance of the police in delivering the summons, or attempting to reach the parties by telephone.

In the period since the release of the OSCE report on emergency protection orders of June 2011 – which expressly raised concerns regarding delays of this nature and their consequences for victims¹¹⁵ – the OSCE has observed an improvement in the manner in which Prishtinë/Priština municipal court deals with petitions for emergency protection orders.¹¹⁶ This improvement is noteworthy; it is hoped that other municipal courts will follow the example set by the Prishtinë/Priština municipal court by taking steps to prioritize domestic violence cases for timely resolution. The following example details a best practice case example for the timely adjudication of petitions for emergency protection orders:

On 5 September 2011, the victim petitioned the court for an emergency protection order against the perpetrator, her husband. The petition was filed as a result of an incident which had occurred on 3 September 2011 in which the perpetrator had assaulted the victim, causing her bodily injuries. Attached to her petition were the hospital records detailing her injuries and the police report arising out of the assault.

¹¹⁵ Note 14, *supra*.

¹¹⁶ In an interview on 10 August 2011, a civil judge from Prishtinë/Priština municipal court informed the OSCE that prior to the issuance of the report in June 2011, domestic violence cases were assigned to judges once a month along with other civil cases. However, the judge reported that following distribution of the report, court practice was changed such that cases are now assigned to judges immediately, so that they can be accorded greater priority and scheduled as a matter of urgency. This change in practice demonstrates that the court has taken concrete steps to address the recommendations issued in the report of June 2011.

The court convened a hearing session on 6 September 2011 and heard the evidence of the victim and the perpetrator, as well as the representations of the Victims' Advocate. Immediately following the hearing session, the court made a decision to issue the emergency protection order. On 13 September 2011, the court convened a further hearing session to confirm the order, and heard further evidence from the parties, and further representations from the Victims' Advocate. Immediately following this hearing session, the court made a decision to confirm the emergency protection order by issuing a protection order valid for a period of six months.

3.2 Failure to distinguish between types of protection orders

As noted earlier in this report, the LPDV contemplates that the court may, upon being so petitioned, issue one of two distinct types of protection orders.¹¹⁷ Although the LPDV defines an emergency protection order as an order that is “issued temporarily” and specifies different timeframes in which the respective petitions must be adjudicated, it does not in fact distinguish between an emergency protection order on the one hand and a regular, non-emergency protection order on the other.

The test for the issuance of either type of order is the same: the order shall be issued where the court “suspects that the perpetrator shall unavoidably risk the health, safety or wellbeing of the [victim]”.¹¹⁸ Given this failure of the legislation to distinguish between the two types of protection orders, it is thus perhaps not surprising that victims, in preparing their petitions, as well as the courts, in hearing and deciding them, often fail to adequately distinguish between the two. Both victims and the courts often appear to treat the two categories more or less interchangeably. This is demonstrated by the following two case examples:

On 25 May 2011, the victim petitioned the court for an emergency protection order against the perpetrator, her husband. The petition detailed a history of ill-treatment and physical violence perpetrated on the victim over the course of the couple's 18-year marriage. In March 2011, the victim had left the marital home, taking the couple's two minor children with her. On 23 May 2011, the perpetrator had entered the victim's brother's house – where the victim had sought shelter – and had assaulted the victim and their two children, causing the victim bodily injuries. A medical report was appended to the petition, detailing the victim's injuries. On 27 May 2011, the court convened a hearing session but immediately adjourned it; neither the victim nor the perpetrator had appeared and there was no evidence in the court file that either had been duly summoned. On 7 June 2011, the hearing session reconvened but again adjourned because, while the victim appeared before the court, the perpetrator did not, and there was again no evidence in the court file that he had been duly summoned. Further hearing sessions were convened on 21 June and 24 June 2011, during which the court heard evidence from both the victim and the perpetrator. Following the hearing session on 24 June, the court issued a protection order against the respondent valid for a period of three months. In its reasoned decision, the court noted that the victim had requested a “protection order”; this was an error, because the victim had in fact requested an emergency protection order.

¹¹⁷ See p. 12, *supra*.

¹¹⁸ Article 17(1), the LPDV, note 1, *supra*.

