

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

Fair Trial Rights in Election Related Cases

October, 2012

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LIST OF ABBREVIATIONS

CCK	Criminal Code of Kosovo
CEC	Central Election Commission
C&RC	Count and Result Centre
ECAP	Election Complaint and Appeal Panel
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ENEMO	European Network of Election Monitoring Mission Organizations
CPCK	Criminal Procedure Code of Kosovo
ICCPR	International Covenant on Civil and Political Rights
OSCE	Organization for Security and Co-operation Mission in Kosovo
RRF	Result and Reconciliation Form
UDHR	Universal Declaration of Human Rights

EXECUTIVE SUMMARY

There has been a substantial increase in the number of election fraud proceedings related to 2010 elections in comparison to the Kosovo justice system's response to misconduct in the 2007 and 2009 elections. Based on the findings of the re-count process, prosecution authorities in Kosovo rendered a high number of direct indictments for election fraud detected during the 2010 elections. The courts have confirmed a considerable number of those indictments and the first main trials have been concluded. Nonetheless, ongoing proceedings display numerous deficiencies that appear to compromise defendants' fair-trial rights and violate the normative framework applicable in Kosovo.

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) has noted that, without any prior investigations, prosecutors have collectively charged all persons who were assigned as committee members in polling stations where the re-count detected manipulation of votes above a certain threshold. As a result, subsequent indictments displayed scarce evidence, poor reasoning, and failed to individualize actions and criminal responsibilities of different co-defendants. At the confirmation stage, the courts did not properly scrutinize the quality of these indictments and passed most if not all of the cases to the main trial. The first main trials included instances where the judges failed to exercise the requisite due diligence in adjudicating these cases. The failure to consider sufficient and relevant evidence, further reinforced through lack of adequate reasoning in the issued verdicts, prompts doubts as to whether courts thoroughly and fairly examined all facts relevant to the case, mainly concerning individual actions and liability of different co-defendants.

By mid 2012, 133 of these cases were being processed by prosecution authorities, of which approximately 120 were pending at confirmation and main trial stage. In order to bring future cases into compliance with applicable law and ensure that defendants may enjoy fundamental fair trial rights in an effective manner, this report makes a number of recommendations. Prosecutors should conduct thorough and proper investigations, and should file indictments only when there is sufficient evidence to support a well-grounded suspicion against individual defendants. The indictments should be supported with proper reasoning, clearly indicating the actions and criminal responsibility of each defendant and co-defendant. Judges should confirm these indictments only when the legally-stipulated criteria are fulfilled, and should sustain their decisions with adequate and sufficient reasoning. During the main trial, judges should thoroughly and fairly examine all facts relevant to the case. This includes administration of evidence by judges, which is necessary to assess and establish the actions and liability of individual co-defendants in the election fraud. Finally, judges should issue verdicts supported with adequate reasoning.

1. INTRODUCTION

The OSCE has previously reported on election fraud cases in the Kosovo justice system.¹ Past reports raised concerns about the failure of prosecution authorities to promptly and vigorously investigate and prosecute fraudulent activities committed in relation to the 2007 and 2009 elections. The present report, on the other hand, acknowledges that an increased number of criminal proceedings have been initiated in response to allegations of fraud during the 2010 elections. While those proceedings indisputably represent an important and positive step forward, the aim of this report is to scrutinize not only the quantity, but also the quality of ongoing proceedings.

The focus of the report is on cases originating during the re-count process ordered by the Central Election Commission (CEC).² Based on the wide-scale irregularities detected through reconciliation of results forms and initial audit³, the CEC ordered re-counting of votes in around 40 per cent of all polling stations across Kosovo⁴. The re-count process confirmed that votes were manipulated in these polling stations. The findings were forwarded on to the competent municipal prosecution offices, which according to the criminal procedure law are competent for the investigation and prosecution of election-related offences. The municipal prosecution offices used these findings as a basis to initiate criminal proceedings against all committee members assigned to these polling stations.

Cases brought on the basis of the re-counting of votes represent the greatest portion of all election fraud charges filed in relation to the 2010 elections. OSCE legal system monitoring has indicated that justice actors, prosecutors and courts in Kosovo have often treated these cases in a superficial manner, falling short of the requisite standard of due diligence. The

¹ See OSCE Legal System Monitoring Section (LSMS) Monthly Report of May 2009, <http://www.osce.org/kosovo/38404> (accessed 25 September 2012), and Monthly Report of October/November 2008, <http://www.osce.org/kosovo/38443> (accessed 25 September 2012).

² The CEC is an independent body of experts responsible for the administration of elections; see Article 3 and Chapter X of Law No. 03/L-073 on General Elections, 5 June 2008, with subsequent amendments in Law No. 03/L-256 on Amending and Supplementing the Law on General Elections, 29 October 2010.

³ The Count and Result Centre (C&RC), a body of the CEC, was tasked with material intake and checking, reconciliation of results forms, verifying and scanning voter lists, data entry and review, audit, counting of conditional and by-mail ballots, recounts of ballots, and investigation. The C&RC reports for the CEC after the elections of 12 December 2010 showed that 760 out of 2,280 polling stations (CEC *master list* on 2010 Early Kosovo Assembly Elections, technical election data) across Kosovo did not pass audit, and ballots were to be recounted and investigated at the C&RC. The C&RC report on 9 January 2011 re-voting found that 92 out of 185 polling stations did not pass audit. Generally, the most frequent issues detected at the C&RC were mistakes or fraudulent data in Candidate Results Forms (over 90 per cent). See European Network of Election Monitoring Mission Organizations (ENEMO), *Election Observation Mission, Kosovo Assembly Elections 2010, Final Report*, April 2011, at p.19–20; http://www.enemo.eu/press/ENEMO_final%20report_KOSOVO_EOM_2011.pdf (accessed 25 September 2012). According to the Kosovar Institute for Policy Research and Development (KIPRED), in 80 per cent of these cases (712 polling stations) the number of votes for candidates had discrepancies with political party votes. In the other 20 per cent of cases (178 polling stations), there were mistakes which could have been of a mathematical nature; see KIPRED Report, *Election Crimes*, October 2011, http://www.kipred.org/advCms/documents/15928_election_crimes.pdf (accessed 25 September 2012).

⁴ Final Report of the European Union Election Expert Mission to Kosovo, 25 January 2011, pp. 7 and 50. Accessed on 15 August 2012 at http://eeas.europa.eu/delegations/kosovo/documents/press_corner/25012012_final_report_eu_eem_kosovo_2010.pdf.

present report considers that such proceedings violate legal standards and compromise the basic fair trial rights of defendants.

1.1 Context and background

On 12 December 2010, early parliamentary elections were held in Kosovo.⁵ The failure of justice actors to adequately respond to electoral fraud reported following previous elections appeared to result in the repeated and gradual increase of manipulation cases committed during the 2010 elections.⁶ The international community stressed the need for Kosovo institutions to deal decisively with cases of electoral fraud⁷, and the highest judicial bodies indeed publicly declared that election-related crimes were a priority⁸. In following this call to action, prosecutors across Kosovo charged 1,343 persons and estimated that another 931 persons would be indicted.⁹ By mid 2012, OSCE monitoring indicated that the courts had already confirmed at least 58 of these indictments and that ten main trials had been concluded. The CEC re-count findings, which revealed widespread manipulation of votes, serve as the basis for most of these proceedings.

⁵ Following a motion submitted by 32 members of Assembly of Kosovo to the Constitutional Court, alleging the violation of the constitution by the then-President of Kosovo, in September 2010 the Constitutional Court issued a judgment finding that the President had been in violation of the constitution. After the resignation of the President, the two main parties of the coalition did not reach an agreement as to the new president. On 15 October 2010, a decision was published announcing Assembly elections to be held on 13 February 2011. On 18 October 2010, one political party withdrew from the ruling coalition and all ministers and deputy ministers from that party stepped down from their posts. After these developments, a motion of no confidence in the government was passed by the Assembly of Kosovo, followed by a decree for dissolution of the Assembly. The date for early elections, in accordance with the legal deadlines, was set for 12 December 2010.

⁶ As a result of the serious irregularities, repeat elections were held on 9 and 23 January 2011 in a number of municipalities across Kosovo. ENEMO reported that “a high number of irregularities during the Kosovo Assembly elections have severely affected the trust in the democratic process in Kosovo. Serious breaches of procedures were seemingly accepted and there were no attempts by the polling station staff to stop irregular voting behaviors. Similar incidents and alleged fraudulent acts reported for the December 12 elections give a bleak picture of the election process in Kosovo. Furthermore, cases of intimidation and pressure on domestic observers have been reported to ENEMO adding to other weaknesses during the process.” See ENEMO Final Report, note 3, *supra*, at p. 3.

