



# Review of the Implementation of the New Criminal Procedure Code of Kosovo

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## **LIST OF ABBREVIATIONS**

CC	Criminal Code of Kosovo
CPC	Criminal Procedure Code of Kosovo
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EULEX	European Rule of Law Mission
GD	General Department within the Basic Courts
ICCPR	International Covenant on Civil and Political Rights
KJC	Kosovo Judicial Council
OSCE	Organization for Security and Co-operation in Europe Mission in Kosovo
PCPC	Provisional Criminal Procedure Code of Kosovo
SCD	Serious Crimes Department within the Basic Courts

## **EXECUTIVE SUMMARY**

This report provides an overview of the implementation of the new Criminal Procedure Code (CPC) that entered into force on 1 January 2013 together with other legislation reforming the Kosovo justice system. The CPC introduced major changes to criminal proceedings in Kosovo, solidifying a shift from the primarily inquisitorial system in place prior to 2003—and largely still in effect between 2003 and 2012—to a system principally characterized as an adversarial one.

Under the new CPC, the defence and prosecution have been given significantly enhanced roles, both pre-trial and at trial, with the judges given new responsibilities and powers to enable them to better act as protectors of the rights of the parties rather than as primary gatherers of evidence. At the same time, victims were given the status as parties to the proceeding, replacing their long-standing ability to bring subsidiary prosecutions.

However, the CPC was published only three days before it came into effect, and there was no time to provide extensive training to judges, prosecutors and lawyers on how to apply the provisions of this new code and to better understand their roles in adversarial proceedings. This report therefore examines whether the defence, prosecutors, judges and injured parties are embracing their new roles and responsibilities foreseen in the new code at different stages in the proceedings.

The report finds that most of the critical new procedures introduced in the CPC are not being applied properly, or are not being applied at all. The defence often does not fulfil its new responsibilities in practice, especially when the defendant is not represented by a defence counsel. Defendants on their own are usually unable to discharge their responsibilities. Even in cases where defence counsel is present, the defence often does not engage in the proceedings as actively as it should. The report also finds that prosecutors generally continue to carry out their role during the proceedings as they used to before the entry into force of the new CPC. For instance, they have not changed the way they take pre-trial statements from witnesses and very rarely use alternatives to trial. Furthermore, injured parties face difficulties finding their new place in the proceedings. It remains unclear whether they should be invited to initial and second hearings before the trial starts. Finally, judges often do not properly perform their role as the protectors of the rights of the parties. Time limits for the completion of the main trial are not always respected and deficiencies remain in the process of confirming the indictment.

The shift envisioned in the CPC to a primarily adversarial system is not seen in practice. The non-implementation of the provisions of the new CPC, which is designed to enforce the right of defendants to a fair trial, appears so widespread that it may result in the violation of the defendants' overall right to a fair trial.

The report concludes that judges, prosecutors and lawyers be given additional in-depth training in criminal procedural law in order to better understand the new provisions. This would address the most glaring deficiencies currently observed as they are the result of the judiciary not receiving adequate training prior to the adoption of the new code. Judges are also reminded to properly inform the defendants of the right to be provided defence counsel at public expense in cases where the conditions for mandatory defence are not met. The report also presents recommendations for judges, prosecutors, lawyers, defendants, injured

parties, victim's advocates, and the Kosovo Judicial Council on how to better apply the new provisions of the code.

## 1. INTRODUCTION

This report sets out the findings of the OSCE's justice sector monitors on the implementation of the new CPC that entered into force in Kosovo on 1 January 2013 together with other legislation reforming the Kosovo justice system.<sup>1</sup> The new CPC introduced a shift from the primarily inquisitorial system in place until 2013 to an adversarial one. In an adversarial system the principal responsibility for gathering and presenting evidence rests with the prosecution and the defence, while the judge acts as a neutral arbiter ensuring the fairness of the trial. In contrast, in an inquisitorial system, the judge plays an active role in the collection of evidence and interrogation of witnesses, with more limited roles played by the parties in this regard.

The report examines whether the shift has occurred in practice, and more particularly, whether the defence, prosecutors, judges and injured parties are embracing their new roles and responsibilities foreseen in the new code at the different stages in the proceedings. To assess whether the new roles are being assumed by the various actors in criminal proceedings, the OSCE conducted a comprehensive quantitative and qualitative assessment of data collected through: monitoring court activities between 2013 and 2015; a survey conducted in the third and fourth quarters of 2014 to shed light on how judges, prosecutors and lawyers were putting the new provisions of the CPC into practice; and interviews with various interlocutors such as judges, prosecutors, lawyers, and victim's advocates. The OSCE also took note of the issues raised by judges, prosecutors and lawyers during the working groups convened by the Kosovo Judicial Council in November 2013 to discuss the 2013 justice sector reforms, and in May 2015 when judges acknowledged facing difficulties in applying the provisions of the CPC in cases where the defendants are not represented by counsel. In some instances, the data collected from the court monitoring activities was limited because of a lack of access to documents in the case file from the investigation stage.

In 2013, OSCE monitored the proceedings in 215 criminal cases, 122 across the general department and 93 across the serious crimes department within the basic courts.<sup>2</sup> The first half of 2013 was a difficult transitional period because, in addition to the CPC, the new Law on Courts entered into force.<sup>3</sup> Moreover, many cases monitored in the first months of 2013 had begun in 2012 and continued under the previous procedural code, under (contentious) transitional provisions.<sup>4</sup> The monitoring revealed that there were strong deficiencies in the

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<sup>1</sup> Criminal Procedure Code, Law No 04/L-123, approved by the Kosovo Assembly on 13.12.2012, with an effective date of 01.01.2013, was promulgated by decree of the President of Kosovo on 21.12.2012. (hereinafter referred to as the CPC). The new Law on Courts also entered into force on 1 January 2013: Law on Courts, Law No 03/L-199, approved by the Kosovo Assembly on 22.07.2010. This Law, with an effective date of 01.01.2013, was promulgated by decree of the President of Kosovo on 09.08.2010.

<sup>2</sup> Case monitoring means more than simply observing a case during a hearing; monitors have also reviewed case files and collected relevant documents such as defence motions to dismiss the indictment and decisions denying or granting such motions, witness statements taken during the investigation stage, etc. Collecting such documents would not have been possible without co-operation from the court interlocutors.

<sup>3</sup> In Prishtinë/Priština, for instance, the new serious crimes department was almost non-functioning for several months due to the start of the renovation of the building where it was to be located in January 2013.

<sup>4</sup> See Supreme Court Legal Opinions issued on 15 and 23 January 2013 (43/2013 and 56/2013 respectively).

way the new CPC was being implemented. As a result of this preliminary stage of monitoring, in 2014, the OSCE designed a more targeted monitoring plan placing greater focus on the implementation of the new CPC provisions at the various stages of pre-trial and trial procedure. Thus, between January 2014 and June 2015, the OSCE monitored 1772 hearings in 906 criminal cases in the general department and the serious crimes department, the breakdown of the hearing is as follows:

Initial hearings	GD	324 hearings (of which 216 were productive hearings) <sup>5</sup>
	SCD	234 hearings (192 productive hearings)
Second hearings	GD	50 hearings (40 productive hearings)
	SCD	87 hearings (71 productive hearings)
Main trial hearings	GD	597 hearings (371 productive hearings)
	SCD	480 hearings (380 productive hearings)

Hearings were monitored in all seven Basic Courts in Kosovo:<sup>6</sup>

	Gjilan/ Gnjilane	Prishtinë/ Priština	Ferizaj/ Uroševac	Gjakova/ Djakovica	Mitrovicë/ Mitrovica	Pejë/ Peć	Prizren	Total
GD	109	185	69	50	189	194	175	971
SCD	51	197	20	107	122	106	198	801

OSCE monitors also collected and analysed 196 written judgements of which 71 were from the serious crimes department, and 125 were from the general department.

To verify the observations of OSCE monitors, the OSCE worked closely with the Kosovo Judicial Council, Kosovo Prosecutorial Council and Kosovo Chamber of Advocates to survey judges, prosecutors and lawyers on the use of the new provisions of the CPC.<sup>7</sup> Eighty lawyers responded to the questionnaire (out of 570 lawyers registered with the Kosovo Bar Association in mid-2014); 56 prosecutors (out of 160 within the prosecutorial system in Kosovo); and 70 criminal judges working in the general and serious crimes departments (out of 107 within the justice system in Kosovo). In addition, through the third and fourth quarters of 2014, the OSCE supported the Kosovo Judicial Council in organizing 14 workshops with judges, prosecutors and lawyers to discuss the implementation of the CPC and to present conclusions and recommendations on the implementation of the CPC.<sup>8</sup>

The second part of this report presents an overview of the international and Kosovo legal frameworks; this is followed by an outline of concerns identified in implementing the new

<sup>5</sup> A “productive hearing” is a hearing during which something of value or substance occurred. For instance, evidence was taken, motions were heard or decided upon, or case management issues were discussed.

<sup>6</sup> These included initial hearings, second hearings and main trial hearings and involved both productive and unproductive hearings.

<sup>7</sup> Three separate questionnaires were sent to judges, prosecutors and lawyers but the questions were similar in all questionnaires. The questionnaire was anonymous and the questions aimed at estimating how frequently the new provisions are being applied. Frequency was measured as follows: “never or seldom” (less than 20 per cent of the time); “occasionally” (between 20 per cent and 50 per cent of the time); and “often” (more than 50 per cent of the time).

<sup>8</sup> Kosovo Judicial Council, *Consolidated Report prepared by the Kosovo Judicial Council Rapporteur* (hereinafter referred to as the KJC Consolidated Report), 29 November 2014, <http://www.gjyqesori-rks.org/en/kjc/report/list/3>.

procedural code. The report concludes with a set of recommendations for relevant stakeholders.

## 2. INTERNATIONAL AND KOSOVO LEGAL FRAMEWORK

### 2.1. International legal framework

Criminal procedure codes are safeguards against the indiscriminate application of criminal laws. They are designed to enforce the right of criminal suspects and defendants to a fair trial, beginning with initial police contact and continuing through the stage of arrest, investigation, trial, sentencing and appeal. Disregarding such procedures can only result in violating the fair trial rights of defendants, which are protected under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Covenant on Civil and Political Rights. These international instruments are directly applicable in Kosovo.<sup>9</sup>

Furthermore, the European Court of Human Rights has held that equality of arms between the prosecution and defence during criminal proceedings is a fundamental aspect of the right to a fair trial.<sup>10</sup> The United Nations Human Rights Committee has described equality of arms as being the enjoyment of the same procedural rights by all parties, unless distinctions are based on law and can be justified on objective and reasonable grounds, not putting one party under an unfair disadvantage.<sup>11</sup> It is therefore an essential duty of the courts to ensure equality between the parties, including the ability to contest all the arguments and evidence adduced by the other party.<sup>12</sup> Inequality in the presentation of one's case may, for instance, affect the right of the defence to call witnesses, which is one of the particular aspects of the right to a fair trial.<sup>13</sup>

### 2.2. Kosovo legal framework

In Kosovo, major changes have been made to the criminal procedural rules in the last decades. The CPC, which entered into force on 1 January 2013, introduced a shift from the primarily inquisitorial system in place until 2013 to a system principally characterized as an adversarial one.<sup>14</sup> Moreover, according to the Guide to the CPC, which is attached to the new code and is meant to help practitioners understand it, there were serious issues in the previous

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<sup>9</sup> Article 22 of the constitution, 15 June 2008.

<sup>10</sup> *Rowe and Davis v the United Kingdom*, ECtHR Judgment of 16 February 2000, para. 60. See also OSCE Office for Democratic Institutions and Human Rights (ODIHR) *Legal Digest on International Fair Trial Rights* (September 2012), <http://www.osce.org/odihr/94214>, p. 112.

<sup>11</sup> United Nations Human Rights Committee, CCPR General Comment 32 (2007), para. 13.

<sup>12</sup> *Äärelä and Näkkäläjärvi v Finland*, United Nations Human Rights Committee Communication (1997), para. 7.4; *Asch v Austria*, ECtHR Judgment of 26 April 1991, para. 27.

<sup>13</sup> In *Nazarov v Uzbekistan*, the United Nations Human Rights Committee refused the defendant's request for the appointment of an expert, which may have constituted crucial evidence for the trial. In the absence of any explanation for the reasons to refuse the defendant's request, the Committee concluded that this denial did not respect the requirement of equality between the prosecution and defence in producing evidence, and thereby amounted to a denial of justice. United Nations Human Rights Committee Communication (2004), para. 6.3.

<sup>14</sup> Guide to CPC, p. 11: under the previous procedural code, the proceedings were described as "quasi-adversarial" or "hybrid".

procedural code that had to be tackled.<sup>15</sup> The Guide also explains that the code now includes “very strong human rights protections, which are an important counterbalance to the ability of the state to investigate and prosecute.”<sup>16</sup> During the drafting of the new code, the principle of equality of arms was considered. Because of this principle, several provisions were added in the new code or provisions from the previous procedural code were amended. For instance, some provisions in the new CPC permit the defendant to collect exculpatory evidence through the prosecution, thereby providing him or her with an opportunity to obtain evidence that is equal to the prosecutor’s.<sup>17</sup>

Under the new CPC, the roles of the judge and the parties have been significantly changed. The judge’s role has changed to a less proactive one during proceedings, while the defence and the prosecution have more responsibilities. The prosecutor has a greater duty to develop and present the evidence (the “prosecution’s case”). On the other hand, the defence ensures that the prosecutor has acted properly and presented lawfully-obtained evidence and a legally cogent indictment. Under the new CPC, the defence also has the ability to seek evidence which supports the defendant’s position, such as an alibi or evidence which disputes the defendant’s motive to commit the crime (“the defence’s case”).<sup>18</sup> The judge remains, however, the “protector of rights” and has explicit new duties to safeguard the rights of the parties.<sup>19</sup> Finally, victims have been given the status as ‘parties’ to the proceedings.