On Friday 22 July 2011 the victims, a woman and her adult daughter, petitioned the court for a protection order against the perpetrator, the woman's ex-husband. However, in the draft form of decision appended to the petition, the victims appeared to be requesting that the court issue an emergency protection order rather than a protection order. The petition was filed as a result of an incident the previous day, in which the perpetrator had allegedly assaulted the victims, injuring both and causing serious injuries to the woman. Appended to the petition were hospital records detailing the mother's injuries, and medical reports detailing the injuries to both victims. On Monday 25 July 2011, the court convened a hearing session, hearing evidence from both of the victims and the perpetrator. Following the hearing session, the court issued a protection order against the perpetrator. In its reasoning, the court noted that the victims had "filed a petition for [a] protection order against the respondent" and that they had also requested that the court "issue an emergency protection order". The court did not, however, comment further on this ambiguity in the petition.

In the latter case example, while the reasons given by the court did not deal explicitly with the issue of which type of order the victims had intended to apply for, the court was nonetheless willing to take the initiative to adjudicate the petition as quickly as possible. The petition was filed on a Friday and adjudicated on the following Monday, meaning that it was in effect adjudicated within 24 court working hours. Faced with ambiguity in both the legislation and the petition, this was an appropriate judicial response, and one which demonstrates a proactive approach to the management of the case. However, in reality, because of the intervening weekend, the petition was not in fact adjudicated within 24 hours, as is mandated by the LPDV. Given the requirements of the legislation and victims' needs for emergency protection, the victims were entitled to have their petition adjudicated within 24 hours rather than 24 court working hours.

3.3 Deficiencies in the form and content of orders issued pursuant to the Law on Protection against Domestic Violence

As noted earlier in this report¹¹⁹, orders issued pursuant to the LPDV are required to state the protection measure or measures ordered by the court; and must put the perpetrator on notice that any violation of the order will constitute a criminal offence. Orders must also notify the parties of the right to appeal the order, and of the right to be assisted by counsel. Emergency protection orders must also state the date set by the court for the confirmation of the order. Additionally, as noted earlier in the report¹²⁰, the decision to issue the protection order or emergency protection order must be a reasoned one; it must link the facts of the case to the particular protection measures ordered. Despite these statutory requirements, the OSCE has noted that in many of the cases monitored, orders issued lack at least some of the requisite information, as the following case example illustrates:

On 6 April 2011, the victim petitioned the court for an emergency protection order. The court convened a hearing session that same day and, after hearing both the victim and the perpetrator, decided to grant the emergency protection order the victim sought. The order listed protection measures and their duration, as well as notifying the perpetrator of his right to appeal the order and the deadline for doing so. It also put

¹¹⁹ See p. 13, *supra*.

¹²⁰ See p. 13, *ibid*.

the perpetrator on notice that any violation of the order would constitute a criminal offence. Finally, the order notified the perpetrator that the filing of an appeal would not stay the execution of the protection measures. The order, however, failed to indicate the date set by the court for the confirmation hearing. Furthermore, the decision contained no reasoning to indicate the facts upon which it was grounded or explain how the ordered protection measures were linked to the facts of the case. On 15 April 2011, the court held a confirmation hearing, at the conclusion of which it decided to confirm the emergency protection order and to continue the previously ordered protection measures for a further three months. Again, however, the court's decision was not reasoned.

Another deficiency the OSCE has observed in orders issued pursuant to the LPDV relates to the kind of protection measures being imposed by the courts. The law clearly enumerates the protection measures which may be ordered.¹²¹ Despite this enumeration of available protective measures, the OSCE has monitored cases in which the courts have imposed measures which were clearly not contemplated by the LPDV, as the following case example illustrates:

At the conclusion of a hearing session on 24 February 2011, the court imposed a number of interim protection measures, to be put into place pending final resolution of the victim's petition for a protection order. One of these measures obliged the victim – already under psychiatric treatment – to continue receiving such treatment until a final decision was made on the petition. On 11 March 2011, the court made a decision to issue the protection order. One of the protection measures imposed an obligation on the victim to continue with his psychiatric treatment for a further three-month period, subject to extension. Another measure imposed upon all of the parties, who shared a common house, was a schedule regulating the specific hours and minutes in which each was permitted to use the common bathroom. A further protection measure limited the movement of the victim within the house except in emergencies.

The above-detailed protection measures go well beyond what is contemplated by the LPDV. Although the legislation does provide for imposing a measure of psychosocial treatment on a perpetrator of domestic violence¹²², there is no legislative authority by which the court can order that a victim undergo or continue to undergo such treatment. Similarly, the protection measures which concerned sharing of the house go beyond what is contemplated in the LPDV. While the court may order the perpetrator “to allow [the victim] to use living premises shared, or a part of the premise”¹²³, and while it may impose “any other measures that are necessary to protect the safety, health or welfare of [the victim]”, the LPDV does not contemplate measures that restrict the victim's freedom of movement.