⁷ For instance, ENEMO Final Report, note 3, *supra*, at p. 24; stated that “it is of utmost importance to investigate impartially all election offences, timely prosecute and hold responsible perpetrators from 2010/11 Kosovo Assembly elections.” See also EC Progress Report 2011, http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_rapport_2011_en.pdf (accessed 25 September 2012); European Parliament press release, “More efforts needed to strengthen democracy in Kosovo”, 10 January 2011; European parliament resolution B7-0187/2012 on the European integration process of Kosovo, 20 March 2012, at para. 5, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B7-2012-0187+0+DOC+PDF+V0//EN> (accessed 25 September 2012).

⁸ In February 2011, the Kosovo Prosecutor’s Office issued a public notification that all election-related offences would be handled by the justice system as a matter of priority. Judges would have a two month deadline to proceed with these cases, despite being overloaded with work. E.g. see “Notification concerning the investigations of criminal offences related to the early Assembly Elections in Kosovo”, issued by the Kosovo Public Prosecutor on 1 February 2011; Petrit Collaku, “Kosovo Judge Vows End to Vote Fraud Impunity”, *Balkan Insight*, 27 December 2010, <http://www.balkaninsight.com/en/article/kosovo-election-manipulators-to-be-trialed> (accessed 25 September 2012.)

⁹ See Kosovo Public Prosecutor Office’s Annual Working Report (January–December 2011) related to Cases of Abuses in Early Parliamentary Elections of 12th December 2010 in Kosovo, 2 February 2012, http://www.psh-ks.net/repository/docs/Elections_January-December_2011.pdf (accessed 25 September 2012). According to the report, municipal prosecution offices in Prishtinë/Priština and Prizren have a considerable number of cases “in process”. This includes 84 cases in Prishtinë/Priština, and 49 cases in Prizren.

1.2 Previous OSCE reporting on election-related offences

The OSCE has regularly reported on election fraud cases in the justice system in Kosovo.¹⁰ It has noted in previous reports that allegations of election fraud and other election-related crimes committed during elections in Kosovo have not undergone effective investigation or prosecution of alleged perpetrators, which has resulted in impunity for these offences. The previous reports raised concerns about the failure of prosecution to promptly and vigorously investigate and prosecute fraudulent activities committed during the 2007 and 2009 elections. These reports also highlighted shortcomings in co-operation between various electoral bodies, police and prosecutors, which contributed to the fact that very few criminal cases are known to have been initiated by prosecution authorities and even fewer reached the courts.

1.3 Purpose, scope and methodology of the report

The purpose of this report is to follow up on previous OSCE reports on election fraud in the justice system, specifically the report of May 2009, and to assess developments in the handling of these cases by the prosecutorial and judicial institutions in Kosovo.

In the 2009 report, the OSCE reported that as of the date of publication, no trial had been held in any cases of alleged election fraud, despite the fact that one-and-a-half years had elapsed since the alleged election incidents took place.¹¹ The OSCE recorded that as of 2009, municipal public prosecution offices had examined 36 cases involving at least 57 persons who allegedly had actively manipulated the electoral process or at the very least acquiesced in misconduct.

In relation to the 2010 elections, however, a significant increase in cases has been clearly identified. Prosecutors across Kosovo filed charges for election fraud and other election-related crimes in at least 198 cases and another 133 cases are being processed.¹² The OSCE has monitored the 2010 elections cases as a matter of priority. The methodology used to collect relevant information consisted of monitoring court sessions, reviewing prosecution and court case-files, and interviewing prosecutors and judges dealing with such cases. The cases were chosen in chronological order of arriving at prosecutors' offices and courts in all regions. The extent of manipulation of votes in different municipalities was not used to determine criteria for monitoring. The OSCE has also reviewed the applicable legal framework, publications such as reports from election-monitoring bodies and other relevant actors, statistical data from the Kosovo Public Prosecutor's Office, press releases and print media articles.

Between March 2011 and June 2012, OSCE court experts monitored 83 cases of election-related offences in all regions of Kosovo. The OSCE monitored 7 cases in Prizren region, 12

¹⁰ See the OSCE Report, *Legal System Monitoring Section – Monthly Report October/November 2008*, <http://www.osce.org/kosovo/38443> (accessed 25 September 2012) and OSCE Report, *Legal System Monitoring Section, Monthly Report – May 2009*, <http://www.osce.org/kosovo/38404> (accessed 25 September 2012).

¹¹ OSCE *Monthly Report – May 2009*, *ibid*, at p. 4.

¹² Public Prosecutor's Annual Working Report, note 10, *supra*. The data contained in the report has been updated by OSCE monitors through information provided by respective prosecution offices. In the cases in process, the personal data of suspects is reportedly missing. The competent prosecution offices requested that the Kosovo police gather the needed data. According to the Public Prosecutor's report, direct indictments are expected to be filed in all these cases.

cases in Gjiilan/Gnjilane region, 12 cases in Mitrovicë/Mitrovica region, 42 cases in Pejë/Peć region, and 11 cases in Prishtinë/Priština. OSCE monitors reviewed the indictments and other related legal documents and, for cases which had reached those stages, attended the confirmation hearings and main trial sessions and examined confirmation decisions and judgments that had been issued.

As outlined above¹³, this report focuses on election fraud cases deriving from the re-count process ordered by the CEC. OSCE monitoring revealed that these cases represent the greatest portion of all proceedings initiated in response to the allegations of election fraud committed during the 2010 elections. Due to the large overall number of these cases and their speedy processing by the justice actors through various procedural stages, the determination of the exact number of these cases is difficult. Nonetheless, the cases monitored by OSCE legal system monitors – which form the basis for this report, its analysis, findings and conclusions – represent a sample of all similar election fraud cases, which illustrates larger patterns across Kosovo.

The present report is divided into six sections. Section 2 presents an overview of the legal framework regulating the prosecution of election-related offences in Kosovo. Thereafter, Section 3 briefly outlines the main evidentiary basis for the 2010 election fraud proceedings, i.e., the complaint mechanism of the Election Complaint and Appeal Panel (ECAP) and the CEC re-count process. Section 4 analyses shortcomings in the treatment of election fraud cases based on the re-count process, first through a focus on the prosecution, and then by examining judicial shortcomings during the confirmation stage and main trial, respectively. The report concludes with a number of recommendations to prosecutors, judges, and the Kosovo Judicial Institute.

2. NORMATIVE FRAMEWORK FOR THE PROSECUTION OF ELECTION-RELATED OFFENCES

2.1. International normative framework

Free and fair elections are a fundamental precept of a democratic society, as reflected in numerous political and normative documents.¹⁴ In its case law on the right to free elections, the European Court of Human Rights has confirmed that free elections enshrine “a characteristic principle of an effective democracy and [are] accordingly of prime importance in the Convention system”.¹⁵

The right to free elections comprises two aspects: the active aspect (i.e. the right to vote) and the passive aspect (i.e. the right to stand as a candidate for election). Both those active and

¹³ See page 5, *supra*.

¹⁴ See: OSCE 1990 *Copenhagen Document*; UN Human Rights Committee, UN Human Rights Committee (HRC), *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, interpreting the principles for democratic elections; see also the *Code of Good Practice in Electoral Matters* developed by the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe.

¹⁵ See *Tanase and Chirtoaca v. Moldova*, ECtHR Judgment of 18 November 2008, paragraph 100. The right to free elections is enshrined in Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). See also Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and Article 21 of the United Nations Universal Declaration of Human Rights (UDHR).

passive aspects need to be carefully safeguarded and protected if elections are indeed to be free and fair, including through effective investigation and prosecution of cases of electoral fraud.

As recognized by OSCE participating States in the Copenhagen Document:

“among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are [...] *free elections* that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives; [as well as] a *fair and public hearing* by a competent, independent and impartial tribunal established by law.”¹⁶

The international normative framework stipulates authorities’ positive obligations to investigate and prosecute election-related offences. The European Commission for Democracy through Law (the Venice Commission), in its Code of Good Practice in Electoral Matters and Guidelines and Explanatory Report, imposes a clear obligation on authorities to “punish any election fraud.”¹⁷

However, any criminal proceedings stemming from allegations of election fraud must also meet the highest standards of a fair trial, in order to remedy irregularities in a legitimate fashion that establishes true facts and deters future violations.

Provided by a number of core human rights instruments, the right to a fair trial is integral to the broad concept of the supremacy or rule of law, which is a pillar of modern democracy. Of key importance to addressing deficiencies identified in the handling of election fraud cases in Kosovo are the right to a fair-trial before a *competent*¹⁸ tribunal and the *presumption of innocence*¹⁹ of all defendants facing criminal charges in these cases.

¹⁶ The OSCE Copenhagen Document, 1990, Section 5 (at 5.1 and 5.16, emphasis added). Available at: <http://www.osce.org/odihr/elections/14304> (accessed 25 September 2012).