### **3. CONCERNS IDENTIFIED IN IMPLEMENTING THE CPC**

#### **3.1. Trials with unrepresented defendants: an overarching concern which impacts the implementation of the new provisions of the CPC**

This report takes note of the particular context of criminal proceedings in Kosovo, where a very high number of defendants are not represented by defence counsel. This is because the appointment of defence counsel at public expense is rarely made, unless the defendant’s case is within the list of cases prescribed by the CPC as being one in which such appointment is mandatory, as described in the footnote below.<sup>20</sup>

##### **3.1.1. Appointment of counsel at public expense**

Article 58 CPC sets out a two-fold test that has to be carried out by the court when deciding whether counsel at public expense shall be appointed to represent a defendant if the conditions are not met for mandatory defence. A defence counsel shall be appointed at public expense for the defendant at his or her request if it is both in the interest of justice and the

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<sup>15</sup> Guide to the Criminal Procedure Code of Kosovo, 2013 (hereinafter referred to as the Guide to CPC), [http://www.kgjk-ks.org/repository/docs/Udhezuesi-dhe-kodi-i-procedures\\_anglisht\\_225215.pdf](http://www.kgjk-ks.org/repository/docs/Udhezuesi-dhe-kodi-i-procedures_anglisht_225215.pdf). Several issues are described p.11.

<sup>16</sup> Guide to CPC, p. 11.

<sup>17</sup> Guide to CPC, pp. 12–13.

<sup>18</sup> Guide to CPC, pp. 27–30.

<sup>19</sup> Guide to CPC, p. 27.

<sup>20</sup> See Article 57 CPC (Defence Counsel in Cases of Mandatory Defence). Defence is mandatory, for instance, when the defendant is mute, deaf, or displays signs of mental disorder or disability; at hearings on detention on remand and throughout the time when the defendant is in detention on remand; and from the filing of an indictment if the indictment has been brought against the defendant for a criminal offence punishable by imprisonment of at least 10 years.

defendant lacks sufficient means to pay the costs of his or her defence.<sup>21</sup> The previous procedural code contained a similar provision.<sup>22</sup> The CPC does not provide any further clarification on the “interests of justice” criteria. The European Convention on Human Rights and Fundamental Freedoms, directly applicable in the Kosovo courts, however uses the same standards, and has developed some criteria in the European Court of Human Rights’ case-law. When deciding whether the interests of justice require free legal representation, the ECtHR examines three criteria: 1) the seriousness of the offence and the severity of the penalty; 2) the complexity of the case; and 3) the capacity for self-representation by the accused.<sup>23</sup>

Article 58 CPC also includes a new provision under paragraph 4 which requires the defendant to complete “an affidavit listing his or her assets and declaring that he or she cannot afford legal counsel” prior to the appointment of a defence counsel at public expense.

The OSCE monitoring revealed that a total of 216 productive initial hearings monitored before the general department during January 2014 and June 2015 did not meet the conditions for mandatory defence.<sup>24</sup> As the chart shows below, an *ex officio* lawyer was appointed in only 11 of these hearings. In 137 hearings, no lawyer was appointed and the defendants therefore remained unrepresented. In the remaining 68 hearings, the defendants decided to hire themselves a lawyer, at their own expense.

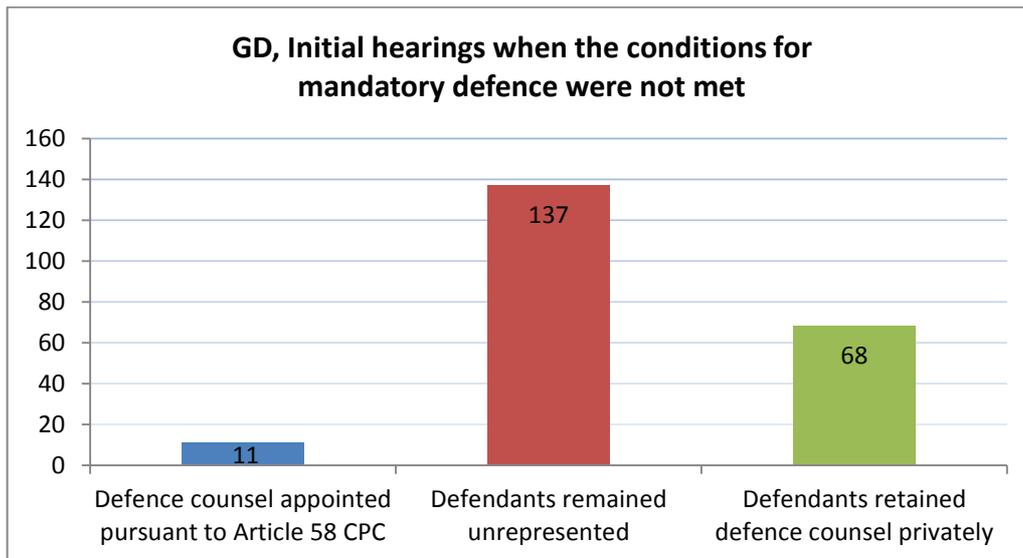
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<sup>21</sup> Article 58 CPC. This mirrors the wording used in Article 14(3)(d) of the International Covenant on Civil and Political Rights: in the determination of any criminal charge against him or her, everyone shall be entitled to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it. Paragraph (1.1) of Article 58 CPC also stipulates that a defence counsel shall be appointed at public expense for the defendant at his or her request if there exists no conditions for mandatory defence and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight or more years.

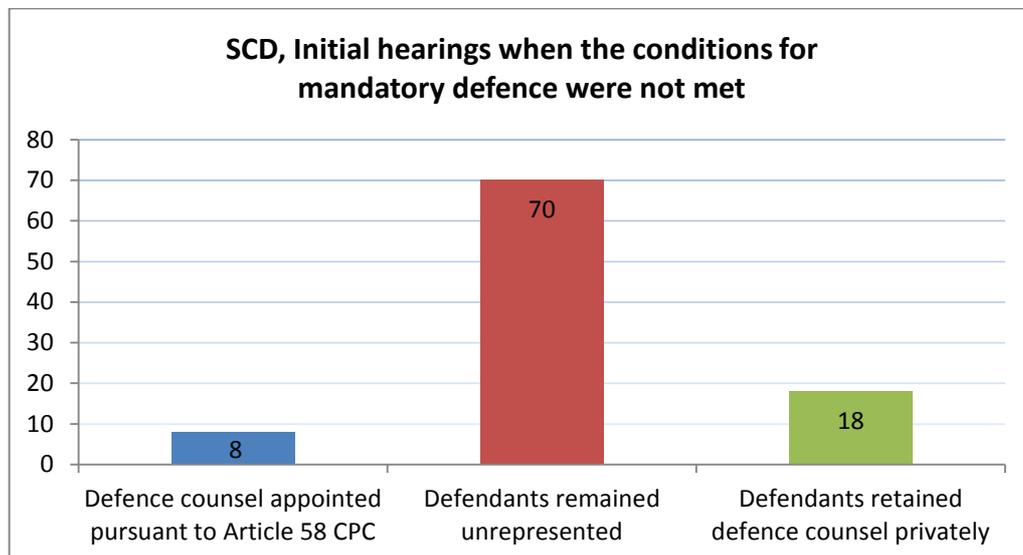
<sup>22</sup> Article 74 PCPC.

<sup>23</sup> *Quaranta v Switzerland*, ECtHR Judgment of 24 May 1991, paras. 33–34. See European and International Standards on the Right to Legal Aid, Open Society Justice Initiative, December 2014, [https://www.opensocietyfoundations.org/sites/default/files/international-minimum-standards-right-legal-aid\\_English-20150210.pdf](https://www.opensocietyfoundations.org/sites/default/files/international-minimum-standards-right-legal-aid_English-20150210.pdf). See also OSCE Mission to Skopje Publication *Ensuring the Right to Legal Counsel*, (December 2010), <http://www.osce.org/skopje/77774>, p. 45: “[T]he expression ‘in the interest of justice’ used in Article 70 of the new LCP created mixed feelings among the respondents – some think the vagueness of this expression leaves too much room for interpretation. It’s important to note that the new LCP has a wording similar to that of the European Convention and its jurisprudence as regards indigent defence. The provision of court-appointed lawyer to indigent defendants in cases where mandatory defence is not applicable needs to satisfy the requirement dictated by the interest of justice, as under the Convention.”

<sup>24</sup> See Article 246(2) CPC. This provision requires that the judge during the initial hearing be satisfied that the right of the defendant to defence counsel has been respected. Therefore, the statistics here provide information as to the number of initial hearings in which a lawyer at public expense was appointed for the defendants pursuant to Article 58 CPC.



Similarly, 192 productive initial hearings before the serious crimes department were monitored. In 96 of these hearings, the conditions for mandatory defence were not met. These included hearings held in cases of election fraud which fall under the jurisdiction of the serious crimes department since January 2013 but are punishable by rather low imprisonment sentences.<sup>25</sup> As the chart here shows, in only eight of these hearings was a lawyer appointed based on Article 58 of the CPC to represent the defendant. In 70 hearings the defendants remained unrepresented, and in the remaining 18 hearings, the defendants chose to hire a lawyer at their own expense.



This has been corroborated by the results of the questionnaires given to the lawyers, judges and prosecutors in the questionnaires. Sixty-seven per cent of the lawyers who responded to the questionnaires responded that they have “seldom or never” been appointed at public expense to represent a defendant in cases not subject to mandatory defence. A total of 58 per cent of the prosecutors said that they have “seldom or never” been involved in cases where

<sup>25</sup> Of note, 22 cases of election fraud were monitored before the serious crimes department, not only initial hearings but also main trial hearings. In 12 cases the defendants were not represented by lawyers.

defence counsel was appointed at public expense. Finally, only ten per cent of the judges who responded to the questionnaires said that they have “often” appointed a lawyer at public expense when the defence was not mandatory.

According to Article 246(1) CPC, at the beginning of the initial hearing, the judge shall instruct the defendant of his or her right to legal assistance. However, in practice, judges regularly fail to properly inform the defendant of his or her right to be assigned a lawyer at public expense in cases where the conditions for mandatory defence are not met. In only 31 out of the 408 productive initial hearings monitored before the general and serious crimes departments, where the conditions for mandatory defence were not met, did judges properly inform the defendants of their rights to be assigned a lawyer at public expense. In general, the judges simply read out loud the rights listed under Article 246(1) CPC, including the right of the defendant to “defend himself or herself in person or through legal assistance”, but did not explain these rights. It was also observed during monitored hearings that judges sometimes added, in an implicit manner, that defendants would have to pay for their own lawyer if they wished to have one, since the conditions for mandatory defence were not met.<sup>26</sup> The Supreme Court stated in a decision dated 1 February 2015 that it is not sufficient for judges to simply mention the right to legal assistance when instructing the defendant of his rights. He or she should be asked whether he or she intends to retain counsel privately, to file a request for counsel to be appointed at public expense, or to waive his or her right under Article 53 of the CPC.<sup>27</sup>

The OSCE monitored 21 decisions made pursuant to Article 58 of the CPC. Most of them were insufficiently reasoned.<sup>28</sup> In none of the cases when lawyers were appointed did the court properly apply the two-fold test foreseen under Article 58 of the CPC. For instance, in some cases, the court decided that it was “in the interest of justice” to engage a lawyer at public expense but failed to look into the financial status of the defendant. In other cases, the court appointed a lawyer on the ground that the defendant was financially unable to pay the costs of his defence, but did not examine whether it was “in the interest of justice” to do so. Justification as to why in certain cases the “interest of justice” required the appointment of a lawyer at public expense was also often very poor. For instance, some cases were considered complex but it was not explained why. The lack of reasoning is even more of a concern in decisions denying requests made by the defendants for free legal representation.

Under the CPC, these decisions can be appealed. However, the lack of reasoning provided by the court prevents defendants from determining whether or not there are grounds to appeal.<sup>29</sup> Finally, it is noteworthy that all 21 decisions reviewed by OSCE were issued orally. While Article 58 of the CPC does not require that such decisions be made in writing, judges are generally obliged to issue well-reasoned decisions to demonstrate to the parties that they have been heard, to afford them the possibility to appeal against it, as well the possibility of having

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<sup>26</sup> In one hearing monitored, the minutes read as follows: “The single trial judge instructs the defendant of the right [...] to defend himself or to engage a lawyer”, which implies that the defendant will have to pay the cost of the defence on his/her own.

<sup>27</sup> Supreme Court decision Pml.nr.23/2015 dated 1 February 2015.

<sup>28</sup> OSCE reviewed 21 decisions. In 19 of them, a lawyer at public expense was appointed, and in the two remaining decisions the request filed by the defendant for free legal representation was rejected. Nineteen of these decisions were insufficiently reasoned.