The OSCE has also observed that some protection measures imposed by the court lack sufficient precision, as for example where an order prohibits the perpetrator from approaching the victim within “a specified distance”¹²⁴ but then fails to specify the prohibited distance in metres. This problem would appear to arise from the use of template orders without proper attention being paid to filling in all necessary detail. Further, the OSCE has noted that protection measures often prohibit the commission of specific crimes, for instance,

¹²¹ See Section 2.2, *supra*.

¹²² See p. 11, *supra*.

¹²³ Article 11(1)(1), LPDV, note 1, *supra*.

¹²⁴ *Ibid*, Article 5(2).

where the perpetrator is ordered not to act, or threaten to act, violently toward the victim. However, such conduct is already prohibited by criminal law; it is not necessary to explicitly prohibit it within a civil protection order.

3.4 The role of the courts vis-à-vis reconciliation between the parties

As noted earlier in the report,¹²⁵ the central purpose of the LPDV is to prevent domestic violence through the issuance of court orders containing appropriate protective measures. Unlike the Family Law of Kosovo, the LPDV does not contemplate a procedure for reconciling the parties.¹²⁶ In spite of this, the OSCE has monitored a considerable number of domestic violence cases where judges have taken it upon themselves to encourage reconciliation between the victim and the perpetrator, as the following case example illustrates:

On 21 April 2011, the victim petitioned the court for an emergency protection order against the perpetrator, her husband of 22 years. The petition detailed a lengthy history of ill-treatment, physical and psychological abuse perpetrated on the victim. The court convened a hearing session on 6 May 2011 at which both the victim and the perpetrator appeared. At the session, the judge encouraged the parties to “give each other one more chance to resolve their problems through agreement.” On the basis of this encouragement, the victim agreed to withdraw her petition for a period of two months, with the understanding that if the perpetrator did not refrain from abuse “eventually”, she would submit a new petition to the court. The court then issued a decision approving the withdrawal of the petition pursuant to Article 15(5) of the LPDV, which provides that a petition shall be considered withdrawn if neither the victim nor the victim’s lawyer appear at the hearing session.

Firstly, it must be noted that Article 15(5) was applied incorrectly in this case, as the victim was in fact before the court when the decision was made. Further, reconciliation is not contemplated in the LPDV and in fact runs contrary to its purpose and provisions, which are to provide protection to victims of domestic violence. As noted earlier in this report¹²⁷, judicial attempts to reconcile the parties are inappropriate in the context of adjudicating petitions for protection orders in domestic violence, as the following case example illustrates:

On 28 February 2011, the victim petitioned the court for a protection order against two of her late husband’s brothers. The petition detailed a deteriorating relationship with her husband’s family in the weeks following his death, and increasing psychological pressure and threats directed towards her by her two brothers-in-law to induce her to leave the marital house and move elsewhere. The situation culminated in an incident where the locks to the house were changed in her absence and she and her minor children were denied access to their home. Following the intervention of the police, the victim was able to access the house; however, upon returning, the victim discovered that one of the perpetrators had moved into the house and shortly thereafter, the locks were changed a second time. Since then the victim and her children had been unable to gain access to the house, even to retrieve their personal

¹²⁵ See Section 2.2, *supra*.

¹²⁶ See Family Law Article 59, and from Article 76 to 83, note 81, *supra*. Particularly in divorce disputes, the court is obliged to achieve formal reconciliation, and final decision on divorce is sent to parties only after concluding the procedures and only if the reconciliation was not achieved (Article 77).

¹²⁷ See note 11, *supra*.

belongings. On 17 March 2011, the court convened a hearing session and heard the evidence of the victim and the perpetrators. At the conclusion of the hearing session, the judge asked the perpetrators if they could provide “any proposal to improve the relations and find a solution.” In response, the parties requested that the session be adjourned while they attempted to find a solution. On 6 June 2011, the parties advised the court that they had arrived at a “judicial agreement” which included a term requiring the victim to withdraw her petition. The court issued a decision approving this “judicial agreement”. On 25 June 2011, the victim was assaulted by one of the perpetrators and suffered injuries. The police were called and the perpetrator was charged with a number of criminal offences arising out of the assault on the victim. A trial on those charges took place on 14 December 2011; the perpetrator was convicted of having inflicted light bodily injury on the victim and having threatened her. He received a six-month suspended sentence in respect of the light bodily conviction, and a fine of 300 Euro was imposed in respect of the threat. To date, the victim has not filed a new petition for a protection order.