¹⁷ Section 3.2 (xv) of the Code of Good Practice in Electoral Matters and Guidelines and Explanatory Report, adopted by the Venice Commission at its 52 Session (Venice, 18 October – 19 October 2002), Strasbourg 23 May 2003, Opinion no. 190/2002, CDL-AD (2002), 23 rev. Available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.pdf) (accessed 25 September 2012).

¹⁸ See, ICCPR, Art. 14(1): “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. In order to be competent, members of the judiciary must possess legal qualifications and training, and must provide effective and equal treatment before the law, including as demonstrated by their adherence to due process and the rule of law, including the rules of evidence in criminal proceedings.

¹⁹ See: ECHR, Art. 6.2, “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”; and ICCPR, Art. 14.2, “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. The UN Human Rights Committee, in its elaboration of the right to be presumed innocent under Art. 14(2) of the ICCPR, observed that: “By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorities to refrain from prejudging the outcome of a trial.” (General Comment No. 13, para. 7.) The European Court of Human Rights (ECtHR) has likewise found that: “Paragraph 2 (Art. 6.2) embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be

2.2. Normative framework in Kosovo

The protections enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its protocols, as well as in the International Covenant on Civil and Political Rights (ICCPR) and other relevant international legal instruments, are directly enforceable in Kosovo courts. The internationally safeguarded right to free and fair elections is also reflected in Kosovo institutions' normative framework.²⁰

The Law on General Elections recognizes and protects both the right to vote and the right to stand as a candidate for election, i.e. the active and passive aspects of the right to free elections.²¹ It sets out the fundamental principles of this right²² and outlines the respective eligibility criteria.²³ In particular, the law regulates questions concerning voter eligibility²⁴, political parties and political entities²⁵, candidate certification²⁶, and the related code of conduct²⁷. It further lays down the rules for electoral campaigning²⁸, the role of media²⁹ and election observers³⁰. It stipulates the organization and responsibilities of the main electoral bodies³¹, and the procedures on voting³², counting of ballots and the announcement of election results³³. Finally, the law determines the electoral system for the Assembly of Kosovo³⁴, financing of elections³⁵, and it establishes mechanisms and procedures for complaints regarding electoral violations³⁶.

The prosecution of election-related crimes is regulated by the Criminal Code of Kosovo (CCK)³⁷, namely Articles 176 to 181. These provisions include criminal offences of preventing the exercise of the right to vote³⁸, violating the free decision of voters³⁹, abusing the right to vote⁴⁰, violating confidentiality in voting⁴¹, election fraud⁴² and destroying voting

made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.” (ECtHR, *Barbarà, Messeugè and Jebardo v Spain*, Judgment of 6 December 1988, A.146, p.33).

²⁰ See for example: Article 2 of the Law on General Elections.

²¹ Law on General Elections, note 2, *supra*, Article 2.

²² Ibid, Article 2.

²³ Ibid, Chapter II, III and IV.

²⁴ Ibid, Chapter II.

²⁵ Ibid, Chapter III.

²⁶ Ibid, Chapter IV.

²⁷ Ibid, Chapter V.

²⁸ Ibid, Chapter VI and VII.

²⁹ Ibid, Chapter VIII and XVII.

³⁰ Ibid, Chapter IX.

³¹ Ibid, Chapter X (The Central Election Commission), Chapter XI (Municipal Election Commissions) and Chapter XII (Polling Station Committees).

³² Ibid, Chapter XIII, XIV and XV.

³³ Ibid, Chapter XVI.

³⁴ Ibid, Chapter XVIII.

³⁵ Ibid, Chapter XIX.

³⁶ Ibid, Chapter XX.

³⁷ Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003, with subsequent amendments. On 6 November 2008, the Assembly of Kosovo promulgated Law No. 03/L-002 on Supplementation and Amendment of the Kosovo Provisional Criminal Code of Kosovo, which left the code substantially the same as the 2003 law, with only a section on guilty plea agreements added and the name of the code changed to Criminal Code of Kosovo, hereinafter referred to as CCK.

³⁸ Ibid, Article 176.

³⁹ Ibid, Article 177.

⁴⁰ Ibid, Article 178.

documents⁴³. The principle of legality in criminal law prohibits the imposition of criminal sanction for acts or omissions that were not defined as criminal offences at the time of their commission or omission.⁴⁴ Criminal liability for omission exists only in those cases where it is explicitly foreseen under criminal law, meaning the law must provide for a positive duty to act, breaches of which can be liable to criminal punishment. That is not the case in relation to the offence of election fraud such as in the cases deriving from the re-count process. Article 180 of the CCK does not specifically stipulate a positive duty of members of the polling station committee to verify the correctness of election data registered by other members of the committee⁴⁵; therefore a failure of these persons to do so is not a criminal offence and thus cannot be criminally sanctioned.

The law thus foresees, among other functions, the prosecution of persons who undertake actions such as multiple voting; violating the confidentiality of the vote; committing fraud during voting; counting, registering or publishing votes; or destroying in any way the voting documents. The law covers the criminal responsibility of both voters and electoral officials. Depending on the gravity of the offence, the CCK stipulates punishments ranging from a fine up to five years imprisonment.

3. EVIDENTIARY BASIS FOR 2010 ELECTION FRAUD PROCEEDINGS

Criminal proceedings related to the 2010 elections are based mainly on the complaints received by ECAP and on the findings of the CEC ordered re-count process.

3.1. ECAP complaint mechanism

The Law on General Elections establishes ECAP as a permanent independent body competent to adjudicate complaints and appeals⁴⁶ concerning the electoral process⁴⁷. Any person with a legal interest in a matter within the jurisdiction of ECAP, or whose rights relating to the electoral process have been violated, may submit a complaint to ECAP.⁴⁸

⁴¹ Ibid, Article 179.

⁴² Ibid, Article 180.

⁴³ Ibid, Article 181.

⁴⁴ See *ibid.*, Article 1; Article 11.2 UDHR; Article 15 of the ICCPR; and Article 7 ECHR, note 15, *supra*.

⁴⁵ Article 180 CCK, note 37, *supra*, foresees criminal responsibility for persons who falsify the results of an election held in Kosovo by adding, removing or deleting votes or signatures, by counting them incorrectly, by registering incorrectly the results of the election in the election documents or in any other manner, or publishes results of the election or the voting that do not correspond to the actual voting.

⁴⁶ Article 122(1) of the Law on General Elections, note 2, *supra*, provides that electoral appeals are a remedy available to any natural or legal person whose legal rights have been affected by certain legally envisaged decisions of the CEC.

⁴⁷ See Article 115(1) of the Law on General Elections, *ibid.* Article 1 of the Law on Amending and Supplementing the Law on General Elections renamed the body from the Elections Complaints and Appeals Commission to Elections Complaints and Appeals Panel. Among other, Articles 6 and 12 of the same law establish the Supreme Court as the appeal instance for ECAP decisions instead of the Constitutional Court, Article 11 increases the number of members from five to ten including the chairperson, and Articles 12 and 15 precise deadlines in certain ECAP procedures. Pursuant to Article 115(2), the President of the Supreme Court shall appoint a Chairperson of ECAP from among the judges of the Supreme Court and members from among the judges of District Courts.

⁴⁸ Law on General Elections, *ibid.*, Article 119(1). The complaint shall be submitted within 24 hours after the close of the polling station and ECAP shall decide the complaint within 72 hours after the complaint is received. Articles 94(2) and 102(1) provide an additional complaint mechanism for voters, members of polling station committees and observers who may note complaints regarding any activities or the

Related to alleged irregularities and manipulation during the 2010 Assembly elections, ECAP received a total of 454 complaints.⁴⁹

3.2. CEC ordered re-count process

Under the umbrella of the CEC, the body responsible for the administration of elections in Kosovo,⁵⁰ the Count and Result Centre (C&RC) has been established.⁵¹ The C&RC is, among other functions, responsible for reconciliation of results forms, verifying and scanning voter lists, tabulating, reviewing and auditing the elections data, and compiling the final results of elections.⁵² Through this process, the C&RC detected that during the counting and registering of votes in the 2010 elections, the distribution of votes among the candidates was potentially manipulated in 890 of the 2,280⁵³ polling stations. In most if not all of these cases, candidates appeared to have received more votes than the political entity they represented.⁵⁴

A candidate, within the meaning of the Law on General Elections, is a person who runs for membership of the Assembly of Kosovo in the name of a political party.⁵⁵ On election day, each voter shall be issued with a single ballot for the election and (a) shall mark it with a vote for one political entity – i.e. a political party – and (b) may also mark it with votes for up to five candidates from the list for the political entity for whom the voter has voted.⁵⁶ In light of these provisions, the election of candidates is strictly linked to the vote for the political entity which the candidate represents, i.e. a candidate cannot receive a vote unless the voter exercised his or her right to vote in favour of the political entity the candidate belongs to. Therefore under this system, a candidate cannot receive more votes than the political entity which he or she represents.