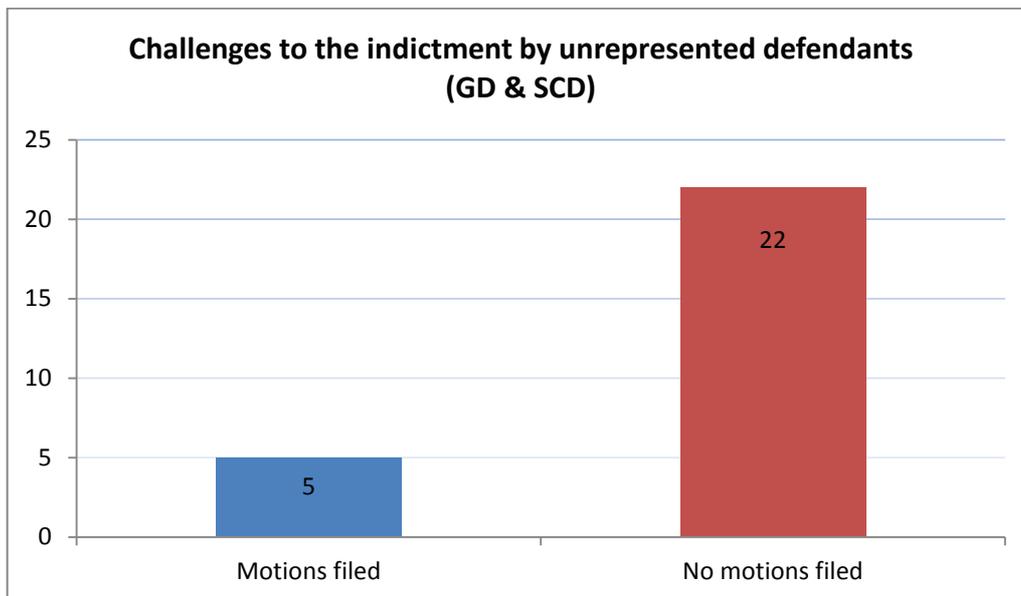
<sup>29</sup> See Articles 374 and 408 CPC for appeals against decisions by the single trial judge or presiding trial judge. See also ODIHR Legal Digest p. 210 regarding the right to reasoned decisions, *supra* note 10.

it reviewed by an appellate body, and to ultimately ensure public scrutiny over the administration of justice.<sup>30</sup>

As regards the new requirement under the CPC that the defendant shall complete an affidavit prior to the appointment of a defence counsel at public expense, the OSCE notes that this was not done in any of the cases monitored when a lawyer was appointed. Lawyers, prosecutors and judges in their answers to the questionnaires also generally acknowledged that, when a lawyer at public expense was appointed, the defendant did not complete the required affidavit.

### 3.1.2. The impact of having unrepresented defendants in an adversarial trial

Under the CPC, as explained further below, the responsibilities of the defence have significantly increased. The defence's role is now to question the quality of the evidence presented by the prosecution, and present evidence to support the defendant's position. Unrepresented defendants, who are unlikely to have legal training or experience of practice in the criminal courts, are not able to meet these new elevated responsibilities. For instance, only 11 per cent of the prosecutors who responded to the questionnaire, and only 4 per cent of the judges, said they were "often" involved in cases where a defendant without a defence counsel filed a motion to dismiss the indictment and/or objections to the evidence prior to the second hearing. Also, OSCE has monitored 111 productive second hearings held before the general and serious crimes departments. In 34 of these hearings, there were unrepresented defendants. Seven of them decided to plead guilty during the hearing and therefore did not challenge the indictment. Out of the 27 defendants who did not plead guilty, only 5 filed motions to dismiss the indictment, whereas the other 22 unrepresented defendants did not challenge the indictment even though their 'not guilty' pleas indicated that they did not accept that they were guilty of the offences with which they were charged and therefore did not accept the content of the indictment against them.



<sup>30</sup> See *Suominen v Finland*, ECtHR Judgment of 8 April 2004, para. 83.

The examination of unrepresented defendants who wish to declare – to provide testimony and give their account – during trial is also of concern. Article 346 CPC states that if the accused chooses to give a statement, the defence counsel will conduct the direct examination of the defendant, and the prosecutor will conduct the cross-examination. However, in seven cases monitored before the general department, the OSCE observed that when the unrepresented defendants chose to declare and to provide testimony under Article 346 CPC their examination started with questioning by the prosecutor since there was no defence counsel to do the direct examination and, as a result, they did not have the opportunity to declare through direct examination to give their version of the story.<sup>31</sup>

As such, unrepresented defendants are also generally unable to conduct the cross-examination of prosecution witnesses. In many cases monitored, unrepresented defendants stated that they had “objections to the statements” of the prosecution witnesses, or to material evidence presented by the prosecution, but did not ask the witnesses any questions, and therefore failed to challenge the quality of the prosecution’s evidence.<sup>32</sup>

As noted above, unrepresented defendants are often placed at a significant disadvantage *vis-à-vis* the prosecution. As such, it is essential that the judge steps in to ensure equality of arms during the trial. Under the CPC, although the judge’s role has shifted from a very proactive role to a less proactive position during the proceedings, the judge remains the “protector of rights” and has explicit new duties to safeguard the rights of the parties.<sup>33</sup> The Guide to the CPC also notes that adversarial proceedings do not mean that the judge is only a passive adjudicator; he or she may seek additional information after the prosecution and defense present their cases.<sup>34</sup> In other words, judges need to be more active in cases with unrepresented defendants than they otherwise should be in an adversarial trial.<sup>35</sup> Therefore, if, for instance, an unrepresented defendant does not file a motion to dismiss the indictment between the first and second hearings, the judge should decide, with the aim of ensuring equality of arms between the defendant and the prosecution, to examine *ex officio* whether there is sufficient evidence in the indictment to proceed to trial.<sup>36</sup> Similarly, if an unrepresented defendant wishes to give a statement during trial, the judge should make sure that he or she has the chance to give his/her version of the story through direct examination.<sup>37</sup>

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<sup>31</sup> Article 9(2) of CPC states that defendant has the right “to state all facts and evidence favorable to him or her.”

<sup>32</sup> See KJC Consolidated Report (*supra* note 8), Annex 5: “Concerns [a]rise especially when the defendant is not represented by a lawyer in cases in which the defence is not mandatory by law”. This concern was also raised during workshops on the implementation of the CPC that took place on 29 September and 20 October 2014 in Prishtinë/Priština.

<sup>33</sup> Guide to CPC, p. 27.

<sup>34</sup> Guide to CPC, p. 28.

<sup>35</sup> See, e.g., Sharon Finegan, “Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice”, Catholic University Law Review, Volume 58, Winter 2009, <http://scholarship.law.edu/cgi/viewcontent.cgi?article=3162&context=lawreview>.

<sup>36</sup> Article 250(3) of CPC reads as follows: “The single trial judge or presiding trial judge shall issue a written decision with reasoning that either denies the request [to dismiss the indictment] or dismisses the indictment”. Of note, the CPC explicitly stipulates in Article 249(5) CPC that where no objection to the evidence has been filed by the defence between the initial and second hearing, all evidence shall be admissible at the main trial unless the court *ex officio* determines that the evidence would violate the rights of the defendants.

<sup>37</sup> Article 346(7) CPC does not expressly describe how the examination of an unrepresented defendant should be conducted but clearly allows the judge to ask questions to the defendant when needed.

This report finds, however, that judges often do not properly perform their role as protectors of the rights of the parties in practice as elaborated further under Section 3.5 below.

### **3.2. New role of the defence**

Criminal proceedings under the CPC are now primarily adversarial and the role of the actors in the proceedings has significantly changed.<sup>38</sup> Under the previous code, the defence played a limited role because the judge was actively involved in the collection of evidence at the investigation stage and in the presentation of the evidence during trial. The judge's role under the CPC is now more passive, and as a result the responsibilities of the defence have increased, including questioning the quality of the evidence presented by the prosecution, and also presenting evidence which supports the defendant's position, such as an alibi or evidence which disputes the defendant's motive to commit the crime.<sup>39</sup>

The sub-sections below examine whether the defence properly fulfils some of its new responsibilities, such as: collecting exculpatory evidence and challenging the selection of prosecution experts at the investigation stage; disclosing evidence to the prosecution and challenging the indictment at the indictment stage; and questioning the evidence of the prosecution through cross-examination at trial.

#### **3.2.1. Requests for exculpatory evidence through the prosecution**

Under the CPC, the defence has "greater abilities to collect or preserve evidence prior to the indictment" since Article 216 of the CPC gives the defendant the right to ask the prosecutor to collect evidence which is relevant to the proceedings and if there is a justification.<sup>40</sup> That justification can include the danger that the evidence may be lost or is unavailable at trial, that it may justify the release of the defendant from detention on remand, or if there is a reasonable probability that it will be exculpatory. The Guide to the CPC highlights that "this is a critical stage for a defendant to have a more equal stance in the trial" since it is at this stage that most of the evidence for trial is obtained.

If the prosecutor rejects the defence's request to collect evidence, he or she shall issue a decision supported by reasoning and notify the defendant. The defendant may appeal the decision to the pre-trial judge.<sup>41</sup> A similar article existed under the previous criminal procedural code.<sup>42</sup> Yet, the opportunity for the defendant to collect evidence through the prosecution has been extended under the CPC since the defendant can now request the prosecutor to collect also evidence that is located outside Kosovo.<sup>43</sup> These new provisions provide the defendant with an opportunity to obtain evidence that is equal to the prosecutor.<sup>44</sup>

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<sup>38</sup> Guide to CPC, p. 11: under the previous code, the proceedings were described as "quasi-adversarial" or "hybrid".

<sup>39</sup> Guide to CPC, p. 27-30.

<sup>40</sup> Guide to CPC, p. 53. See also Commentaries to the Criminal Procedure Code of Kosovo by Ejup Sahiti, Rexhep Murati and Xhevdet Elshani, published by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) in December 2014 ("Commentaries to the CPC"), p. 545 (Inculpatory facts but also exculpatory ones should be established. The defendant and his/her counsel, before and during trial, should be able to use all facts and evidence that are in favor of the defendant).

<sup>41</sup> Article 216(4) CPC.

<sup>42</sup> Article 239 PCPC.

<sup>43</sup> Article 216(3) CPC.

<sup>44</sup> Guide to CPC, p. 13 (Equality of Arms).

In practice, however, the defence seldom requests the prosecutor to collect evidence. Although 75 per cent of the lawyers who responded to the questionnaire said that they “occasionally” or “often” file applications to the prosecutor, 78 per cent of the prosecutors stated that they “seldom or never” receive such requests by the defence, and almost all judges said that they “seldom or never” receive appeals by the defence against decisions denying these requests. During interviews conducted throughout the reporting period, some prosecutors explained that the issue of defence requests for the collection of exculpatory evidence is considered when the defendant is called by the prosecution to give a pre-trial statement. Therefore, defence requests are made orally most of the time, and prosecutors’ decisions rejecting or approving such requests are oral too; or prosecutors simply ignore them. In such circumstances it is difficult for the defence to exercise its right to appeal since no decisions with reasoning are issued.

In addition to the pre-trial stage, under the new CPC, the defence can now ask the prosecutor at the investigation stage for expert analysis that is relevant for the defence case.<sup>45</sup> Under the previous procedural code, this could not be done. An expert analysis had to be ordered by the court.<sup>46</sup> If the prosecutor refuses the defence’s request for expert analysis, the defence may appeal this decision to the pretrial judge.<sup>47</sup> According to the Guide to the CPC, these new provisions give the defendant “an equal opportunity to have evidence analyzed by an expert”.<sup>48</sup>

In practice, however, the defence seldom requests the prosecutor for expert analysis at the investigation stage. Only eight per cent of the lawyers who responded to the questionnaire said that they “often” file such requests to the prosecutor, and 90 per cent of the prosecutors stated that they “seldom or never” receive such requests from the defence. Finally, 87 per cent of the judges said that they “seldom or never” receive appeals by the defence against decisions denying such requests for expert analysis. The reason why no appeals are filed by the defence is the same as the one explained above: defence requests for expert analysis are generally made orally and the prosecutor’s decisions on these requests are oral too; or the prosecutor may not issue a decision at all.

The defence’s general failure to use the new opportunities in the CPC to obtain exculpatory evidence at the investigation stage through the prosecution is also demonstrated by the fact that the defence almost never submits the notice with the names of defence witnesses when it is required to do so during the second hearing, usually preferring instead to wait until trial to seek evidence, if any (see below 3.2.3). Of note, one of the conclusions in the KJC Consolidated Report is that courts continue to collect evidence in place of the parties even though the new code provides them with greater opportunities to do so.<sup>49</sup>

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<sup>45</sup> Article 141(1) CPC. The defence may also obtain and pay for expert analysis on his or her own (Article 141(2) CPC).

<sup>46</sup> Article 176 PCPC.

<sup>47</sup> Article 141(1) CPC.

<sup>48</sup> Guide to CPC, p. 13.

<sup>49</sup> KJC Consolidated Report (*supra* note 8), p. 2: “Although the new Code provides to the parties more opportunity to present their evidence, this however is hardly applied in practice. It remains for the courts again to collect evidence quite often”. See also p. 4: “Both parties, prosecution and defence should play much active role in proposing evidence at earliest phase of the court proceedings”, and Annex 3 (conclusions from the Pejē/Peć workshops): “Courts are again ending up collecting evidence since parties do not”.

This failure to efficiently prepare the case at the investigation stage is of significant concern. The accusatory form of the criminal procedure is based on the active role of the parties in gathering and presenting evidence. This form of procedure can be successfully carried out only if there is thorough preparation of the parties for the trial.<sup>50</sup> The role of the defence, in particular, is to show to the court alternative plausible explanations to what occurred on the critical day and to generate doubt on the explanation presented by the prosecution. To that end, the defence must “consider whether to seek evidence which supports the defendant’s position, such as an alibi or evidence which disputes the defendant’s motive to commit the crime.”<sup>51</sup> Sound preparation before trial is therefore essential: “Counsel should first review the disclosure material, meet with the accused/injured party and any other relevant witnesses and, finally, brainstorm the case with other colleagues and investigators. Counsel must review all the information available, with an eye towards inconsistencies and holes in the opposing party’s case [...] All areas and theories that come to mind should be noted and analyzed. The testimony of each possible witness should be considered. Evidentiary issues should be identified [...] Parameters for any investigative tasks should be set. A visit to the incident/crime scene and examination of the physical evidence should be arranged.”<sup>52</sup> Finally, the fact that prosecutors do not consider it necessary to issue reasoned decisions upon requests raised by the defence for exculpatory evidence also shows a lack of understanding of the purpose of these important provisions in the CPC.