The OSCE has observed that, even in cases where the court decides to grant the relief requested in the petition and issue a protection order or emergency protection order, the court often remains concerned with reconciling the parties, as the following case example illustrates:

On 25 May 2011, the victim petitioned the court for a protection order. The petition detailed a history of ill-treatment, including beatings perpetrated on the victim by her husband over the course of their long marriage. Two months prior to filing the petition, the victim had left the perpetrator. The perpetrator had followed her to her brother’s house, where she had sought shelter, and had assaulted her as well as their two minor children. The victim had suffered injuries as a consequence of the assault. On 24 June 2011, the court, having heard evidence from both the victim and the perpetrator, decided to issue a protection order. However, instead of the 12-month duration the petitioner had been seeking, the court decided to issue the order for a much briefer period of three months. In its reasoning, the judge noted that the protection order had been granted “to give some time to the parties to think over and to decide on their future lives.” The judge noted that they were still married and had two children, and that the perpetrator could not “be denied the right to meet and contact his children”, and concluded that the victim and the perpetrator should “sit down and decide how to regulate their family meetings and relationship.”

In the above case example, the court’s reasoning demonstrated that the short duration of the protection order had less to do with the protection of the victim than with a desire to facilitate reconciliation between the parties. The court, in adjudicating a petition for a protection order, should have limited its enquiry to the issue of whether the victim had made a case for the imposition of protective measures; it should not have concerned itself with such matters as the parties’ need “to decide on their future lives” or the perpetrator’s “right to meet and contact his children”.

Cases where the parties have reconciled prior to the hearing session present a special challenge to the court. In such cases, the victim often requests that she be permitted to withdraw her petition. However, the LPDV does not contemplate such a procedure for withdrawal; indeed, the only circumstances in which the petition may be “considered withdrawn” are where the victim fails to appear at the hearing session although duly

summoned. Further, despite the parties' reconciliation, the facts set out in the petition may indicate that the victim's protection needs would be best served by the issuance of the protection order. On that basis, courts should be wary of simply "rubber stamping" the victim's request to withdraw the petition and should instead carefully consider all of the circumstances in the case, including the perpetrator's past history of violence toward the victim, and assess whether the violence is likely to recur notwithstanding the reconciliation.

The case example detailed below demonstrates best practices in this regard:

On 27 April 2011, the victim petitioned the court for a protection order against the perpetrator, her husband. The petition detailed a history of a number of incidents of physical violence, culminating in an incident of physical abuse which had occurred five days prior to the petition being filed, and which had resulted in injuries to the victim. A copy of the police report arising out of that incident was appended to the petition. On 13 May 2011, the court convened a hearing session at which the victim and perpetrator both appeared; also present was the Victims' Advocate. The victim advised the court at that hearing session that she and the perpetrator had reconciled, that the perpetrator had promised her he would not "make the same mistakes in the future" and that she wished to withdraw her petition. The Victims' Advocate, however, argued that the protection order should still be granted notwithstanding the reconciliation, "because the respondent several times committed violence against the victim [and] therefore [the requested protective] measures will increase the safety for the victim and her family." The court agreed with the Victims' Advocate and issued the order, noting that it was "necessary to protect the health, safety or wellbeing of the [victim] and her family."

The court in the above case example deemed that the grounds for issuing a protection order still existed under the LPDV, even though the victim and the perpetrator had reconciled. In some cases, it is possible that the reconciliation of the parties will weaken the grounds for issuing a protection order. However, given the history of violence in the family in this case example, along with the strong position taken by the Victims' Advocate, the OSCE is of the view that the court was correct in refusing to agree to the victim's request to withdraw the petition.

4. CONCLUSION

The OSCE remains concerned that despite some improvements made in recent months in compliance with the mandated time limits for applications for domestic violence protection orders, courts in Kosovo still fail to exercise the requisite standard of due diligence to protect victims of domestic violence through the timely and effective imposition of protective measures. This report highlights concerns with respect to the adjudication of petitions for protection orders and emergency protection orders in domestic violence cases. The shortcomings observed are particularly acute in four areas.