The initial audit of election data conducted by the C&RC revealed instances where candidates received more votes than the political party they were representing. The C&RC informed the CEC of these cases and recommended that ballots from the particular polling stations be re-counted and investigated at the C&RC. The CEC followed this recommendation and ordered the C&RC to re-count votes in around 40 per cent of polling

preliminary count at any polling station in its respective Poll Book; see also Section 4(8) of the CEC Electoral Rule No. 07/2009 on Elections Observers.

⁴⁹ ENEMO Final Report, note 3, *supra*. ECAP received 363 complaints related to the poll on 12 December 2010, and an additional 84 complaints related to the re-voting process on 9 and 23 January 2011.

⁵⁰ Law on General Elections, note 2, *supra*, Article 1 and Chapter X.

⁵¹ CEC Electoral Rule No. 06/2008.

⁵² Law on General Elections, note 2, *supra*, Article 3. See also CEC Electoral Rule No. 06/2008; The C&RC audits data by comparing the Result and Reconciliation Forms (RRFs), containing the votes for the political parties, with the Candidate Result Forms (CRFs), containing the votes for the individual candidates. The ENEMO Final Report, note 3, *supra*, at p. 20, stipulated that the most frequent issues detected at the C&RC in relation to 2010 elections were errors in RRFs and especially mistakes or fraudulent data in the CRFs (over 90 per cent).

⁵³ Report on Work and Annual Activities of Central Election Commission (CEC), January – December 2010 (April 2011), at page 29.

⁵⁴ ENEMO Final Report, at p. 19-20, note 4, *supra*. For breakdowns of irregularities in the 12 December 2010 early elections as well as the 9 January 2011 re-voting, including failures to pass audits and discrepancies between the votes for individual candidates and their political parties, see: and KIPRED report, *Election Crimes*, October 2011, http://www.kipred.org/advCms/documents/15928_election_crimes.pdf (accessed 25 September 2012).

⁵⁵ Law on General Elections, note 2, *supra*; pursuant to Article 3, a candidate shall mean a candidate running for membership of the Assembly of Kosovo in the name of a political party or citizen initiative.

⁵⁶ Law on General Elections, *ibid*, Article 110.4. Pursuant to paragraph 5, if a ballot is marked for more than five candidates, only the vote for the political party shall be counted.

stations across Kosovo. This process identified 712 polling stations out of the 890 polling stations where the number of votes for candidates had discrepancies with political party votes. The re-count confirmed that the candidate result forms from these polling stations contained mistakes or fraudulent data.⁵⁷

Both the material related to the ECAP complaints and to the re-count process ordered by the CEC was sent to the Public Prosecutor's Office.⁵⁸ The present report focuses on the election fraud proceedings based on the re-count process only. The report analyses the handling of these cases by the justice actors, prosecution and courts respectively.

4. SHORTCOMINGS IN THE TREATMENT OF ELECTION FRAUD CASES BASED ON THE CEC ORDERED RE-COUNT PROCESS BY THE PROSECUTION AND COURTS

The OSCE has observed a number of shortcomings in the handling by both prosecutorial and judicial authorities of election fraud cases resulting from the re-count process. Those shortcomings include: a failure of prosecutors to diligently investigate cases of alleged election fraud on a case-by-case basis; the rendering of indictments without sufficient evidence; a failure of courts to properly scrutinize the quality of these indictments at the confirmation stage; and a failure of courts to thoroughly and fairly examine these cases during the main trial in compliance with applicable law and defendants' fair-trial rights.

4.1. Prosecution

4.1.1. Deficiencies of direct indictments⁵⁹: insufficient evidence, poor reasoning and failure to individualize actions and criminal responsibility of co-defendants

The OSCE is concerned with the manner in which municipal prosecutors treated suspicions of election fraud deriving from the re-count process. OSCE monitoring has indicated that prosecutors managed these cases in a superficial manner, with more focus on the number of rendered indictments, rather than their quality.

Since March 2011, municipal prosecution offices⁶⁰ across Kosovo have rendered a high number of direct indictments for election fraud based on the findings of the re-count process. OSCE monitors reviewed a considerable number of these indictments: in Pejë/Peć, 28 indictments; in Gjakovë/Đakovica, 10 indictments; in Prishtinë/Priština, 1 indictment; in

⁵⁷ According to KIPRED, in 80 per cent of these cases (712 polling stations) the number of votes for candidates had discrepancies with political party votes. In the other 20 per cent of cases (178 polling stations), there were mistakes which could have been of a mathematical nature; see KIPRED Report, Election Crimes, October 2011, http://www.kipred.org/advCms/documents/15928_election_crimes.pdf (accessed 25 September 2012).

⁵⁸ Public Prosecutor's Annual Working Report, note 9, *supra*. Between 30 December 2010 and 9 January 2011, ECAP submitted 191 cases to the Public Prosecutor's Office. In March 2011, the Public Prosecutor's Office received files from the C&RC which specified manipulations made in relation to the votes of candidates.

⁵⁹ Article 304 of the Criminal Procedure Code of Kosovo (CPCCK) foresees that the indictment may be filed by prosecutor after the investigations (regular indictment) or if the public prosecutor considers that the information that he has in relation to criminal offence and the offender provide sufficient grounds for filing an indictment [...] (direct indictment). Filing of direct indictment is foreseen in Article 461 of the CPCCK for criminal offences for which the principal punishment is a fine or imprisonment of up to three years.

⁶⁰ Pursuant to Article 180 CCK, the criminal offence of election fraud is punishable with imprisonment of up to five years, and thus, in line with Article 21 CPCCK, falls under the competence of municipal courts.

Ferizaj/Uroševac, 2 indictments; in Prizren, 7 indictments; and in Gjilan/Gnjilane, 5 indictments.

Prosecutors have a professional duty to vigorously investigate, and only if the evidence permits, prosecute individuals suspected of electoral misconduct.⁶¹ Conversely in these cases, the prosecution charged a great number of persons for electoral fraud without conducting any investigations. As a result, the subsequent indictments displayed a scarcity of evidence and poor reasoning, and failed entirely to individualize the actions and criminal responsibility of different co-defendants.

As noted earlier in this report, the re-count process revealed irregularities in vote-counting in 890 polling stations across Kosovo.⁶² The Public Prosecutor forwarded these findings and related evidence to the territorially-competent municipal prosecution authorities for further investigation and possible prosecution of election-related crimes.

The OSCE was informed about an additional instruction from the Public Prosecutor's Office, which served to supplement the re-count findings.⁶³ The particular instruction called on municipal prosecution offices to file direct indictments, i.e., without any formal investigation⁶⁴, in all cases where the re-count process detected irregularities in votes above a certain threshold⁶⁵. Indictments, as per this instruction, should charge the defendants with the criminal offence of election fraud. It should be noted that election fraud is the most serious offence in the category of election-related crimes: the CCK foresees imprisonment from six months up to five years for this particular offence.⁶⁶

⁶¹ Prosecutors are not to initiate or continue prosecution when an impartial investigation shows the charge to be unfounded: see para. 27 of Recommendation 2000(19) on The Role of Public Prosecution in the Criminal Justice System, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

⁶² See note 57, *supra*.

⁶³ The OSCE was provided with a copy of an e-mail sent from the Public Prosecutor's Office to Pejë/Peć, Gjakovë/Dakovica and Gjilan/Gnjilane municipal prosecution offices, ordering that direct indictments be filed in all cases where the re-count process detected manipulation of votes above a certain threshold. Additionally, prosecutors should request the accessory punishment pursuant to Article 54(3) and (8) CCK, i.e., a prohibition on exercising public administration or public service functions and an order to publish a judgment. The OSCE review of respective case-files revealed that some municipal prosecution offices declared this e-mail instruction to be a criminal report, and thus form the basis for the subsequent indictments. The indictments filed by the Gjilan/Gnjilane municipal prosecution make an explicit reference to the Public Prosecutor's instruction and list it as evidence. The Prizren Municipal Chief Prosecutor informed the OSCE that their office also received a similar instruction.

⁶⁴ If the prosecutor considers that the information he or she has in relation to the criminal offence and the offender provide sufficient grounds for filing an indictment, proceedings before the court may be conducted only on the basis of an indictment, i.e., without prior investigation. Article 304(1) Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments. On 22 December 2008, Kosovo promulgated Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, which left the code substantially the same as the 2003 law, though a section on guilty plea agreements was added, an article on the length of police-ordered detention was amended, and the name of the code was changed to Kosovo Criminal Code of Procedure.

⁶⁵ OSCE review of the instructions sent by e-mail by the Public Prosecutor's Office to different municipal prosecutions, and interviews with various prosecutors, revealed that different municipalities were assigned different thresholds for when the direct indictments should be filed, e.g. Pejë/Peć 300 votes, Gjilan/Gnjilane 400 votes, Viti/Vitina 500 votes.