### 3.2.2. Challenges against the selection of prosecution experts

Under the CPC, one of the new powers of the prosecutor is to engage an expert during the investigation stage without having to file a motion to the court.<sup>53</sup> The defence may then challenge the selection of the expert by the prosecution based on his or her qualifications or potential conflict of interest by filing a motion with the pre-trial judge.<sup>54</sup> This implies that the prosecutor has the obligation to inform the defence of his or her decision to appoint an expert, even though the relevant provision of the CPC does not explicitly state the prosecutor must serve the decision on the defence, because the defence would not be able to exercise its right to challenge the selection of an expert by the prosecution if the prosecution did not inform the defence of such decision. The Guide to the CPC explains that providing the defendant with the option to challenge the selection of prosecution experts is meant to balance with the fact that the prosecutor under the CPC is now able to engage an expert during the investigation stage without having to file a motion to the court. This “balance” has been one of the guiding principles of the drafters of the CPC: “If a change was made that resulted in one party having greater powers, another change was made to balance that power”.<sup>55</sup>

In practice, the defence rarely challenges the selection of a prosecution expert. Nearly all prosecutors who responded to the questionnaire stated that the defence “seldom or never” challenges the selection of their experts under Article 137(1) of the CPC by filing a motion

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<sup>50</sup> OSCE Mission to Skopje Publication *Ensuring the Right to Legal Counsel*, p.13, *supra* note 23.

<sup>51</sup> Guide to CPC, p. 30.

<sup>52</sup> See OSCE Mission to Skopje Publication *Cross-Examination, A Guidebook for Practitioners* (December 2010), <http://www.osce.org/skopje/78064>, p. 70 (Guidelines on cross-examination by Michael G. Karnavas).

<sup>53</sup> Under the previous PCPC, Article 176, expert analysis had to be ordered in writing by the court on the motion of the public prosecutor. Under the new CPC, prosecutor shall simply issue a decision which shall meet the requirements listed under Article 137(1) CPC. See also Commentaries to the CPC (*supra* note 40), p. 380 (The court no longer “sponsors” the appointment of the expert).

<sup>54</sup> Article 137(1) CPC.

<sup>55</sup> Guide to CPC, Checks and balances, p. 17.

with the pre-trial judge. Moreover, 92 per cent of the judges confirmed that they “seldom or never” receive such motions. The fact that the defence almost never files such motions also raises the suspicion that the prosecution does not always inform the defence of decisions to appoint experts. In fact, approximately 40 per cent of the lawyers who responded to the questionnaire stated that they are not informed of prosecutors’ decisions to appoint an expert.<sup>56</sup> This information has been corroborated during several interviews with lawyers.<sup>57</sup> One stressed that prosecutors in general not only do not give him these decisions but do not provide him with any documents at all. It is for him to go to the prosecution office and gather documents. This concern has also been raised by the Kosovo Judicial Council in its Consolidated Report which notes that “there are difficulties in ensuring the equality of arms in practice [...] [P]rosecutors often fail to allow the defence unrestricted access to the case file”.<sup>58</sup>

### 3.2.3. Disclosure obligation

At the investigation stage, the defence collects the evidence it needs for its case that will be presented at trial. Then, during the second hearing, the defence has the obligation to submit to the prosecution a notice of the names of the witnesses it intends to call at trial.<sup>59</sup> The judge will ensure that the defence has fulfilled this obligation during the second hearing.<sup>60</sup> If the defence fails to do so, the court may impose a fine of up to 250EUR upon the defence counsel.<sup>61</sup> The defence witnesses are then summoned to the main trial,<sup>62</sup> and at the beginning of the trial the court shall issue a schedule setting forth the order in which the witnesses proposed by the parties will be called.<sup>63</sup>

In practice, however, the defence often does not submit the required notice of names of defence witnesses to the prosecution during the second hearing. OSCE monitored 111 productive second hearings in the general and serious crimes departments. When defendants pled not guilty, the defence did not file the required notice. It did so in only five of the monitored hearings. Moreover, in none of the hearings monitored where the defence did not submit the required notice was a fine imposed. Finally, there is a lack of uniform court practice with respect to second hearings; it often happens that these hearings are not held.<sup>64</sup> Judges, then, do not have the opportunity to verify that the defence fulfilled its disclosure obligation.

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<sup>56</sup> In general, it is difficult to monitor whether prosecutors meet their obligation to inform the defence (and the injured party) of their decision to appoint an expert, as implicitly required under Article 137(2) CPC, because this occurs during the investigation stage between the parties, and not during public hearings. For the same reason it is difficult to monitor whether prosecutors meet their duty to provide the defence (and the injured party) with the expert report no later than ten days after they receive it, as required under Article 138(5) CPC.

<sup>57</sup> Seven lawyers from different regions in Kosovo were interviewed during the reporting period about this issue.

<sup>58</sup> KJC Consolidated Report (*supra* note 8), Annex 2.

<sup>59</sup> Article 256 CPC.

<sup>60</sup> Article 254(2) CPC.

<sup>61</sup> Article 256(3) CPC. Similar provisions existed under the previous code (Article 308 PCPC).

<sup>62</sup> Article 287(1) CPC.

<sup>63</sup> Article 331(1) CPC.

<sup>64</sup> One of the conclusions in the KJC Consolidated Report reads as follows: “there is no unified court practice regarding the conduct of the initial and second hearing”, p. 2.

The answers provided by the judges, lawyers and prosecutors to the questionnaire confirm this general failure by the defence to submit the required notice. Only 32 per cent of the lawyers who responded to the questionnaire said that they “often” submit the notice during the second hearing. Furthermore, only 12 per cent of the prosecutors responded that the defence “often” provides them with these notices, and six per cent of the judges responded that the defence “often” submits the notice.

As explained above, the defence almost never submits the notice with the names of defence witnesses during the second hearing, usually preferring instead to wait until trial to seek to present evidence. This practice is unsuitable in an adversarial system. The defence should know before the trial starts what the defence case will consist of and should, among other things, prepare opening statements that will help the court understand how it disputes the evidence. The Guide to the CPC explains that, “[e]ven after the main trial has been scheduled, under Article 288 CPC the parties may request that new witnesses be summoned. This allows the parties the right to a fair trial, but it cannot be abused because the request must be supported by reasoning and must specify the evidence to be obtained.”<sup>65</sup> It is even more of a concern that in some cases, not only before the general department but also before the serious crimes department, the defence decides not to present any evidence at all, even though the defendants pled not guilty. This also explains why the defence in these cases does not submit the notice with the names of defence witnesses during the second hearing.<sup>66</sup> These cases are concrete examples of an overall failure by the defence to assume its new responsibilities under the new CPC.

#### **3.2.4. Challenges to the indictment**

The Guide to the CPC explains that the prosecution and the defence are on an equal level, both playing an equally important role, during the initial and second hearing, which is a “vitally important step in the process”.<sup>67</sup> Under Article 250 CPC the defence has the right to ask the court to dismiss the indictment if it considers that the indictment is not supported by a well-grounded suspicion.<sup>68</sup>

In practice, however, many of the motions filed by the defence are of poor quality. In the 24 motions collected and reviewed by the OSCE, which were filed in cases before the serious crimes department, the defence broadly argued that the prosecutor did not collect sufficient evidence to support a well-grounded suspicion that the defendant committed the criminal offence. The Guide to the CPC warns that such an argument should not be routinely sought because “it risks the judge returning a decision den[ying] the request and find[ing] that the indictment, if proven, indeed supports a well-grounded suspicion. Receiving such a decision may provide the defence with an incentive to reach a plea agreement with the prosecutor under Article 233”.<sup>69</sup>

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<sup>65</sup> Guide to CPC, pp. 65–66. See also Commentaries to the CPC, p. 746 (requesting new evidence should not be abused) and p. 665 (Disclosing the evidence to the prosecution decreases the risk of prolonging the proceedings during the main trial stage).

<sup>66</sup> OSCE monitored 28 such cases before the general department and 17 before the serious crimes department.

<sup>67</sup> Guide to CPC, p. 13 and 57.

<sup>68</sup> The “well-grounded suspicion” was also the standard used under the previous code. According to Article 19 of the CPC, a “well-grounded suspicion” is the “[p]ossession of admissible evidence that would satisfy observer that a criminal offence has occurred and the defendant has committed the offence”. This standard should be distinguished from other standards such as “reasonable suspicion” and “beyond reasonable doubt”.

<sup>69</sup> Guide to CPC, p. 58.

### 3.2.5. Cross-examination of witnesses

When a party presents evidence, the party proposing the evidence shall question the witness first or present the evidence first.<sup>70</sup> Other parties will then be given the opportunity to cross-examine the witness or challenge the witness' credibility.<sup>71</sup> The previous procedural code did not contain such specific provisions on witness examination. In the previous procedural code, if a witness or an expert witness could not recall the facts he or she had presented in previous testimony or if he or she deviated from his or her previous testimony, the presiding judge or the parties had to draw the attention of the witness to the previous testimony and ask the witness why he or she was now testifying differently. Where necessary, the presiding judge had to read the previous testimony or a part thereof.<sup>72</sup>

In practice, however, the defence often fails to efficiently challenge the evidence presented by the prosecution through cross-examination. In many cases monitored it was observed that lawyers continue to examine witnesses the way they used to before the new CPC entered into force.<sup>73</sup> They ask questions to witnesses but do not use cross-examination as a “modern trial tool” that would enable them to discredit the testimony of the prosecution witnesses, or to strengthen the defence case.<sup>74</sup> They also often state that they object to the testimony of the witness but fail to explain why. Moreover, in many cases, the court continues to play a significant role during the questioning of the witness. The defence appears unable to conduct efficient cross-examination, either because it is not prepared enough, or because of the lack of experience in conducting this type of questioning. One of the conclusions in the KJC Consolidated Report is that the “new examination techniques are not applied properly”. It further recommends that judges, prosecutors and lawyers be further trained in applying these techniques, cross-examination in particular.<sup>75</sup>

The general failure by the defence to efficiently challenge the quality of the evidence presented by the prosecution through cross-examination shows that the defence faces difficulties in embracing its new active role foreseen in the new CPC.

### 3.3. New role of the prosecution

The new provisions of the CPC entrust the prosecutor with greater responsibility in developing and presenting evidence. The prosecutor “must therefore think about the evidence and, if needed, find corroboration for evidence which is not as credible, relevant or convincing as he or she would like”.<sup>76</sup> The sub-sections below assess whether or not the prosecution properly discharges some of its new responsibilities, such as: taking evidence from witnesses during pre-trial interviews and pre-trial testimony sessions at the investigation stage; filing a notice of corroboration with the indictment when the evidence needs to be corroborated; and using alternatives to trial when appropriate, including negotiated pleas of guilt, not only after the indictment is filed, but also before.

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<sup>70</sup> Article 332 CPC.

<sup>71</sup> Article 332(2) CPC.

<sup>72</sup> Article 364 PCPC.

<sup>73</sup> OSCE monitored 51 hearings in cases before the serious crimes department during which the defence cross-examined a prosecution witness.

<sup>74</sup> See Guide to CPC, p. 69.

<sup>75</sup> KJC Consolidated Report (*supra* note 8), pp. 3–4.

<sup>76</sup> Guide to CPC, pp. 27–30.

### 3.3.1. Witness pre-trial statements: pre-trial interview and pre-trial testimony

#### 3.3.1.1. Two types of new witness statements

According to the Guide to the CPC, “[a]n area which has substantial changes in the Criminal Procedure is pre-indictment investigations [...] There are now more options for taking evidence from witnesses during the investigation: pre-trial interviews, pre-trial testimony and Special Investigative Opportunity. There are more protections with some [options] than with others, and consequently [the witness statements obtained] are more admissible at trial than others.”<sup>77</sup>

The previous procedural code did not contain specific provisions regulating the way witness statements had to be taken during pre-trial proceedings.<sup>78</sup> It also did not include detailed provisions regulating the way these pre-trial witness statements would be used during trial.<sup>79</sup> The CPC now contains precise provisions regulating the way witness statements have to be taken during the investigation stage by prosecutors. There are three kinds of sessions during which evidence may be taken from witnesses: pre-trial interview and pre-trial testimony sessions, or special investigative opportunity.<sup>80</sup> Even though the name was slightly changed, there are no substantial differences between the special investigative opportunity and the previous extraordinary investigative opportunity.<sup>81</sup> Therefore, only the first two types of sessions are new. In a pre-trial interview session the prosecutor may permit the defence counsel, victim or victim’s advocate to participate, and the pre-trial interview may be video- or audio-recorded, transcribed verbatim or summarized into a report.<sup>82</sup> There are greater formalities in a pre-trial testimony session. The prosecutor shall give five days written notice to the defendant and defence counsel, injured party and victim’s advocate of the date, time and location of the pre-trial testimony. A copy of the notice shall be placed in the file. Failure of the defendant, defence counsel, injured party or victim’s advocate to participate in a session of the pre-trial testimony after receiving notice, without justification, shall prevent that same defendant, defence counsel, injured party or victim’s advocate from objecting to the admissibility of the testimony at a later stage of the criminal proceedings. Finally, the pre-trial testimony shall be audio-recorded, video-recorded or transcribed verbatim if the criminal offence is punishable by a maximum imprisonment of three years or more.<sup>83</sup>

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<sup>77</sup> Guide to CPC, p. 45.

<sup>78</sup> Article 237(4) simply stipulated that the public prosecutor could invite the defendant, his or her defence counsel and the injured party to be present during the examination of the witness or expert witness. Article 238 also permitted the prosecutor or the defendant, on an exceptional basis, to request the pre-trial judge to take testimony from a witness for the purpose of preserving evidence where there was a unique opportunity to collect important evidence to there was a significant danger that such evidence may not be subsequently available at the main trial (extraordinary investigative opportunity).

<sup>79</sup> According to Article 364 PCPC, these statements could be used if a witness could not recall the facts he or she had presented during the pre-trial proceedings or if he or she deviated from his or her previous testimony. The presiding judge or the parties were entitled to draw his or her attention to the previous testimony and ask him or her why he or she was now testifying differently. The pre-trial statement or part therefore had to be read where necessary. The PCPC also did not specify in which particular circumstances a pre-trial statement could be used as direct evidence. Only a few general rules applied, described in Part II of the PCPC relating to Evidence.