The first of these involves the failure of courts in Kosovo to hear and decide these petitions within the timeframes mandated by the LPDV. The case examples detailed in this report show that too many petitions remain unresolved for weeks and even months beyond the deadlines mandated for their resolution. Delays of this nature can have potentially serious consequences for victims of domestic violence who are at risk of assault, injury or worse.

The second area of concern involves two serious defects in the LPDV. The first of these is the failure to adequately distinguish between protection orders and emergency protection orders. The lack of a clear distinction between the two types of orders may be confusing to both victims and courts. Victims may be confused as to which order is most appropriate to their situation. Likewise, courts lack legislative guidance when deciding whether or not the evidence presented by the petitioner best supports the issuance of a protection order or an emergency protection order. The second defect in the LPDV relates to gender-neutrality. The LPDV fails to include any acknowledgement that domestic violence affects women in particular, and that it constitutes a form of discrimination and a violation of women's human rights.

The third area of concern involves deficiencies in the form and content of protection orders issued by the court. Execution of a protection order may be hampered where the order fails to set out, clearly and with precision, the protection measures the court has ordered. Where a decision to grant, or to reject, a petition for a protection order is not fully reasoned, the parties' right to appeal the decision, or to apply for an extension or renewal of the order, may be compromised.

The fourth area of concern involves the role of the courts *vis-à-vis* reconciliation between the victim and the perpetrator. Petitions for protection orders brought pursuant to the LPDV are distinct from applications for other relief brought pursuant to the Family Law of Kosovo. Courts are not under any obligation to assist the parties in reconciling; in fact, in the context of domestic violence cases, encouraging reconciliation may well have the effect of denying the victim the very protection being sought. Further, in cases where the victim and the perpetrator have reconciled prior to the hearing session, courts should not simply "rubber stamp" the victim's request to withdraw the petition. Notwithstanding the reconciliation, the victim's protection needs may be best served by the issuance of the protection order.

The OSCE is of the view that, notwithstanding the two above-mentioned defects in the LPDV, the needs of domestic violence victims generally have been sufficiently addressed in the existing legislative framework. However, as the UN Human Rights Committee has noted, the challenge is not a normative one: it "lies in ensuring respect for and effective implementation of existing laws and standards."¹²⁸ In Kosovo, there is a wide gap between the normative framework intended to protect victims of domestic violence, on the one hand, and the implementation of this normative framework by the courts, on the other. In all too many cases observed by the OSCE, deficiencies in the process of adjudicating these petitions are sufficiently serious that it cannot be said that victims of domestic violence have enjoyed access to an effective remedy. Where victims of domestic violence do not enjoy access to an effective remedy, the requisite due diligence standard is not met, and where the requisite due diligence standard is not met, domestic authorities cannot be said to have discharged their positive obligation to protect such victims from further acts of violence at the hands of perpetrators.

¹²⁸ UN Human Rights Commission, Resolution 2003/45 on the Elimination of Violence against Women, 23 April 2003, Article 2.
<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/92369a7e29927af3c1256d1f004196ce?Opendocument>
(accessed 1 March 2011).

5. RECOMMENDATIONS

To the Assembly of Kosovo:

- Consider amending the Law on Protection against Domestic Violence to more clearly articulate the criteria which distinguish a protection order from an emergency protection order;
- Consider amending the Law on Protection against Domestic Violence to bring it into line with international standards by acknowledging that domestic violence affects women in particular, and that it constitutes a form of discrimination and a violation of women's human rights.

To municipal court presidents:

- Take immediate steps to bring courts into strict compliance with the 24-hour time limit for adjudicating petitions for emergency protection orders, and the 15-day time limit for adjudicating petitions for protection orders;
- Take immediate steps to create a weekend "duty judge" post with an on-call rotation, so that petitions for emergency protection orders filed on Fridays can be adjudicated within the 24-hour time limit.

To municipal court judges:

- Where a petition is ambiguous, or where the facts set out in the petition support the issuing of an order other than the one sought by the victim, clarify the relief sought – i.e., a protection order or emergency protection order – prior to making a decision on the petition;
- Refrain, prior to adjudicating petitions for protection orders and emergency protection orders, from encouraging the parties to reconcile;
- Where the parties have reconciled prior to the hearing session, consider whether, on the facts set out in the petition, the victim should be permitted to withdraw the petition.

To the Kosovo Judicial Institute:

- Continue to provide training to civil judges in the adjudication of petitions for protection orders filed pursuant to the Law on Protection against Domestic Violence.