⁶⁶ CCK, note 37, *supra*, Article 180: "Whoever falsifies the results of an election held in Kosovo by adding, removing or deleting votes or signatures, by counting them incorrectly, by registering incorrectly the results of the election in the election documents or in any other manner, or publishes results of the election or the

The applicable procedural law foresees that the prosecutor shall file an indictment when there is sufficient evidence to substantiate a well-grounded suspicion that the defendant committed the suspected criminal offence.⁶⁷ The indictment shall contain an explanation of the grounds for filing the indictment and the evidence establishing the key facts.⁶⁸

In cases where the prosecutor charges more than one person, the indictment shall detail the actions of each alleged accomplice by which he or she participated in the commission of the offence or substantially contributed to its commission in any other way.⁶⁹ Accordingly, each alleged co-perpetrator should be held criminally liable (only) for his or her actions related to the offence and (only) within the limits of his or her intent or negligence.⁷⁰

However, in relation to the cases of election fraud, prosecutors collectively and without any investigations charged *all* committee members⁷¹ in polling stations where the re-count detected irregularities above a certain threshold. In accordance with the instruction of the Public Prosecutor, in many municipalities the sole determining factor behind these indictments was the number of allegedly manipulated votes.⁷² The following case examples demonstrate shortcomings detected in these indictments.

On 23 June 2011, Prizren municipal prosecution office filed an indictment against seven defendants for the criminal offence of election fraud in co-perpetration. According to the prosecution, on 12 December 2010, Defendant 1 in the capacity of the chairperson, and Defendants 2, 3, 4, 5, 6 and 7 in the capacity of members of the polling station committee, intentionally falsified the results of elected candidates, adding 63 and removing 71 votes. Hence they allegedly manipulated a total number of 134 votes. The particular irregularities were detected through the re-count process. Based on this, the prosecutor concluded that the defendants counted and registered the votes incorrectly, and the CEC material was listed as evidence. With no further evidence or reasoning, the indictment concludes that “the evidence put forward is a satisfactory base that the defendants 1, 2, 3, 4, 5, 6 and 7, on 12 December 2010, committed the actions as stated in the enacting clause, and hereby fulfilled all the essential elements of the criminal offence election fraud in co-perpetration.” No substantiation was provided regarding which particular actions or circumstances constituted the “satisfactory base” for such a conclusion, or which were the essential elements of the crime in the particular case.

On 19 January 2012, Prishtinë/Priština municipal prosecution office charged seven defendants with the criminal offence of election fraud in co-perpetration. Similarly to

voting that do not correspond to the actual voting shall be punished by imprisonment of six months to five years.”

⁶⁷ CPCK, note 64, *supra*; pursuant to Article 316(1)(4), the confirmation judge shall dismiss the indictment when there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment.

⁶⁸ CPCK, *ibid*, Article 305(1)(5).

⁶⁹ CCK, note 37, *supra*, Article 23.

⁷⁰ CPCK, note 64, Article 27(1).

⁷¹ The CEC appointed seven committee members to each polling station to conduct and ensure the proper running and accuracy of the election process. Committee members were responsible for the whole process of voting, counting and registering of votes. See Polling and Counting inside Polling Stations on Municipal Election Commission Level, CEC Electoral Rule No. 09/2009.

⁷² See notes 63, 64 and 65, *supra*.

the previous case example, the prosecution asserts that on 12 December 2010, the defendants, in the capacity of polling station committee members responsible for the voting process, intentionally falsified the results of the elections by adding and removing votes of certain candidates from different political subjects. The indictment refers to the CEC re-count evidence, which revealed that 1652 votes were manipulated. Apart from the CEC material, the indictment omits to present any other corroborating evidence or reasoning. The indictment concludes that “defendants’ behaviour manifests all the essential elements of the criminal offence that they are charged with”.

Moreover, many of these indictments displayed identical content and wording; only defendants’ personal data, identification of respective polling station and the number of manipulated votes differed.⁷³ This raises an additional concern that the same template was used for all indictments, with little or no attention paid to the individual circumstances of each case.

In all too many instances, the prosecution filed indictments not only without conducting any investigations but also without any prior contact with the suspects.⁷⁴ These persons were made aware of the charges of election fraud against them only when the indictment was delivered to them. In all these cases, the confirmation of indictment session was the first opportunity for the defendants to respond to the accusations against them. The OSCE monitored confirmation hearings which revealed serious mistakes contained in prosecutors’ indictments.

On 21 September 2011, a confirmation hearing was held before Gjilan/Gnjilane municipal court. One of the defendants strongly objected to the charges brought against him by the municipal prosecution office. Despite being assigned as a polling station committee member by the CEC, he stressed that in the end he did not in fact work on the election day. The other defendants confirmed that this person was not a member of their polling station committee. The court reviewed the elections documents from the respective polling station, presented as evidence by the prosecutor. The signature of the defendant was not among the signatures of polling station committee members. Only at that point did the court terminate the procedure against the defendant.

The OSCE monitored a number of similar cases where the proceedings were terminated at the confirmation stage because the defendants were not present in the respective polling station which was the subject of the indictment on the critical day, i.e., they did not serve as polling station committee members at all or worked in another polling station. Such errors could have been avoided had the competent prosecutor thoroughly examined the case file or undertaken additional investigative steps such as examining the defendants.

⁷³ OSCE monitors observed such indictments filed by municipal prosecution offices in Prishtinë/Priština, Gjakovë/Djakovica, Gjilan/Gnjilane, Prizren and Ferizaj/Uroševac.

⁷⁴ OSCE monitoring has revealed that defendants were generally contacted only in Prishtinë/Priština, where the municipal prosecution office ordered the police to acquire defendants’ statements prior to filing indictments based on the re-count. All other municipal prosecution offices rendered indictments solely on the basis of the CEC material, without examining or even notifying the defendants in this regard. One case where the prosecution conducted a proper investigation was monitored in Prizren. This report lists this particular case as a good practice example: see p. 13, *infra*.

As seen from the illustrated case examples, most indictments based on the findings of the re-count relied exclusively on the material provided by the CEC.⁷⁵ These indictments lacked adequate reasoning, and mainly, they failed entirely to individualize the actions and resulting criminal responsibility of different co-defendants. In the vast majority of these cases, prosecutors did not undertake any investigative steps. In some instances, the prosecutors did not even verify whether the defendants in fact acted upon their assigned committee member's duty on the election day through a diligent review of available evidence or prior contact with the suspects. Filing direct indictments against persons exclusively based on their assigned capacity (as committee members) violates prosecutors' professional obligations and duties of due diligence. It may also amount to a breach of international human rights standards: flagrant and serious deficiencies in the criminal investigation and prosecution even of crimes carrying less serious punishment amount to a failure of authorities to fulfil their positive obligations to protect human rights.⁷⁶

Nonetheless, the OSCE has also observed recent positive developments. The following case illustrates an example of good practice in how the prosecution should treat election fraud suspicions deriving from the findings of the re-count.

On 5 March 2012, Prizren municipal prosecution office filed an indictment against two defendants for the criminal offence of election fraud in co-perpetration. The particular fraud allegations originated during the re-count process, which revealed that votes for candidates were manipulated in the polling station where the defendants served as committee members. The case has been handled by a mixed team of one local and one international prosecutor from the European Union Rule of Law Mission in Kosovo (EULEX). Based on the CEC material, the prosecution initiated an investigation against all seven committee members. The investigation included a review of the CEC evidence but also hearing of witnesses and defendants. As a result, the prosecution raised charges against two persons from the polling station committee, the chairperson and the committee member who inserted the data in the respective forms. The investigation against the remaining five committee members was terminated due to a lack of evidence. The indictment in this case contains a thorough reasoning, which analyses the evidence collected during the course of the investigation, and hereby allows for a proper scrutiny of the actions of the municipal prosecution office.

Despite the instruction of the Kosovo Public Prosecutor's Office⁷⁷, in the above case example the prosecution recognized that the evidence from the re-count process was insufficient to support a well-grounded suspicion against all polling station committee members. In light of this, the prosecution launched a proper investigation, and based on the evidence collected therein, it charged two committee members and terminated proceedings against the other five. Although the legislation foresees the possibility of direct indictments without prior

⁷⁵ The CEC material, which was used by prosecutors to raise the election fraud charges included the RRFs, containing votes for the political entities, CRFs, containing votes for the candidates, both as registered by the polling station committees, the C&RC audit report – highlighting the discrepancies between the votes as counted and registered by the polling station committee and by the audit team – and the respective CEC reports to the Public Prosecutor's Office.

⁷⁶ See *Blumberga v. Latvia*, ECtHR Judgment of 14 October 2008, at para. 67.