<sup>80</sup> Article 123 CPC.

<sup>81</sup> See Article 149 CPC (Special Investigative Opportunity).

<sup>82</sup> Article 131 CPC.

<sup>83</sup> Articles 132 and 133 CPC.

The new CPC carefully regulates the way evidence obtained during a pre-trial interview or a pre-trial testimony session can be used at trial.<sup>84</sup> Evidence obtained during a pre-trial interview session may not be used as direct evidence during the main trial but may be used during cross-examination to impeach the witness if he or she has testified materially differently from the evidence he or she gave during the pre-trial interview.<sup>85</sup> Evidence obtained during a pre-trial testimony session, on the other hand, may be used as direct evidence during the main trial if the witness is unavailable due to death, illness, assertion of privilege or lack of presence within Kosovo, but may not be used as the sole or as a decisive inculpatory evidence for a conviction.<sup>86</sup>

More generally, the CPC stipulates in Article 262 CPC that the court shall not find the accused guilty based solely or to a decisive extent (i) on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings; (ii) on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused; or (iii) on testimony or other evidence given by a cooperative witness.

The objective of these new detailed provisions is to protect the defendant's right to cross-examine witnesses when the prosecutor wishes to use pre-trial statements during trial. Of note, Article 14(3)(e) of the ICCPR and Article 6(3)(d) of the ECHR guarantees, in the context of criminal proceedings, a right to "examine, or have examined, the witnesses against him".<sup>87</sup> The right to cross-examine witnesses is an essential aspect of the right to a fair trial. It requires, in principle, that the accused has an opportunity to challenge any aspect of the witness' statement or testimony during a confrontation or an examination.<sup>88</sup> All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument.<sup>89</sup> In other words, there must be a good reason for the non-attendance of a witness.<sup>90</sup> However, the right to a fair trial does not encompass an absolute right to have a certain witness testify in court.<sup>91</sup> To use as evidence statements of witnesses obtained at the pre-trial stage is not in itself inconsistent with the right of cross-examination, provided that the defendant has been given an adequate and proper opportunity to challenge and question the witness when that witness made that statement, or at some later stage of the proceedings.<sup>92</sup> When a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.<sup>93</sup> Finally, to allow effective enjoyment of the right to cross-examination, the United Nations

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<sup>84</sup> Article 261 CPC (Prior Statements Used at Main Trial) and Article 337 (Use of Prior Witness Testimony).

<sup>85</sup> Article 261(2) referring to Article 123(2) CPC.

<sup>86</sup> Article 261(3) referring to Article 123(3) CPC. See also Article 337(2) CPC.

<sup>87</sup> *Bricmont v. Belgium*, ECtHR Judgment of 7 July 1989, para. 81.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Barberà, Messegué and Jabardo v. Spain*, ECtHR Judgment of 6 December 1988, para. 78.

<sup>90</sup> *Al-Khawaja and Tahery v. the United Kingdom*, ECtHR Judgment of 15 December 2011, para. 119.

<sup>91</sup> *McLawrence v. Jamaica*, Human Rights Committee Communication No. 702/1996 (26 April 1996).

<sup>92</sup> *Unterpertinger v. Austria*, ECtHR Judgment of 24 November 1986, para. 31.

<sup>93</sup> See, in particular, *Lucà v. Italy*, ECtHR Judgment of 27 February 2001, para. 40, and *Al-Khawaja and Tahery v. the United Kingdom*, ECtHR Judgment of 15 December 2011, para. 119. The term "decisive" was described in *Vidgen v. Netherlands*, Judgment of 10 July 2012, para. 40, and the case of *Al-Khawaja*, para. 131.

Human Rights Committee has recalled that there is a right to disclosure of all material to the case.<sup>94</sup>

### 3.3.1.2. **Pre-trial statements and the defendant's right to cross-examine witnesses**

In practice, prosecutors continue to take "statements" from witnesses, as they used to do before the new CPC entered into force, and do not specify whether the statements are taken during "pre-trial interview" or "pre-trial testimony" sessions.

While 81 per cent of the prosecutors responded that they "occasionally" or "often" hold pre-trial interview sessions, and 75 per cent of them "occasionally" or "often" hold pre-trial testimony sessions, the witness statements collected in various cases show that the results of the questionnaire do not reflect the practice. OSCE has reviewed 24 witness statements from prosecutors in all prosecution offices in Kosovo during the reporting period. These documents show that prosecutors continue to take "statements" from witnesses, as they used to before the new CPC entered into force.<sup>95</sup> Testimony from witnesses is not being taken during "pre-trial interview" or "pre-trial testimony" sessions, but simply during "questioning" sessions. They do not contain references to any of the articles in the CPC related to pre-trial interview and pre-trial testimony sessions.<sup>96</sup> It is therefore not possible to determine whether the evidence was obtained during pre-trial interview or pre-trial testimony sessions. Also, in none of the trial sessions monitored by OSCE during which the parties used pre-trial witness statements, was it ever specified that the statements were taken during a pre-trial testimony session or a pre-trial interview session. Finally, prosecutors have acknowledged during interviews conducted in 2013 that they do not hold "pre-trial interview" or "pre-trial testimony" sessions.<sup>97</sup>

The collected documents show that prosecutors take statements from witnesses without respecting the formalities foreseen in the law. Prosecutors often invite the defence counsel but not the defendant to attend the witness's examination. When the defence is invited, this is done on a very short notice. A total of 70 per cent of the lawyers who responded to the questionnaire said that they were in general informed by the prosecutor of the date of the session less than two days, or between two and five days in advance, which is in violation of Article 132(6) CPC. Furthermore, the statements are not audio-recorded or video-recorded, and 95 per cent of the prosecutors acknowledged this fact. The collected documents also show that the witness statements are generally not taken verbatim; questions are most of the time not transcribed and answers are rephrased to ensure that sentences flow well.

As discussed above, the new CPC provisions are designed to ensure that the defendant's right to cross-examine witnesses be respected. Therefore, the failure by prosecutors to apply these provisions may not only constitute a violation of criminal procedure but may also infringe on the defendant's right to a fair trial. For instance, OSCE monitored seven cases during which

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<sup>94</sup> *Peart v. Jamaica*, Human Rights Committee Communications 464/1991 and 484/1991, para. 11.5.

<sup>95</sup> The statements are referred as "Minutes of statement of the witness", "Minutes of hearing of the witness", "Minutes of interview of the witness", or "Minutes on evidence of witness". The statements were collected throughout the reporting period and are representative of all seven Kosovo regions.

<sup>96</sup> Only article 125 on the warnings required to be read to witnesses before being questioned and article 129 on the witnesses' right not to incriminate themselves or close relatives are mentioned.

<sup>97</sup> Interviews were conducted between 14 June and 5 July 2013. Twenty-eight prosecutors in all regions in Kosovo were interviewed. Of note, according to the Commentaries to the CPC (*supra* note 40), the distinction between "pre-trial testimony" and "pre-trial interview" sessions has caused confusion (p. 366).

the pretrial statements of some witnesses—for which it was not specified whether they had been taken during pre-trial testimony sessions or pre-trial interview sessions—were used as direct evidence during trial because the witnesses did not appear.<sup>98</sup> However, the defence was not present when these pre-trial statements were taken. Since the defence in these cases did not have an opportunity to challenge and question the witnesses at any stage of the proceedings, it could be said that the right of the defendants to cross-examination was not respected. The court in these cases decided to use the pre-trial statements of the witnesses because both the defence and the prosecution agreed, but failed to verify whether the defence had the opportunity at some stage in the proceedings to question the witnesses who gave these statements.

Pre-trial statements of witnesses might be of significant use during trial, especially if the statement was given by a key witness. They should therefore be taken according to the proper procedure, otherwise they might be rejected at trial and this might result in the collapse of the prosecution case. This has been a constant concern and was raised by the OSCE as far back as 2003.<sup>99</sup>

In light of the difficulties prosecutors face in implementing these new provisions, the Chief Prosecutor may wish to examine the reasons why these provisions are problematic and may decide to issue guidelines to assist prosecutors in applying them.

### **3.3.2. Notice of corroboration**

The Guide to the CPC explains that the prosecutor must think about evidence and, if needed, find corroboration for evidence which is not as credible, relevant or convincing as he or she would like.<sup>100</sup> When corroboration is needed, a notice of corroboration should be filed. This is a new tool provided under the CPC. According to the Guide to CPC, this tool has been added based on the case law from the ECtHR which limits the use of evidence where a defendant has had a limited ability to confront the witness.<sup>101</sup> Article 19(1.31) CPC defines the notice of corroboration as follows: “a document filed by a party in support of testimony or evidence that is not directly obtainable at the main trial. The notice of corroboration would list other admissible evidence that corroborates the testimony or evidence in question. A notice of corroboration is intended to show that the evidence in question would not be the sole or decisive evidence supporting a judgment that the defendant is guilty”.<sup>102</sup>

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<sup>98</sup> The pre-trial statements of the witnesses were “read” during trial because the witnesses did not appear. In fact it is clear that the statements were not only “read”, but used as direct evidence.

<sup>99</sup> OSCE Report *Review 5: The Criminal Justice System in Kosovo* (May 2003), <http://www.osce.org/kosovo/12555>, pp. 41–42. OSCE noted that in some trafficking cases the judges admitted evidence at the trial stage of the proceedings in circumstances where the accused or his/her defence counsel were not afforded the opportunity to challenge it. In trafficking cases the primary witnesses are usually the victims of trafficking and while they may give evidence at the investigative stage of criminal proceedings, in the vast majority of cases they do not attend the trial, as they are normally repatriated before it commences.

<sup>100</sup> Guide to CPC, p. 29.

<sup>101</sup> Guide to CPC, p. 37.

<sup>102</sup> Article 263(1) CPC specifies that a prosecutor who intends to rely on prior statements under Article 261 shall file a notice of corroboration. It should be filed with the indictment, but no later than the start of the main trial (Article 263(3) CPC). Finally, Article 243(1.1) CPC stipulates that the prosecutor shall file a notice of corroboration with any statement taken under Article 132, namely a statement taken during a pre-trial testimony session, if he or she intends to submit it as direct evidence without the presence of the witness.

In practice, this new document is not being used. In total 64 per cent of the prosecutors who responded to the questionnaire said that they have “occasionally” or “often” filed a notice of corroboration. However, 16 prosecutors, including Chief Prosecutors, were interviewed during the reporting period about this issue. They generally acknowledged that they do not file notices of corroboration. According to them these documents are not useful during the proceedings. Besides, 68 per cent of the judges and 40 per cent of the lawyers who responded to the questionnaire said that prosecutors “seldom or never” file a notice of corroboration together with the indictment. Moreover, none of the indictments filed after January 2013 and collected by OSCE during the reporting period make references to a notice of corroboration. They were also never mentioned during trials.

### **3.3.3. Negotiated pleas of guilt**

#### **3.3.3.1. An efficient administration of justice**

Under the CPC, the defendant can plead guilty during the regular proceedings (in the initial hearing, second hearing, or during the main trial). However, the CPC also contains procedures allowing the parties to negotiate written plea agreements for a more efficient administration of justice.<sup>103</sup> To a certain extent such procedures existed also under the previous Procedural Code.<sup>104</sup> However, under the new CPC, the prosecutor may now initiate the plea negotiations not only after the indictment is filed, but also before. Another feature of the new code is the possibility for the prosecutor to recommend more lenient punishment, to the extent allowed with this code, depending on the time when the agreement is reached: during the main trial, prior to the main trial, and whether the defendant participates as a co-operative witness.<sup>105</sup> According to the Guide, this presents another change to the role of the prosecutor. The negotiated plea of guilt is the most important alternative to a trial.<sup>106</sup>

Reflecting the importance of this element of the CPC, the Chief Prosecutor of Kosovo (together with the Chief EULEX Prosecutor) in November 2013 issued instructions on guilty plea agreements. These instructions were issued with the purpose of streamlining prosecutor’s activities related to negotiated pleas of guilt. The instructions cover what the written plea agreement should contain and what prosecutors can (and cannot) offer as part of the plea negotiation process. The instructions also deal with prosecutors’ responsibilities towards injured parties as part of the plea negotiation process and their duties relating to the

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<sup>103</sup> Regarding guilty pleas during the regular proceedings: Article 246(4) CPC requires that the judge, at the beginning of the initial hearing “afford the defendant the opportunity to plead guilty or not guilty” (See also Article 248 CPC: Guilty Pleas during the Initial Hearing.). The judge shall again afford this opportunity to the defendant at the beginning of the main trial (Article 325). Under the PCPC, the defendant could also plead guilty or not guilty at the beginning of the confirmation hearing (Articles 314 and 315 PCPC) and at the beginning of the main trial (Articles 358 and 359 PCPC).

<sup>104</sup> A subchapter on “Guilty plea agreements” was added to the previous Criminal Procedural Code in November 2008. Law No. 03/L-003 on Amendment and Supplement of the Kosovo Provisional Code of Criminal Procedure No. 2003/26. Under Article 308A the defendant and the prosecutor could negotiate the terms of a written plea agreement under which the defendant agreed to plead guilty.

<sup>105</sup> Article 233(7) CPC provides that the prosecutor can recommend a sentence lower than the minimum possible imprisonment sentence set by the Criminal Code. Depending on the stage of the proceedings, the proposal could go as low as 90 per cent of the minimum (if the plea agreement is concluded at the main trial), 80 per cent, 60 per cent, or as low as 40 per cent for defendants given the status of a “co-operative witness”.

<sup>106</sup> Guide to CPC, p. 30 and p. 62. See also Commentaries to the CPC (*supra* note 40), pp. 571–605.

subject of confiscation of objects and material benefits of crime.<sup>107</sup> Non-compliance with the Instructions is considered a serious violation of the Code of Ethics for Prosecutors.