⁷⁷ See notes 63, 64 and 65, *supra*.

investigations⁷⁸, prosecutors should use this option only when they possess evidence which is sufficient to reach the threshold of a well-grounded suspicion.

4.2. Courts

4.2.1. *Confirmation of indictments: indictments confirmed in the absence of a well-grounded suspicion against individual co-defendants*

The OSCE is concerned about instances where the treatment of 2010 election fraud cases by the courts at the confirmation stage reinforced rather than remedied the identified shortcomings of indictments. In too many cases, the courts confirmed indictments falling short of the requisite legal conditions.

OSCE monitors attended confirmation sessions and/or reviewed respective confirmation decisions in 15 cases: in Pejë/Peć, 10 cases; in Gjiilan/Gnjilane, 2 cases; and in Prizren, 3 cases. OSCE legal system monitors are aware of many more instances where this type of indictment was confirmed by the courts without amendments. This implies that also in these cases, the courts failed to properly scrutinize these indictments on the requisite legal conditions. Altogether, OSCE monitors are aware of 58 indictments, which were confirmed and passed on to the main trial stage without adequate legal scrutiny⁷⁹: in Pejë/Peć, 25 cases; in Gjiilan/Gnjilane, 25 cases; in Prizren, 6 cases; and in Ferizaj/Uroševac, 2 cases.

A confirmation session is meant to assess the quality of a prosecutor's indictment before passing it to the main trial. Aside from other legal requirements⁸⁰, the court shall confirm the indictment only when there is sufficient evidence to support a well-grounded suspicion that the defendant committed the charged offence.⁸¹ In cases of indictments against more than one person, the court shall review and decide on the quality of the indictment separately regarding each co-defendant. In spite of this, the OSCE has monitored a considerable number of confirmation sessions where judges failed to respect these legal precepts, as illustrated in the following examples:

On 19 September 2011, a confirmation hearing was held before Pejë/Peć municipal court. The defendants pleaded not guilty and argued that the prosecutor presented no evidence which proved their involvement in election fraud. The confirmation judge rejected these objections without adequate reasoning. Instead, the judge referred the defendants to the instruction of the Kosovo Public Prosecutor's Office which foresaw criminal proceedings in all cases where the alleged manipulation exceeded 300 votes. The judge confirmed the indictment in its entirety and instructed the defendants that all other matters would be addressed during the main trial.

On 29 August 2011, Deçan/Dečani municipal court confirmed an indictment in a similar election fraud case. Without any further reasoning, the judge ascertained that

⁷⁸ CPCK, note 64, *supra*, Article 304.1 After the investigation has been completed, or if the public prosecutor considers that the information that he has in relation to the criminal offence and the offender provide sufficient ground for filing an indictment, proceedings before the court may be conducted only on the basis of an indictment filed by the public prosecutor.

⁷⁹ The 58 indictments reviewed included the 15 cases which went on to scheduled confirmation hearings, monitored by the OSCE.

⁸⁰ CPCK, note 64, *supra*, Article 305.

⁸¹ CPCK, *ibid*, Article 316(4) as read with Article 316(1)(4).

there was sufficient evidence supporting the suspicion that the defendants committed election fraud in the polling station specified in the indictment. In this regard, the judge referred to the CEC documents submitted by the prosecutor. During the main trial session on 17 November 2011, the court presented to the defendants the CEC material from the case file to confirm their signatures. At this point it became clear that these documents pertained to a different polling station than the one where the defendants served as committee members. The CEC material submitted by the prosecution, upon which the indictment was confirmed, displayed names and signatures of persons other than the defendants.

OSCE monitoring revealed that in a substantial number of cases, the courts conducted confirmation hearings as a mere formality. A high number of election fraud indictments were confirmed in the absence of evidence which would support a well-grounded suspicion against individual co-defendants. Most of the confirmation decisions reviewed by the OSCE were issued in blanket form, lacking adequate and/or sufficient reasoning.⁸²

When judges confirm indictments in the absence of the requisite well-grounded suspicion, they act in contradiction with the applicable law. When they pass such cases to the main trial, judges also fail to take advantage of the pre-selection function assigned to the confirmation stage, whereby they further increase already great numbers of pending trials and exacerbate resulting backlogs.

4.2.2. Main trial: failure to thoroughly and fairly examine cases vis-à-vis individual co-defendants

The OSCE is concerned about instances where judges have failed to exercise the requisite level of due diligence in adjudicating election fraud cases resulting from the re-count process. The failure to administer sufficient and relevant evidence, further reinforced through a lack of adequate reasoning in the issued verdicts, prompts doubts as to whether the courts thoroughly and fairly examined all the relevant facts of these cases, mainly relating to the individual actions and liability of co-defendants.

Until the end of June 2012 main trials had already started in at least 21 cases⁸³, and no less than ten cases have been concluded on the first instance⁸⁴. During the main trial, the court has the duty to ensure that the case is thoroughly and fairly examined.⁸⁵

The court must truthfully and completely establish the facts of the case which are important to rendering a lawful decision.⁸⁶ Equal attention must be paid to both inculpatory and exculpatory facts and evidence.⁸⁷

⁸² CPCK, *ibid*, Article 317(1) provides that all confirmation decisions shall be supported by adequate reasoning but in such a way so as not to prejudice the adjudication of the matters which will be considered in the main trial. This is also clearly related to the right to a fair trial under Article 6(1) ECHR, which entails the right to a well-reasoned decision. See OSCE report *Confirmation of indictment concerns* (October 2010), <http://www.osce.org/kosovo/73711> (accessed 25 September 2012).

⁸³ In Pejë/Peć, eight cases; in Gjakovë/Đakovica, two cases; in Gjiilan/Gnjilane, one case; in Prizren, eight cases; two in Ferizaj/Uroševac and one in Prishtinë/Priština.

⁸⁴ In Pejë/Peć, three cases; in Gjiilan/Gnjilane, one case; in Prizren, five cases; and in Ferizaj/Uroševac, one case. As of yet, no cases have been concluded in Prishtinë/Priština.

⁸⁵ CPCK, note 64, *supra*, Article 333(2). Pursuant to Article 360(5), in addition to the evidence proposed by the parties, the trial panel shall have the authority to collect evidence that it considers necessary for the fair and complete determination of the case.

As noted earlier in this report⁸⁸, in cases of co-perpetration each co-defendant is criminally liable only for his or her actions related to the offence, and only within the limits of his or her intent or negligence. According to this principle, the court shall assess the actions and the related criminal responsibility of each co-defendant separately.

The presumption of innocence represents an integral part of the right to fair trial.⁸⁹ The principle places the burden of proof on the prosecution and it guarantees the accused the ultimate benefit of the doubt. This means that the prosecutor has the legal burden to prove all the elements of the offence vis-à-vis all defendants, and the court is obliged to interpret factual or legal doubts in favour of these defendants. The court shall convict a defendant only when the administered evidence proved his or her guilt beyond any reasonable doubt.⁹⁰

The OSCE has monitored 19 of the initial main trials conducted in relation to election fraud cases resulting from the re-count process. Ten of these cases had been concluded by first instance courts. Initial monitoring displayed instances where judges adjudicated these cases without administering sufficient or relevant evidence to assess and establish the individual actions and liability of co-defendants. Six of the eight concluded cases resulted in collective convictions against all of the polling station committee members on trial. This raises additional concerns whether outstanding doubts regarding the merits of these cases were indeed interpreted in favour of the defendants, as prescribed by law. The following case examples illustrate some of these shortcomings:

On 1 March 2012, Gjilan/Gnjilane municipal court convicted four defendants⁹¹ for election fraud in co-perpetration and sentenced them to two months' imprisonment. All four defendants pleaded not guilty. As evidence, the court referred to the CEC material, which showed that the candidates of some political parties received more votes than the parties themselves. The court defined this as a "visible and intolerable manipulation of votes". The defendants declared that each of them counted votes for the political party they were representing, and it was the chairperson who filled the forms. All four defendants confirmed that they had signed these forms without any remarks, but some stated that they did not check what they were signing, and that the chairperson may have tricked them. Based on the CEC evidence and defendants' statements, the court concluded that "all defendants, as members of the polling station committee, were responsible for counting votes and filling the forms". Therefore, "with their active and passive - silent participation, they added or removed votes of citizens, and incorrectly registered these votes in the candidate result forms". The

⁸⁶ CCK, note 37, *supra*, Article 7(1).

⁸⁷ CCK, *ibid*, Article 7(2).

⁸⁸ See note 70, *supra*.

⁸⁹ Article 6(2) ECHR; CPCK, note 37, *supra*, Article 3.