### 3.3.3.2. Pleading guilty during regular proceedings

In practice, parties still rarely negotiate written plea agreements. In total 61 per cent of the judges who responded to the questionnaire stated that they are “seldom or never” presented with written plea agreements. Besides, 45 per cent of the lawyers and 51 per cent of the prosecutors said that they “seldom or never” negotiate such agreements. According to statistics obtained from the KPC, negotiated pleas of guilt were used only in 3 per cent of the cases dealt with by prosecution offices across Kosovo between April and June 2015.

OSCE monitoring shows that a significant number of defendants agree to plead guilty but do not do so through written plea agreements. Instead, defendants plead guilty during regular proceedings. For instance, 408 productive initial hearings were monitored in the general and serious crimes departments. In 101 of them the defendants pled guilty (25 per cent of the hearings). In contrast, only in eight cases monitored during the reporting period, before both departments, were written plea agreements reached between the parties.<sup>108</sup> In two other cases, the parties attempted to reach an agreement, to no avail. The statistics obtained from the KPC also show that the number of written plea agreements reached between parties is low: only 171 agreements were reached between April and June 2015 out of 5925 cases processed by the seven prosecution offices.<sup>109</sup>

Out of the 11 prosecutors that were interviewed during the reporting period, five expressed their reluctance to use this alternative because it is a burdensome process. The prosecutor, for instance, is required to inform the chief of his or her respective office, who should then give written authorization for the preliminary meeting to commence negotiations for a plea agreement. Prosecutors seem to overlook the fact that they can benefit from initiating negotiated pleas of guilt under Article 233 CPC. Indeed, the co-operation with the defendant may advance the investigations.<sup>110</sup>

Another reason why there is a low number of written plea agreements seems to be that defendants who plead guilty during the regular proceedings are imposed low sentences anyhow, or even below the minimum foreseen by law.<sup>111</sup> Defendants may therefore have no incentive to negotiate a written plea agreement. The KJC Consolidated Report points out that, when defendants plead guilty during trial, courts “quite often” impose sentences below the minimums foreseen by law, arguing that there are exceptionally mitigating circumstances in the case. It further recommends that courts should review their sentencing policy for the

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<sup>107</sup> Instructions on Guilty Plea Agreements, Office of the Chief Prosecutor of Kosovo of Kosovo and Office of the Chief EULEX Prosecutor, 13 November 2013, addressed to all prosecutors in Kosovo, [http://www.psh-ks.net/repository/docs/Instructions\\_on\\_guilty\\_plea\\_agreements.pdf](http://www.psh-ks.net/repository/docs/Instructions_on_guilty_plea_agreements.pdf).

<sup>108</sup> It should be noted that no official statistics are being kept by courts of the number of written plea agreements reached between prosecutors and defendants.

<sup>109</sup> Implementation of Alternative Proceedings, Office of the Chief Prosecutor of Kosovo, p. 7.

<sup>110</sup> Guide to CPC, p. 23.

<sup>111</sup> The entering of a guilty plea is indeed a factor that should be taken into consideration by the court when determining the punishment (Article 73(3.6) CC). See also OSCE Report *Inadequate Assessment of Mitigating and Aggravating Circumstances by the Court* (July 2010), <http://www.osce.org/kosovo/70907>.

purpose of increasing the number of cases during which a negotiated plea agreement will be reached.<sup>112</sup>

Also, in the cases monitored during which the parties reached a plea agreement or expressed the will to do so, the indictment had already been filed. This shows that the new CPC provision allowing the parties to negotiate a plea agreement at any time prior to the filing of the indictment is not being applied either. The KJC Consolidated Report states that “most of the plea agreements are achieved after the filing of indictments”.

Another issue observed is that courts often fail to set deadlines for negotiations. Only eight per cent of the lawyers surveyed stated that the court “often” sets a deadline for negotiations; 16 per cent of prosecutors responded the same; and only six per cent of the judges acknowledged this fact. Article 233(10) CPC forbids the judge from participating in the plea negotiations but allows him or her to “set a reasonable deadline not longer than three months for the conclusion of the negotiations to prevent delay of the procedure”. In three cases monitored by the OSCE, the court did not set a deadline, but instead scheduled the date for the commencement of the main trial while expecting the parties to reach an agreement in the meantime. Such decision does not appear appropriate because if the parties fail to reach an agreement during that period of time, the trial will start without the defendant having had the opportunity to exercise his or her right to file motions to dismiss the indictment or objections to the evidence before the commencement of the main trial.<sup>113</sup> It also happens that the court adjourns the case for an indefinite period of time after one of the parties expresses willingness to negotiate an agreement with the prosecution.

#### **3.3.4. Other alternatives to trial**

Before filing an indictment, prosecutors have to consider using, when appropriate and in the public interest, the alternatives to a trial foreseen under Article 229 CPC.<sup>114</sup> There are four types of alternatives. The first type, negotiated pleas of guilt, is the most important alternative, as explained above (3.3.3). Prosecutors can also provisionally suspend proceedings (Article 230 CPC), abandon prosecution when prosecution is not obligatory (Article 231 CPC), or refer the case for mediation (Article 232 CPC).

In practice, these alternatives to trial are rarely used by prosecutors. Only three per cent of the prosecutors who responded to the questionnaire said that they “often” suspended the prosecution of a criminal offence based on Article 230 CPC and 70 per cent of them responded that they “seldom or never” do so. Similarly, only seven per cent of them said that they “often” referred a case for mediation and 76 per cent responded that they “seldom or never” do so. In total 85 per cent of lawyers who responded to the questionnaires said that they “seldom or never” participated in a case where the prosecutor suspended the prosecution of a criminal offence based on Article 230, and 86 per cent responded that they “seldom” or “never” were involved in cases sent by the prosecutor for mediation. According to statistics

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<sup>112</sup> KJC Consolidated Report (*supra* note 8), p. 3.

<sup>113</sup> Article 246 states that the judge shall afford the defendant the opportunity to plead guilty or not guilty during the initial hearing. If the defendant decides to plead not guilty, he or she should have had the right to file objections against the evidence and requests to dismiss the indictment. According to article 254(5) CPC, the judge shall not schedule the main trial if such objections or requests are pending. See also Article 255(5) CPC states that, during the second hearing, the judge shall schedule the main trial, unless he or she still must rule on a pending objection under Article 249 or request under Article 250 of the present Code.

<sup>114</sup> Guide to CPC, p. 61.

obtained from the KPC, alternatives to trial (excluding negotiated pleas of guilt) were used only in six per cent of the cases dealt with by prosecution offices across Kosovo between April and June 2015.

In this regard, the OSCE notes the highly commendable efforts of the Office of the Chief Prosecutor of Kosovo to increase the use of these alternative procedures across Kosovo, holding a series of trainings in September 2015, supported by the OSCE, for all prosecution offices across Kosovo on the use of these alternative procedures and greatly advocating for the increased use of these procedures by all prosecutors.

### **3.4. New role of the injured party**

Under the CPC, the injured party has a greater role in the proceedings, both in the evidence-gathering stage (investigation stage) and the main trial stage. The sub-sections below examine whether injured parties file declaration of damages, whether they are now more often represented by victim's advocates, and what is their role during initial and second hearings.

#### **3.4.1. Declaration of damages**

Declarations of damages did not exist under the previous procedural code. However, the injured party had the right to file a property claim in criminal proceedings.<sup>115</sup> The new CPC also contains a chapter on property claims with provisions that are identical to the provisions contained in the previous procedural code.<sup>116</sup>

The new CPC includes a new article on "Declaration of Damages by the Injured Party". According to Article 218 of the CPC, during the investigatory stage or within 60 days of the filing of the indictment, the injured party may file a simple declaration of damage from the charged criminal offence. A victim's advocate may assist the injured party in filing a declaration of damage. The declaration of damage shall describe: (i) the person who caused the damage; (ii) how the damage occurred; (iii) how the damage was caused by or was a foreseeable result of the criminal offence, and (iv) if there were costs due to the damage or the loss caused by the criminal offence, the declaration shall provide a reasonable estimate of the costs or losses.<sup>117</sup> If the declaration of damages provides an estimate of the costs or losses, it shall serve as a property claim.<sup>118</sup>

The form for the declaration of damages has been available since 2013.<sup>119</sup> In the declaration, the injured party has the possibility to describe the physical, financial, and emotional impact of the crime, which includes physical injuries, amount of medical expenses or property damage as a result of the crime (i.e., items damaged or stolen and/or income lost), and psychological impact that the crime had on the injured party or a family member. The Standard Operating Procedures for Victim Protection and Assistance Office, which entered

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<sup>115</sup> Article 80 PCPC. Chapter XII PCPC regulated the way property claims were to be filed and decided upon.

<sup>116</sup> Chapter XXV CPC.

<sup>117</sup> Article 218(3) CPC.

<sup>118</sup> Article 218(6) CPC.

<sup>119</sup> OSCE interviewed six victims' advocates from six of the seven Kosovo regions between June and July 2014. According to these interviews, some started using these forms as early as January 2013 (Pejë/Peć), whereas the others later, by the end of 2013 and beginning of 2014.

into force in October 2013, state that victim's advocates may assist victims in preparing and filing such declarations.<sup>120</sup>

In practice, however, declarations of damages are rarely filed. In total, 58 per cent of the prosecutors and 74 per cent of the judges who responded to the questionnaire responded that they "seldom or never" were involved in a case in which a declaration of damages was filed during the investigatory stage or shortly after the indictment was filed. Whereas, 77 per cent of the lawyers said that they "occasionally" or "often" assisted the injured party in filing a declaration of damages.<sup>121</sup> However, no declarations of damages were discussed or mentioned by parties and/or the courts during hearings monitored, nor were they referred to in written judgments collected by OSCE. Moreover, six victim's advocates, representing six out of Kosovo's seven regional Victim Protection and Assistance offices, interviewed explained that, although injured parties are strongly encouraged to file declarations of damages, they often do not do so. Even when they do file them, as victims' advocates explained, it has not been fruitful so far, either because the trials are still pending or because the court did not use the declarations to decide on property claims. This has been confirmed by the answers provided by prosecutors and judges who responded to the questionnaires. In total, 65 per cent of the prosecutors said that, in cases in which a declaration was filed, the court "seldom or never" used it to decide on the property claim while 67 per cent of judges said they "seldom or never" used the declaration to decide on the property claim.

### 3.4.2. The victim's advocate during trial

Under the previous procedural code, the injured party had certain rights during trial, namely: to propose evidence, to put questions to the defendant, witnesses and expert witnesses, to make remarks and present clarifications concerning their testimony and to give other statements and to file motions.<sup>122</sup> However, the injured party was not considered to be a "party" to the proceedings *per se*. The injured party had the possibility to exercise his or her rights through an authorised representative, who could be a victim's advocate.<sup>123</sup> In particular cases such as domestic violence cases and sexual crime cases, the injured party had to have such a representative from the initiation of the criminal proceedings. Victim's advocates also had a general obligation to assist injured parties in safeguarding their rights.<sup>124</sup>

In the new code, the injured party has "the status of a party" in the criminal proceedings.<sup>125</sup> This means for instance that, during the trial, the injured party can present evidence and can cross-examine witnesses.<sup>126</sup> The injured party may be represented by a lawyer, by a victim's advocate or may represent himself or herself.<sup>127</sup> According to the SOPs of October 2013,

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<sup>120</sup> Standard Operating Procedures (SOPs) for Victim Protection and Assistance Office (October 2013), Article 30, [http://www.psh-ks.net/repository/docs/No.1202.2013\\_Directive\\_on\\_SOP\\_FOR\\_THE\\_VPAO.pdf](http://www.psh-ks.net/repository/docs/No.1202.2013_Directive_on_SOP_FOR_THE_VPAO.pdf).

<sup>121</sup> Out of 81 lawyers, 35 responded that they "occasionally" represented an injured party in criminal proceedings, and 14 others responded that they did so "often". Out of these 49 lawyers, 11 "seldom or never" assisted the injured party in filing a declaration of damages, 25 did so "occasionally", and 13 "often". Out of the 38 lawyers who stated that they "occasionally" or "often" assisted the injured party in filing a declaration of damages, four responded that the declaration was "often" used by the court to decide on a property claim; 19 responded "occasionally" and 15 responded "seldom or never".

<sup>122</sup> Article 80 PCPC.

<sup>123</sup> Article 81(1) PCPC.

<sup>124</sup> Article 81(4) PCPC.

<sup>125</sup> Article 62(1.3) CPC.

<sup>126</sup> Articles 327(1.3) and 332(2) CPC.

<sup>127</sup> Article 63 CPC.

victim's advocates should represent victims in five types of specific crimes: crimes of trafficking, crimes of domestic violence, and crimes against sexual integrity, homicide and robbery. The fact that victim's advocates can now represent victims in homicide and robbery cases is new.

In practice, however, the injured party is still rarely represented by a victim's advocate. In 82 murder cases monitored during the reporting period, only in one case was a victim's advocate representing the injured party. The injured party was at the same time being represented by a lawyer. Furthermore, 26 robbery trials were monitored before the serious crimes department. In none of these cases the injured party was represented by a victim's advocate.

### **3.4.3. Presence of the injured party during the initial and second hearing**

Under the previous code there were no initial hearings, but confirmation hearings, to which the injured party had to "be invited".<sup>128</sup> The provisions related to the indictment stage in the new Code are unclear as to whether the injured party will be invited to attend the initial hearing. Article 245 CPC states that "[a]t the initial hearing, the state prosecutor, defendant or defendants, and defence counsel shall be present". The injured party is not listed. However, Article 248(2) CPC stipulates that, in considering the guilty plea during the initial hearing, the court may invite the views of the prosecutor, the defence counsel, and also those of the injured party. It is however unclear whether it should be understood from this provision that the injured party should generally be invited to attend all initial hearings, or that the injured party should be invited only when the defendant pleads guilty during that hearing. This issue was raised in the KJC Consolidated Report, which states that "[t]here is discrepancy in the Code in relation to the attendance of the injured party at the initial hearing".