⁹⁰ The presumption of innocence principle is fundamental in the criminal justice system. Criminal conviction may impose a variety of hardships on a defendant, including public imprisonment, fines, and public humiliation. It is in the public interest that innocent people are not convicted, i.e., to protect a particular individual on trial but also to maintain public confidence in the integrity and security of the legal system. This explains why the legal burden of proof rests entirely with the prosecution, and the high proof standard of reasonable doubt. For further discussion of these principles, please see Simon Cooper, "Human Rights and Legal Burdens of Proof" [2003] 3 Web JCLI; <http://webjcli.ncl.ac.uk/2003/issue3/cooper3.html> (accessed 25 September 2012).

⁹¹ The Gjilan/Gnjilane municipal prosecution office filed the indictment against seven defendants. The procedure was terminated against three of the defendants at the confirmation stage. See p. 12, *supra*.

court found all committee members guilty because “the elements of the criminal offence they are charged with exist in their acts”. However, the court did not specify or explain what these particular acts were.

On 10 August 2011, the Dragash/Dragaš municipal court convicted seven defendants for election fraud in co-perpetration with a suspended sentence of six months’ imprisonment. All seven defendants pleaded not guilty. As in the previous case example, the evidentiary proceeding consisted of reading the CEC material and taking statements from the defendants. In the written verdict, the court elaborated in detail on the irregularities detected throughout the re-count process. It outlined the exact inconsistencies in votes for every affected candidate. The verdict further reflected on the defendants’ statements. The court established that each defendant was, as a polling station committee member, responsible for counting the votes of his or her own political party, and that it was the chairperson – one of the defendants – who filled in the forms. All the defendants confirmed that they had signed the forms, though they admitted that they did not check the correctness of inserted data. Without any further reasoning, the court concluded that “the actions of defendants present all the elements that constitute a criminal offence of election fraud”. Also in this case, the court did not specify in greater detail what the individual actions of the defendants were.

In the case examples presented, the courts adjudicated the cases and issued convicting verdicts based only on the CEC material and defendants’ statements. The courts found all defendants guilty of election fraud in co-perpetration, yet they failed to properly examine and establish their individual actions and responsibility in the criminal act. The OSCE is concerned that in this way, the courts did not fully discharge their due diligence duties in examining all relevant facts of the case. Given these deficiencies in the determination of factual situations, the convictions issued may have also compromised the principle of the presumption of innocence, which requires that doubts be interpreted in favour of defendants. Finally, the verdicts lacked adequate reasoning, which only further obstructed proper scrutiny of court actions and thereby further undermined the fair trial rights of defendants.⁹²

In addition, in a considerable number of recently monitored cases, the courts have expanded evidentiary proceedings beyond reading the CEC material and taking defendants’ statements. New evidence considered in such hearings includes examination of witnesses⁹³ and a new re-count of votes⁹⁴, but concerns still remain regarding the extent to which this new evidence supported a well-grounded suspicion of the individual criminal responsibility of accused persons.

On 12 March 2012, Pejë/Peć municipal court held a main trial session in a 2010 election fraud case resulting from the re-count process. The court examined two witnesses, both members of the C&RC. The witnesses explained the re-count process, including their individual role and activities. They clarified how the irregularities in

⁹² See note 82, *supra*. The right to a well-reasoned decision is an integral part of the right to fair trial under Article 6 ECHR. CPCK, note 59, *supra*, Article 403(1)(13), Article 401(1)(1) and (3). A lack of or an inadequate reasoning may pose a substantial violation of criminal procedure. Together with erroneous or incomplete determination of factual situations they both form valid grounds for appeal on which a judgment may be challenged.

⁹³ In most cases, persons involved in the re-count process have testified as witnesses. The OSCE also monitored one case in Prizren where election observers were summoned as witnesses.

⁹⁴ OSCE monitors observed such practice in Pejë/Peć, Dečan/Dečani, Gjakovë/Đakovica and Dragash/Dragaš.

votes were discovered, and how these were handled and marked by the C&RC audit team. In the same session, the presiding judge announced that the court would formally request the CEC to conduct another re-count of votes.

In the above case example, the hearing of audit team members as witnesses shed light on relevant circumstances related to the re-count process and the irregularities in votes detected therein. The new re-count ordered by the court aims to verify the findings of the first re-count. This extension of evidentiary proceedings unquestionably represents a positive step, but it remains to be seen how the courts will use this evidence in determining the merits of the case, especially as regards the individual actions and responsibility of co-defendants. The following case example demonstrates possible challenges:

On 6 March 2012, Deçan/Dečan municipal court convicted seven defendants for election fraud in co-perpetration and sentenced them to 90 days' imprisonment. Apart from the CEC evidence and defendants' statements, the court ordered recounting of votes for the particular polling station. The new re-count supported the findings of the first re-count that a substantial number of votes for candidates had been added and removed. In their statements, all the defendants declared that they were not involved in or aware of any manipulation. Some defendants stated that if mistakes occurred, it happened unintentionally. In its evaluation of evidence, the court established as uncontested that "all defendants worked on the critical day in the respective polling station, where each had their duty, and at the end, they all signed the forms". The court highlighted the new re-count evidence which confirmed the discrepancies in votes. The court concluded that this evidence proved that the defendants added and removed votes of different candidates by putting incorrect data in the forms, and as a result, the defendants manipulated 430 votes. The court stated that "the defence of the accused does not stand because they did not justify it with any evidence; just a denial is not accepted as evidence". The court found all defendants guilty because "the elements of the criminal offence they are charged with exist in their acts". The court did not specify the actions of the different co-defendants in more detail.

In this case example, the court correctly established that votes were manipulated in the particular polling station, as proved by the findings of the first and second re-count. However, also in this case, the court failed to assess the individual actions of different co-defendants in regard to this manipulation. And also in this case, the court convicted all seven co-defendants without establishing their individual involvement and responsibility in the election fraud.

In all presented case examples, the courts appeared to have collectively derived the criminal responsibility of all co-defendants from their capacity as members of a polling station committee. In this regard, the courts did not seem to have differentiated whether the defendants actively or passively participated in the commission of election fraud by incorrectly counting or registering candidates' votes. If convicting the committee members for omitting to verify the correctness of inserted data, the courts implicitly convict them for an act of omission, i.e. the failure of the committee members to conduct reasonable checks of the data registered in the election forms. As in the presented case examples, it is generally the chairperson who registers this data.

As noted above, however, the CCK does not specifically stipulate a positive duty of members of the polling station committee to verify the correctness of election data registered by other members of the committee, such that a failure of these persons to do so is not a criminal

offence and thus cannot be criminally sanctioned.⁹⁵ Moreover, as indicated earlier in this report, international standards provide a particularly high standard of proof beyond reasonable doubt in criminal law.⁹⁶ In respect of this, the courts should not measure the criminal responsibility of defendants merely on the basis of the fact that they have violated their obligations as polling station committee members as according to the Law on General Elections it could constitute only a civil liability.⁹⁷ The fact that in the presented case examples, the courts failed to adequately reason the issued verdicts, only further obstructs proper scrutiny of court actions.

The OSCE is further concerned that by rejecting the defence of the accused because they did not present any exculpatory evidence, the court compromised the defendants' presumption of innocence. In criminal proceedings, the burden of proof rests entirely with the prosecution.⁹⁸ Accordingly, defendants are not required to prove their innocence, and even more so, any factual or legal doubt shall be interpreted in their favour. In light of this, Kosovo courts should absolutely not hold or interpret any disadvantage against defendants if they fail to present evidence proving their innocence.

Despite the above-illustrated shortcomings in the adjudication of election fraud cases based on the re-count process, the OSCE has identified a case example in which the court assessed the actions and responsibility of each co-defendant individually. The case-by-case approach of the court's analysis here is closer to normative standards (notwithstanding the obvious inappropriateness of finding criminal guilt under the CCK without clear proof of intent to commit election fraud):

On 30 May 2011, Ferizaj/Uroševac municipal court found one defendant, a chairperson, guilty of election fraud and sentenced him to a suspended sentence of six months' imprisonment and a fine of 800 Euro. The court acquitted all other defendants, who had acted as committee members in the same polling station committee, due to a lack of evidence.⁹⁹ During the main trial, the court admitted CEC material and statements of the defendants as evidence. All defendants declared that the chairperson was the individual who had filled the forms, with two other committee members dictating the information entered in the forms. All committee members confirmed that they had signed the forms in the end. Based on this evidence, the court ascertained that "the elements of election fraud existed *only* in the behaviour of the

⁹⁵ See text above, at note 45, *supra*.

⁹⁶ See note 90, *supra*.