Under the previous code, at the end of the confirmation hearing, if the judge decided to dismiss the indictment, the injured party had the possibility to appeal the decision.<sup>129</sup> If the appeal was successful, the injured party was considered to have thereby assumed prosecution as a subsidiary prosecutor. The availability of the subsidiary prosecution has been removed under the new CPC. The Guide to the CPC explains that "[i]n order to balance the loss of the right to private prosecution, the rights of victims have been sharply increased in this new Criminal Procedure Code. Under Article 62 the injured party has a series of rights [including the right] to be a party in the proceedings".<sup>130</sup> Therefore, the Supreme Court may wish, through a general session,<sup>131</sup> to clarify whether the injured party shall be invited to attend the initial hearing.

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<sup>128</sup> Article 309(2) PCPC. Article 313(2) PCPC also explicitly stressed that "the injured party ha[d] the right to attend". During the hearing, the judge could allow the injured party to make a statement (Article 314(5) CPC). Besides, Article 311 stipulated that, in case the defendant decided to waive the confirmation hearing and submit written objections to the indictment or the admissibility of evidence, the objections had to be served immediately on the prosecutor and the injured party (Article 311(2) PCPC). The prosecutor and the injured party could then file their own written statements within eight days upon reception of the objections (Article 311(3) PCPC).

<sup>129</sup> Article 317(3) PCPC.

<sup>130</sup> Guide to CPC, p. 22. According to the Commentaries to the CPC (*supra* note 40), the presence of the injured party at the initial hearing is not prohibited by any provision. Besides, the injured party is a party to the proceedings (p. 635).

<sup>131</sup> Law on Courts, Article 23.

In practice, the injured party is rarely present during the initial hearing. A total of 408 productive initial hearings were monitored before the general and serious crimes departments during the reporting period. In only 14 hearings held before the general and serious crimes departments was the injured party present.<sup>132</sup> Overall, 27 per cent of the judges who responded to the questionnaire said that they “seldom or never” invite the injured party to attend the initial hearing whereas, 29 per cent of them said that they do so “occasionally”, and 44 per cent do so “often”. This shows an inconsistent practice in the courts with regard to the issue of whether the injured party should be invited to attend the initial hearing.

Furthermore, it is of concern that in 28 cases monitored, the judge proceeded with sentencing during the initial hearing after the defendant pled guilty even though the injured party was not present. The judges did not raise the issue of whether it would be necessary to adjourn the hearings to give the injured party the opportunity to present his or her views and/or to file property claims at a next hearing.<sup>133</sup> Article 248(2) CPC does not oblige the court to invite the views of the injured party when considering the guilty plea during the initial hearing.<sup>134</sup> However, it would seem appropriate for either the prosecutor or the judge to at least raise the issue of whether the injured party should or should not be invited to the hearing to present his or her views.

### **3.5. New role of the judge**

With the new CPC, the judge’s role has shifted from a very proactive to a less proactive role during the proceedings, while the defence and the prosecution have taken on more responsibilities. However, the judge remains the “protector of rights” and has explicit new duties under the CPC to safeguard the rights of the parties. The sub-sections below examine whether judges fulfil some of their new responsibilities, such as: deciding upon appeals on detention on remand within 48 hours; completing trials within the new imposed time limits; issuing timely written judgments as well as reasoned decisions on challenges to the indictment by the defence; and ensuring the audio/video recording of the main trial.

#### **3.5.1. Time limits related to detention on remand**

Article 164(7) CPC stipulates that “[w]ithin 24 hours of the arrest, the state prosecutor shall file with the pretrial judge a request for detention on remand”.<sup>135</sup> Article 189(3) CPC, which is also new, obliges the Court of Appeals to decide within 48 hours of the filing of the appeal

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<sup>132</sup> It should however be noted that in some cases there is no injured party (for instance in cases of illegal possession of weapons or in narcotic cases). Furthermore in many hearings where the injured party was not present it is unclear whether he or she was not present because he or she had not been summoned by the court or simply because he or she could not come.

<sup>133</sup> Of note, the motion to realize a property claim may be filed at any time before the end of the main trial before the Basic Court (Article 460 CPC).

<sup>134</sup> Article 248(2) CPC says “may”.

<sup>135</sup> The PCPC did not set a deadline for the prosecutor to file the request for detention on remand. Article 14 PCPC simply stated that a person deprived of liberty under the suspicion of having committed a criminal offence had to “be brought before a judge promptly and at the latest within 72 hours of the arrest [...]”. Of note, the constitution of Kosovo requires that “[t]he written notice on the reasons of deprivation shall be provided as soon as possible.” It adds that “[e]veryone who is deprived of liberty without a court order shall be brought within 48 hours before a judge who decides on her/his detention or release not later than 48 hours from the moment the detained person is brought before the court” (Article 29(2) of the constitution).

against the ruling imposing detention on remand. There was no such deadline under the previous procedural code.<sup>136</sup>

In practice, prosecutors generally do meet the new 24-hour deadline imposed in Article 164(7) CPC. In total, 72 per cent of the lawyers responded that prosecutors “seldom or never” fail to file a request for detention on remand within 24 hours of the arrest, and 87 per cent of the judges responded the same. However, 48 per cent of the lawyers who responded to the questionnaire responded that when they filed an appeal to the Court of Appeals against a decision by the pre-trial judge to detain their client on remand, the Court of Appeals “often” failed to decide within 48 hours of the appeal being filed and 60 per cent of the prosecutors responded the same. Finally, 57 per cent of the judges responded that the Court of Appeals “occasionally” or “often” fails to meet the deadline. The KJC Consolidated Report confirms that these deadlines are not being respected on appeal.

It is of concern that appeals filed to the Court of Appeals against decisions imposing detention on remand are not always decided upon in a timely manner. This may violate the defendant’s right to liberty.

### **3.5.2. Time limits for the completion of the main trial**

The CPC, through Article 314, imposes time limits during which trials must be completed. There were no time limits under the PCPC. A trial should now be completed within three months for a case before the general department or within four months for a case before the serious crimes department. The main trial may be extended by a reasoned decision if specific circumstances exist, such as an unusually large number of witnesses.<sup>137</sup> The main trial may then be extended for 30 days for each decision.<sup>138</sup> Respecting these time limits is essential because the CPC does not set maximum time limits for detention on remand after the indictment is filed; instead, the detention is limited by the timeline for the trial. The judge should therefore work diligently to hold the trial as quickly and fairly as possible.<sup>139</sup>

In practice, however, a significant number of trials held before the serious crimes department are not completed within the time limits imposed under Article 314 CPC. The OSCE has monitored 31 trials held before this department during which the time limits were not met. The practice, in general, is to schedule a one-day or half-day hearing per month, which is not frequent enough to complete trials within the imposed time limits, especially those before the serious crimes department, even supposing all hearings scheduled were productive.<sup>140</sup> Not only courts do not respect time limits, but they also fail to issue reasoned decisions to extend the main trial. The answers provided by the lawyers, judges and prosecutors to the questionnaire confirm these concerns. In total, 38 per cent of the lawyers who responded to the questionnaire said that they have “often” been involved since January 2013 in cases where the main trial was not completed within the relevant time-limits. However, only ten per cent of the prosecutors responded that the time-limits were not respected, whereas 63 per cent of the judges admitted that it happened “occasionally” or “often”. Both the lawyers and prosecutors said that in cases where the main trial was not completed within the time-limits,

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<sup>136</sup> See Chapter XXXVIII related to Appeal Against Rulings.

<sup>137</sup> Article 314(2) CPC.

<sup>138</sup> Article 314(3) CPC.

<sup>139</sup> Guide to CPC, p. 26.

<sup>140</sup> This practice existed before the CPC entered into force.

the court “seldom or never” issued a decision to extend the main trial. It is also of concern that courts follow the same scheduling practice when the defendant is in detention on remand during trial. Failing to respect the new time limits foreseen in the CPC may therefore violate the defendant’s right to be tried within a reasonable time as well as the right to liberty.

### 3.5.3. Date of the written judgment

The new CPC requires that the written judgment issued at the end of the main trial shall include the date when it was drawn up.<sup>141</sup> There was no such requirement under the previous code. In a report issued in 2012, the OSCE noted that due to lack of signature date it was impossible to verify whether a judgment was drawn up within the time limits imposed by the code (within 15 days of its announcement if the accused is in detention on remand and within 30 days in others instances).<sup>142</sup> Applying these new provisions is essential to ensure that the defendant’s right to a timely judgment is respected.

However, in practice, in only 36 of the 196 written judgments collected, was there a distinction between the date when the oral verdict was announced and the date when the judgment was issued.

### 3.5.4. Review of challenges to the indictment

According to the Guide to the CPC, “[a] major structural change to the criminal procedures is the elimination of both the Confirmation Hearing and the position of the Confirmation Judge. Most agreed that the procedure did not substantially protect any rights, but was an excessive drain on judicial resources.”<sup>143</sup> Confirmation hearings under the PCPC have therefore been replaced by initial and second hearings under the new code.<sup>144</sup> The process of confirming the indictment, the Guide explains, is a “vitaly important step” in the proceedings during which the judge “provide[s] an independent review of the indictment ‘to protect the rights of the Defence against wrongful and wholly unfounded charges’”.<sup>145</sup>

Under the CPC the court shall immediately schedule the initial hearing to be held within 30 days of the indictment being filed, or at the first opportunity, and not later than 15 days from the indictment being filed, if the defendant is being held in detention on remand.<sup>146</sup> During the initial hearing, the court will schedule a second hearing no less than thirty days after the initial hearing, and no more than forty days after the initial hearing. Prior to the second hearing, the defence will have to file a motion to dismiss the indictment under Article 250 CPC. Upon receiving the motion, the court has to issue “a written decision with reasoning” that either denies the motion or dismisses the indictment (if the motion is grounded).<sup>147</sup> This article does not set a deadline before which the decision has to be issued. However, Article 285(2) CPC says that the main trial shall commence within one month from the second hearing.

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<sup>141</sup> Article 370(2) CPC.

<sup>142</sup> Article 369 CPC. OSCE Report *Execution of Judgments* (January 2012), <http://www.osce.org/kosovo/87004>.

<sup>143</sup> Guide to CPC, p. 21.

<sup>144</sup> Chapter XXXII (2) PCPC (Confirmation of the Indictment) and Chapter XV CPC (Indictment and Plea Stage).

<sup>145</sup> Guide to CPC, p. 55 and 57, quoting Case of *Dyilo v. The Prosecution* at the ICC and the United Nations High Commission for Human Rights, Report of the Committee against Torture.

<sup>146</sup> Article 242 (4) and (5) CPC.

<sup>147</sup> Article 250(3) CPC.

In a report published in 2010, the OSCE expressed the concern that the fair trial rights of defendants were too often violated during confirmation hearings especially because the confirmation rulings from the judge contained little to no reasoning.<sup>148</sup> In other words, all indictments were confirmed whether or not they were supported by sufficient evidence, and whether or not the legal qualification of the offence chosen was appropriate.

This remains a concern today. Courts continue to issue decisions with insufficient reasoning upon defence motions to dismiss the indictment.<sup>149</sup> The reasoning is in fact very often the same from one decision to another: judges merely state that the prosecutor gathered sufficient evidence to support a well-grounded suspicion that the defendant committed the criminal offence and briefly list the evidence described in the indictment. Specific arguments raised by the defence are ignored.

OSCE also monitored cases in which the courts erroneously reversed the burden of proof in their decisions; instead of examining whether the prosecutors had presented sufficient evidence in the indictment, they examined whether the defendants had done so in their motions to dismiss the indictment. The courts then concluded that the defendants had not proven their innocence and confirmed the indictment.<sup>150</sup> It is also of concern that courts sometimes do not issue any written decision at all, which is in violation of Article 250(3) CPC. In total, 18 per cent of the lawyers who responded to the questionnaire responded that they “seldom or never” receive the written decision, and 43 per cent of the prosecutors responded the same.

Another issue is that the written decision is often issued by the court with delay. Overall, 31 per cent of the lawyers who responded to the questionnaire said that it usually takes the judge more than three weeks to issue the written decision whereas, 45 per cent of the prosecutors said that it usually takes “from one to three weeks”. This is of concern since according to Article 285(2) CPC the main trial should commence within one month from the second hearing. Delays in issuing the written decision will result in postponing the commencement of the main trial.

### **3.5.5. Audio/video-recording of the main trial**

Under Article 315 CPC, there shall be a written record of the trial, “in its essentials”.<sup>151</sup> The trial shall also be audio-recorded, video-recorded, or recorded stenographically, unless there are reasonable grounds for not doing so. The previous procedural code contained similar provisions.<sup>152</sup> However, a new provision was inserted in the CPC, Article 19(1.27), explaining that there are three types of records in criminal proceedings: summary, transcript and recording. According to this provision, “[a] summary is an accurate description of what a person said. A transcript is a verbatim record of what a person said. A recording is either and

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<sup>148</sup> OSCE Report *Confirmation of Indictment Concerns*, (November 2010), <http://www.osce.org/kosovo/73711>.

<sup>149</sup> OSCE reviewed 19 decisions in cases before the serious crimes department.

<sup>150</sup> See also OSCE Report *Review of Criminal Cases relating to Failure to File Declarations of Assets by Senior Public Officials* (November 2015), <http://www.osce.org/kosovo/204286>, p.11.

<sup>151</sup> The meaning of “in its essentials” as detailed in the CPC is somewhat unclear and a clarifying statement by the Supreme Court through a legal opinion would be useful.

<sup>152</sup> Article 348 PCPC.

audio- or video-recording through electronic means which is capable of repeating the exact words that a person said.”