⁹⁷ Generally, polling station committee members certify the accuracy of the electoral process through signing of relevant forms. Any mistake contained in the signed forms could be construed as a violation of the committee members' obligations. However, pursuant to Article 102(2) of the Law on General Elections, note 2, *supra*, the law envisages a different degree of responsibility for the chairperson and other committee members. It foresees that *only* the chairperson shall be responsible for the compilation and accuracy of the counted results from the polling station recorded on the appropriate forms, and shall forward the completed forms to the designated location. Section 15(19) of CEC Electoral Rule No. 09/2009, note 71, *supra*, also stipulates that the chairperson of the polling station shall be responsible for the compilation and accuracy of the counted results, recorded on the appropriate result forms. The Law on General Elections is a civil law, which can only provide for civil liabilities. In light of this, the differing responsibilities for chairpersons and other members of the polling station committee enshrined under this law becomes secondary to the fact that there is a lack of legal basis for criminal liability for the act of omission in relation to the offence of election fraud.

⁹⁸ See note 90, *supra*.

⁹⁹ In his closing statement, the prosecutor withdrew charges against two other defendants because he deemed that it was not proven that each of them committed the offence of election fraud.

defendant, the chairperson”. The court deemed that in his capacity as chairperson, the defendant “had responsibilities to initiate and conclude the election process fairly, and he personally filled and signed all the forms”. Moreover, the court established the CEC documents were trustworthy due to their “public nature” and because “neither of the defendants denied signing them”. The court established that according to the evidence admitted to the court, “the committee members dictated the results, and it was only the chairperson who wrote them”. In light of this, the court found the chairperson guilty. In contrast, the court acquitted the other two defendants because “the prosecutor did not manage to divide their responsibility”. In this regard, the court referred to legal provisions highlighting the principle by which the benefit of the doubt must be given in favour of the defendants¹⁰⁰, the obligation of the court to pay equal attention to both inculpatory and exculpatory evidence¹⁰¹, and the lack of evidence¹⁰².

In this case, the court paid proper attention to individual co-defendants and their actions in the charged offence. The well-reasoned verdict not only allows for proper scrutiny of the actions of the court in a transparent manner which justifies the decision of the judge, but also indicates a thorough and fair adjudication of the case where all facts relevant to the case were examined.

5. CONCLUSIONS

Effective investigations and trials of election-related offences not only ensure the accountability of those guilty of such crimes, but also serve to deter similar misconduct in the future. Failure to vigorously investigate, prosecute and handle election fraud cases may encourage impunity and ultimately lead to a repetition of misconduct in subsequent elections.

The findings of the CEC-ordered re-count process served as a basis for a high number of criminal proceedings initiated in response to 2010 election-fraud allegations. OSCE monitoring has identified indictments and the processing of an increased number of cases in comparison to the response of the Kosovo justice system to cases of alleged fraud during the 2007 and 2009 elections, posing a significant positive development. Nonetheless, OSCE monitoring has also indicated that Kosovo justice actors have often treated these cases in a superficial manner, falling short of the requisite standard of due diligence. The report highlights that such proceedings violate international and Kosovo legal standards and compromise defendants’ fair trial rights. The report outlines concerns relating to the performance of prosecutors at the pre-trial stage and the treatment by courts of these cases during confirmation of indictments and main trials.

Based on the irregularities detected in the re-count process, municipal prosecution offices charged hundreds of polling station committee members with the criminal offence of election fraud. OSCE monitoring has indicated, however, that prosecutors have placed more focus on the high number of rendered indictments than their quality. In all too many cases, prosecutors filed indictments without any investigations or any prior contact with the suspects, solely based on the evidence from the re-count process. As a result, indictments fell short of supporting a well-grounded suspicion against individual co-defendants, displayed either no

¹⁰⁰ CPCK, note 64, *supra*, Article 3(2).

¹⁰¹ CPCK, *ibid*, Article 7(1).

¹⁰² CPCK, *ibid*, Article 390(1)(3).

reasoning or poor reasoning, and failed to individualize the actions and criminal responsibility of each accused. Prosecutors appear to have used one identical indictment template for all cases and, in some instances, they charged persons who were not present in respective polling stations on the critical day. Indicting persons exclusively on the basis of their assigned capacity as committee members violates standards of due diligence and prosecutors' professional obligations, and may also amount to a breach of international human rights standards.¹⁰³

Once these indictments reached the confirmation stage, most judges also neglected to properly assess their quality as obliged under the law. Instead, in all too many instances judges treated the confirmation stage as a mere formality. They confirmed indictments even in the absence of a well-grounded suspicion against individual co-defendants, issued uniform decisions without adequate reasoning, and largely passed most – if not all – cases on to the main trial. When judges confirm indictments which do not meet the requisite legal criteria, they violate applicable law and also fail to take advantage of the pre-selection function of the confirmation stage, thereby further increasing an already great number of pending trials and exacerbating the resulting backlog.

As of September 2012, only a small portion of all election fraud cases based on the re-count process have reached the main trial stage. However, initial OSCE court monitoring has revealed instances where the courts fell short of the requisite standard of due diligence in adjudicating these cases. Particularly worrisome are cases where the courts conducted and concluded main trials, often with convicting verdicts, only based on the CEC evidence and the statements of defendants. The OSCE is concerned that, as a result, courts have failed to ensure a thorough and fair examination of the case as prescribed by the law, especially regarding the individual actions and liability of co-defendants. Given these deficiencies, the issued convictions may have also compromised the presumption of innocence principle, which is at the core of the right to fair trial.

Despite the observed shortcomings, the OSCE monitored a number of case examples of good practices where Kosovo justice actors demonstrated diligent performance, adhering to legal precepts and respecting fair trial rights, access to justice and the principles of due diligence.

6. RECOMMENDATIONS

To municipal prosecution offices:

- Vigorously investigate all election fraud suspicions stemming from the findings of the re-count process;
- File indictments only when in possession of sufficient evidence to support a well-grounded suspicion that the defendant(s) committed the criminal act;
- Duly reason all indictments. In cases involving multiple defendants, clearly indicate the actions of each defendant whereby he or she participated or substantially contributed to the commission of the criminal offence.

¹⁰³ See note 61, *supra*.

To municipal court judges:

- Confirm indictments only when all legal criteria are fulfilled, including the presence of well-grounded suspicion against each defendant;
- Duly reason all confirmation decisions;
- In the main trial, thoroughly examine all facts relevant to the case. In cases involving co-defendants, examine their individual actions and liability in relation to each criminal offence charged;
- Diligently assess parties' requests for evidence and/or *ex officio* order such evidence which is necessary for a fair and complete adjudication of the case;
- Be cognizant of the presumption of innocence principle, which vests the burden of proof with the prosecution and guarantees defendants the ultimate benefit of the doubt;
- Be cognizant of the principle of legality when assessing defendants' criminal liability for an act of omission in election fraud;
- Do not derive criminal responsibility of the defendants from their role and obligations as polling station committee members;
- Duly and sufficiently reason all decisions and verdicts, paying attention to each element of the offence and each offender.

To the Kosovo Judicial Institute:

- Develop training for criminal judges and prosecutors on the role of the confirmation-of-indictment hearings and the evidentiary standards applied;
- Consider training criminal judges and prosecutors on legislation related to election-related offences.

ANNEX
Statistical overview of 2010 election-related offences, as of 2 February 2012¹⁰⁴

Municipal prosecution office	Cases received¹⁰⁵	Indictments¹⁰⁶	Summary indictments¹⁰⁷	Cases dropped/ closed/ transferred for competence	Cases in process¹⁰⁸	Cases concluded at first instance
Prishtinë/Priština	160	21	19	36	84	12
Ferizaj/Uroševac	47	38	0	9	0	8
Gjilan/Gnjilane	58	31	2	27	0	2
Gjakovë/Đakovica	33	12	1	21	0	2
Pejë/Peć	47	30	0	11	0	3
Mitrovicë/Mitrovica	55	4	7	12	0	5
Prizren	95	30	3	15	49	3
TOTAL	495	166	32	131	133	36

¹⁰⁴ Public Prosecutor's Annual Working Report, (January-December 2011) on cases of misconduct in early parliamentary elections of 12 December 2010. http://www.psh-ks.net/repository/docs/Elections_January-December_2011.pdf (Accessed 25 September 2012).

¹⁰⁵ These cases include ECAP complaints (ca. 191 cases, submitted between 30 December 2010 and 9 January 2011), note 58, *supra*, and CEC re-count findings (ca. 304 cases).

¹⁰⁶ OSCE monitoring and interviews with competent prosecutors have indicated that the vast majority of indictments filed in relation to the 2010 elections are based on the re-count process. The exception relates to the municipal prosecution office in Mitrovicë/Mitrovica, which has not filed any such indictment.

¹⁰⁷ CPCK, note 64, *supra*, Article 461 ff. Summary proceedings are simplified proceedings, without a confirmation hearing, permitted for criminal offences where the principal punishment is a fine or imprisonment up to three years.

¹⁰⁸ In these cases, the personal data of suspects is reportedly missing. The competent prosecution offices requested that the Kosovo police gather the needed data. According to the Public Prosecutor's Annual Working Report, note 10, *supra*, direct indictments are expected to be filed in all these cases.