In practice, main trial hearings continue to be inadequately recorded. During the reporting period, not a single hearing monitored was video-recorded. There is apparently limited possibility to audio- or video-record or record stenographically trials in Kosovo as courts do not have the necessary resources to do so. The failure to video-record trials is one of the issues mentioned in the KJC Consolidated Report. In addition, OSCE is concerned that trial records, in general, are seldom accurate enough because the testimony of witnesses is often re-phrased and/or summarized in the record. Questions asked to witnesses are also rarely entered into the record. A rephrased court record with no verbatim minutes available, nor any audio or video recording, for an important witness is insufficient for a proper assessment by the court of the witness’ credibility. Verbatim record was done in only 19 per cent of the hearings monitored.

The recording issue became even more problematic in some cases monitored in 2013 during which the composition of the panels changed during trials. On 1 January 2013, the justice system in Kosovo was fundamentally restructured with the entry into force of not only the new CPC but also a new Law on Courts.<sup>153</sup> In the immediate implementation period of the Law on Courts in Kosovo, the OSCE observed a significant increase in the number of panel changes in trials that started in 2012 and continued in 2013.<sup>154</sup> Either one or more judges were replaced or the entire panel was reconstituted. The OSCE has monitored trials in which the newly constituted panel decided not to rehear the witnesses who had testified in previous sessions even though in none of these cases was the prior testimony recorded verbatim or by audio or video recording. The newly-composed panels possessed only summaries of the testimony of the witnesses to rely on when making its judgment. However, a re-phrased court record with no verbatim minutes available, nor any audio or video recording, for any important witness is clearly insufficient.<sup>155</sup>

Judges should strive to utilize audio or audio-video recording facilities where they are available. When such facilities are not available the judge, along with the prosecutor and any defence counsel present, should ensure that the written record accurately reflects what has been said by the parties and witnesses during the hearing. The prosecutor and defence counsel should properly read any written minutes before they are signed. Furthermore, when a defendant is unrepresented, the judge should advise him or her of the importance of fully reading the minutes before signing them.

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<sup>153</sup> *Supra* note 1.

<sup>154</sup> This occurred for a number of reasons. First, the Law on Courts requires that serious crime cases, now heard in the new serious crimes department within the Basic Court, have three professional judges instead of two (Law on Courts, Article 15(2); CPC Article 25(3)). Second, many judges received new court assignments and did not complete their ongoing trials. Third, a number of cases from Prishtinë/Priština, Pejë/Peć and Prizren were transferred to the newly established Basic Courts in Ferizaj/Uroševac and Gjakovë/Djakovica (Law on Courts, Article 39(2)). Fourth, some offences, such as election fraud, that fell within the jurisdiction of municipal courts now fall within the jurisdiction of serious crimes department and require a larger panel (See Article 15(1.14) of the Law on Courts and Article 180, former Criminal Code of Kosovo for the criminal offence of election fraud).

<sup>155</sup> The ECtHR in the decision *P.K. v. Finland* (ECtHR decision of 9 July 2002, p. 6.) explained that, before deciding on whether to rehear or not a witness who testified in previous sessions in front of the previous panel, the newly-constituted panel shall properly examine all relevant factors including the quality of the record of the prior testimony to ensure that the principle of immediacy is complied with.

#### 4. CONCLUSION

Under the new CPC, the proceedings have become even more adversarial and the role of the judge and the parties has significantly changed. However, in practice, the defence, prosecutors, judges, and injured parties have yet to fully embrace their new roles and responsibilities.

This report finds that the defence often does not fulfil its new responsibilities in practice. This finding should be understood within the particular context of criminal proceedings in Kosovo, where a very high number of defendants are not represented by defence counsel, not only in cases before the general department, but also in cases before the serious crimes department. In these cases, the defence generally does not embrace its new role because there is no counsel present to assist the defendants, and on their own they are usually unable to discharge their responsibilities. Unrepresented defendants, understandably, cannot efficiently prepare before trial, nor present a convincing defence case. Cross-examination, also, is a difficult task for qualified practitioners, let alone unrepresented defendants. Since unrepresented defendants will often be placed at a significant disadvantage *vis-à-vis* the prosecution it is essential that the judge step in and ensure equality of arms during the trial.

In cases where defence counsel is present, the defence often does not engage in the proceedings as actively as it should. As a result, in many trials, there is no equality of arms between the defence and the prosecution, and the fair trial rights of the defendants are not appropriately enforced. In particular, the defence generally does not properly prepare before the commencement of the trial. For instance, the defence seldom uses the new opportunities that have been introduced in the CPC to obtain exculpatory evidence at the investigation stage through the prosecution. It also rarely challenges the selection of an expert by the prosecutor. Then, during the second hearing, the defence almost never submits the notice of the name of defence witnesses it intends to call at trial. Furthermore, between the initial and second hearing, the defence often files poorly reasoned motions to dismiss the indictment. During trial, the defence often fails to efficiently challenge the evidence presented by the prosecution through cross-examination and to present a solid defence case. In 45 cases monitored, not only before the general department but also before the serious crimes department, even though the defendants pled not guilty, no defence witnesses were called and no defence case was presented. These cases are concrete examples of an overall failure by the defence to assume its new “elevated responsibilities” under the new CPC.

Prosecutors also generally carry out their role during the proceedings as they used to before the entry into force of the new CPC. For instance, they have not changed the way they take pre-trial statements from witnesses. New provisions have been added in the CPC regulating the way witness statements have to be taken during pre-trial proceedings and how they should be used during trial. Even though the objective of these detailed provisions is to better protect the defendant’s right to cross-examine, prosecutors continue to take pre-trial statements from witnesses in the same way as they used to under the previous procedural code, making no distinction between “pre-trial interview” and “pre-trial testimony”. The failure by prosecutors to apply these provisions may not only constitute a violation of criminal procedure but may also infringe defendant’s right to a fair trial. Indeed, if the pre-trial statement is used as direct evidence during trial because the witness did not appear, but the defence was not present when that pre-trial statement was taken, this will result in violation of defendant’s right to cross-examination because the defence will not have had an adequate and proper opportunity to challenge and question the witness at any stages of the proceedings. Prosecutors also do

not use notices of corroboration, and rarely negotiate written plea agreements with the defence, nor use other alternatives to trial.

Injured parties, despite their new status under the CPC, face difficulties finding their new place in the proceedings. They rarely file declarations of damages or these declarations are not used by the court. Injured parties are also rarely represented by a victim's advocate in murder or robbery cases, and it remains unclear whether injured parties should be invited to attend initial and second hearings.

Finally, with the new CPC, the judge's role has migrated from a very proactive to a less proactive role during the proceedings because the defence and the prosecution have taken on more responsibilities. The judge remains nevertheless the protector of the rights of the parties. He/she has explicit new duties under the CPC to safeguard these rights. In practice, however, the judge does not fully embrace this role. Time limits for detention on remand, completion of the main trial, and the issuance of the written judgment are not always respected. Furthermore, at the indictment and plea stage, there remain deficiencies in the process of confirming the indictment despite the new provisions. Main trial hearings also continue to be inadequately recorded. These failures become even more significant in cases where the defendant is not represented by counsel. They might not only result in violations of criminal procedure but of the defendant's overall right to a fair trial.

## **5. RECOMMENDATIONS**

### **To the Kosovo Judicial Institute and the Kosovo Bar Association**

- The Kosovo Judicial Institute and the Kosovo Bar Association should offer additional in-depth training in criminal procedural law to judges, prosecutors, and lawyers to enable them to better understand their roles in adversarial proceedings.

### **To Judges**

- In cases where the conditions for mandatory defence are not met, judges should ensure that the defendants are properly informed of the right to be provided defence counsel at public expense. It is not sufficient to inform the defendant of his or her right to defence counsel in a superficial and hasty manner, as a routine duty, without explaining this right further. Defendants should be encouraged to ask for defence counsel at public expense to assist them during court proceedings.
- Judges should ensure that decisions granting or denying a request for defence counsel at public expense are properly reasoned. The decision shall explain, in particular, why it is in the interest of justice in some cases to appoint defence counsel, and why the court considered that the defendant was financially unable to pay the cost of his or her defence.
- Judges should ensure the protection of the defendant's rights. In cases involving unrepresented defendants equality of arms should be upheld between the defendant and the prosecution.
- Judges should strive to utilize audio or audio-video recording facilities where they are available. In the absence of those facilities, judges should ensure that the written record accurately reflects what has been said by the parties and witnesses during hearings. Judges should also ensure that unrepresented defendants are advised of the importance of fully reading the minutes of any hearing before signing them.
- Judges should render well-reasoned decisions on defence motions to dismiss the indictment. The decisions should always be in writing. It is not sufficient to conclude that the prosecutor gathered sufficient evidence to proceed with trial and to briefly list the evidence described in the indictment. Conclusions should be supported by reasoning. The evidence should be analysed and the arguments of the defence should be addressed. Decisions should also be rendered in a swift manner so as not to delay the commencement of the trial.
- Judges should ensure that dates when written judgements are drawn up are included and not only the date when the verdict in the case was announced.
- Judges should ensure that trials are completed within three months before the general department and within four months before the serious crimes department.
- Judges should render reasoned decisions to extend the main trial, and the main trial should be extended for no more than 30 days for each decision. Respecting these time limits is essential because the CPC does not set maximum time limits for detention on remand after the indictment is filed; instead, the detention is limited by the timeline for the trial.
- Judges should ensure that declarations of damages filed by injured parties whenever possible are used as property claims during trial.
- After the defendant pleads guilty during the initial hearing and if the injured party was not present during the hearing, judges should consider adjourning the hearing to

another date to give the injured party the opportunity to present his or her views and/or to file property claims.

- When a written plea agreement is negotiated between the parties, judges should consider setting a reasonable deadline not longer than three months for the conclusion of the negotiations. A case should not be adjourned for an indefinite period of time and courts should ensure that proceedings are not delayed.
- Judges should carefully examine prosecution requests during trial to use a witness pre-trial statement as direct evidence when the witness does not appear. Judges should not only “read” the statement but should also determine whether the statement was taken during a pre-trial interview or a pre-trial testimony session, even supposing the defence agrees with the prosecution request. Courts should always ensure that the defence has had an adequate and proper opportunity to challenge and question the witness at some stage in the proceedings.
- Judges should ensure at the indictment stage, whether the second hearing is held or not, that the defence has fulfilled its obligation to submit to the prosecutor a notice of the names of the witnesses it intends to call at trial. If the defence fails to do so, the court should consider imposing a fine of up to 250EUR upon the defence counsel.
- The judges should ensure that a schedule is issued at the beginning of the trial setting forth the order in which the witnesses proposed by the parties will be called.
- The Court of Appeals should decide within 48 hours of the filing of the appeal against the ruling imposing detention on remand.
- The Supreme Court should clarify whether the injured party shall be invited to attend the initial hearing.

### **To defence counsel**

- The defence should efficiently prepare before the trial starts. The defence should know before the trial starts what the defence case will consist of. It should not wait until trial starts to seek evidence. A defence case should be presented and defence witnesses should be called if the defendant pleads not guilty.
- The defence should ask the prosecution in writing to collect exculpatory evidence, including expert analysis. Decisions from prosecutors rejecting such requests shall be supported by reasoning. The defence can appeal the decisions to the pre-trial judge.
- The defence should consider challenging the selection of an expert by the prosecution based on his or her qualifications or potential conflict of interest by filing a challenge to the pre-trial judge.
- The defence shall submit to the prosecutor a notice of the names of the witnesses it intends to call at trial during the second hearing.
- The defence should provide proper reasoning in the motions filed at the indictment stage.
- The defence should properly prepare the cross-examination of prosecution witnesses.
- The defence should ensure that the written record accurately reflects what has been said by the parties and witnesses during any hearing. The defence should properly read any written minutes before they are signed.

### **To Prosecutors**

- Prosecutors should initiate plea negotiations not only after the indictment is filed but also before.
- Prosecutors should consider and use alternatives to trial whenever appropriate.

- Prosecutors should file notices of corroboration when needed. They must think about evidence and find corroboration for evidence which is not as credible, relevant or convincing.
- Prosecutors should apply the provisions regulating the way witness statements have to be taken during the investigation stage. They have to specify for each statement whether it is taken during a pre-trial interview or pre-trial testimony session, or a special investigative opportunity. It is not sufficient to simply take a “statement” from a witness. When pre-trial testimony sessions are held, the formalities foreseen in the law have to be respected.
- Prosecutors should render a decision supported by reasoning when rejecting requests from the defence to collect exculpatory evidence. The decision can be appealed to the pre-trial judge.
- Prosecutors should inform the defence of the decision to appoint an expert. The defence can then challenge this decision to the pre-trial judge.
- Prosecutors should ensure that the written record accurately reflects what has been said by the parties and witnesses during any hearing. Prosecutors should properly read any written minutes before they are signed.
- The Chief Prosecutor should consider issuing guidelines to assist prosecutors in understanding when and how notices of corroboration should be used, and to clarify what is the difference between a statement taken during a pre-trial interview session and one taken during a pre-trial testimony session.

#### **To Victim’s advocates**

- Victim’s advocates should encourage and assist injured parties in filing declarations of damages, and shall ensure whenever possible that the declaration is used by the court as a property claim during trial.
- Victim’s advocates should represent victims not only in crimes of trafficking, crimes of domestic violence, crimes against sexual integrity but also in homicide and robbery cases.

#### **To the Kosovo Judicial Council**

- The KJC should consider designing a mechanism for the assessment of the defendant’s financial status. This assessment is necessary when deciding on whether defence counsel at public expense should be assigned to a defendant under Article 58 CPC.
- The KJC should ensure that audio-recording and/or video-recording of trials is technically feasible in all courts and that trials are audio-recorded and/or video-recorded, or that verbatim minutes be taken in all trials so that the exact words said by anyone present are recorded.
- The KJC should consider conducting a review of sentencing practices in Kosovo. This review would help understanding the reasons why defendants currently plead guilty during initial and second hearings or during the main trial instead of negotiating with the prosecutor a written plea agreement before the indictment is raised.



Review of the Implementation  
of the New Criminal  
Procedure Code of Kosovo