Department of Human Rights and Communities

Legal System Monitoring Section

THE USE OF DETENTION IN CRIMINAL PROCEEDINGS IN KOSOVO: COMPREHENSIVE REVIEW AND ANALYSIS OF RESIDUAL CONCERNS

– Part I –

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EXECUTIVE SUMMARY

This report is based on direct and focused monitoring and analysis of 125 cases involving detention on remand proceedings before the Kosovo municipal and district courts over the course of a nine-month period.[1] The report also analyses some cases and situations which occurred outside the reporting period in so far as they raise questions of law sufficiently important or particularly serious human rights concerns.

Overall, the OSCE Mission in Kosovo (OSCE) found that, despite some improvements, detention on remand proceedings in Kosovo still fall short of international standards.

The relevant legal framework in Kosovo is modern, human-rights compliant and, with some exceptions,[2] clear. Problems remain, however, with the way that the law is being applied by the various institutional actors playing a role in detentions on remand, namely the police, prosecutors, judges and defence counsel. Inadequate application of the Kosovo legal framework and international human rights standards results in frequent violations of defendants' right to liberty, and each of the actors involved shares responsibility for these violations, to a greater or lesser extent.

The OSCE has found that police officers sometimes fail to hand police reports to prosecutors without delay, thus leaving the latter short of time to draft adequately reasoned requests for detention. Prosecutors often fail to support their requests for detention with sufficient reasons, and occasionally seem to over-rely on detention even in situations where other, less restrictive measures (such as house arrest, attendance at the police station, bail etc.) appear sufficient for a proper conduct of investigations. Courts frequently impose detention even where the facts of the case arguably do not warrant detention on remand and most rulings on detention contain scant and abstract reasoning. Defence counsel many times fail to effectively challenge the need for detention on remand, thus falling short of diligently defending their clients' right to liberty.

Thus, despite being well protected in the applicable international law and in the Kosovo legal framework, the right to liberty is still endangered in Kosovo through the law's faulty application. The institutional actors involved in detention proceedings, in particular public prosecutors and judges, should more vigilantly safeguard the right to liberty, and should resort to detention on remand only when strictly necessary, and in full conformity with the requirements of the law.

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1 The reporting period was 1 January – 30 September 2008. The monitoring also continued, albeit less intensely, beyond this reporting period, pursuant to OSCE's mandate to monitor court proceedings.

2 One such exception is the inconsistency of Article 14(2) of the Provisional Criminal Procedure Code of Kosovo promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments (PCPCK) – which prescribes that an arrested person be brought before a judge within 72 hours – with Article 212(4) PCPCK (as amended on 22 December 2008) – which requires that an arrested person be brought before a judge within 48 hours, or otherwise be released.

I. INTRODUCTION

Since 2000, the OSCE has paid close attention to the manner in which detention is applied in the course of criminal proceedings in Kosovo. Detention on remand has been a thematic focus for the OSCE's human rights monitoring activities both due to the paramount importance of a person's right to liberty, and also because various international monitoring bodies consistently and continuously evidence that violations of this fundamental right unfortunately remain commonplace throughout the world.[3]

The OSCE has reported in the past on various concerns surrounding the application of detention on remand in Kosovo.[4] In its 2004 *Review of the Criminal Justice System*, the OSCE found that Kosovo courts were failing to adequately justify initial rulings on detention and to consider alternatives to detention; that there was a lack of uniformity in determining the starting time of extensions to detentions; and that courts were failing to show special diligence in handling detention matters, and appeared to not be adequately aware of how to address *habeas corpus* petitions.[5]

This report assesses the extent to which the previously reported problems and shortcomings has been addressed by the relevant stakeholders. The report explores the applicable international human rights standards[6] and the Kosovo legal framework regulating the application of detention in criminal proceedings. Against that framework, the report evaluates the manner in which detention is applied in practice by the courts. The report finds that while certain progress has been achieved in the past few years, unfortunately there remain many deficiencies in the way that detention is applied in the course of criminal proceedings in Kosovo.

II. LEGAL FRAMEWORK

All detentions encroach upon a fundamental human right: the right to liberty and security of person.[7] Personal freedom is a condition which every person should generally enjoy, and any limitation of liberty should always be exceptional, objectively justified, and as short as possible.

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[3] UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/10/21 (16 February 2009), paragraph 45.

[4] See, for instance, the LSMS Report Kosovo. Review of the Criminal Justice System (April 2003–October 2004). Crime, Detention, and Punishment.

[5] *Ibidem*.

[6] The international law utilized as a reference for the legal analysis in this report is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in particular its Article 5 of the right to liberty and security, and the relevant case-law of the European Court of Human Rights (ECtHR) interpreting that right. The ECHR was chosen as reference both because it is arguably the most advanced system of human rights protection in the world, and also because it is directly applicable in Kosovo (see UNMIK Regulation 1999/24 on The Applicable Law in Kosovo, section 1.3(b); see UNMIK Regulation 2001/9 On A Constitutional Framework for Provisional Self-Government in Kosovo, section 3.2(b); see also Articles 22(2) and 53 of the constitution).

[7] Article 9(1), the International Covenant on Civil and Political Rights (ICCPR); Article 5(1), ECHR; Article 13(1) PCPCK. Article 29 of the constitution.

The European Court of Human Rights (ECtHR), has repeatedly stated that the right to liberty, along with the right to life, freedom from torture and ill-treatment, and freedom of movement, is "in the first rank of the fundamental rights that protect the physical security of an individual […] and as such its importance is paramount."[8]

Any deprivation of liberty may also directly affect a person's enjoyment of other rights such as the right to private life, to freedom of assembly, or movement and may also place the individual in a vulnerable position and at risk of ill-treatment.[9] Therefore, law enforcement and judicial authorities should always duly weigh such considerations in every case where they contemplate imposing detention on remand. Furthermore, the need for detention should always be balanced against one's basic right to be presumed innocent until proven guilty.[10]

Reflecting the paramount importance of the right to liberty, international human rights conventions and criminal procedure laws in democratic societies establish a system of firm guarantees for all persons deprived of this basic right. Police officers, public prosecutors and judges must carefully apply these procedural guarantees in practice.

The overall purpose of the normative framework regulating the use of detention in the course of criminal proceedings is to safeguard the right to liberty and to ensure that no-one is dispossessed of his or her liberty in an arbitrary fashion.[11]

In Kosovo, the legal framework enshrining the right to liberty consists of directly applicable international human rights standards, as well as corresponding local legislation. At the international level, the International Covenant on Civil and Political Rights (ICCPR) states that any deprivation of liberty must be carried out based on such grounds and in accordance with such procedure as established by the domestic law (principle of legality).[12] Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) demands that the deprivation of liberty be in accordance with the law, and exclusively for the purposes enumerated therein.[13] The criminal procedure law applicable in Kosovo similarly prescribes that "No one shall be deprived of his or her liberty save in such cases and in accordance with such proceedings as are prescribed by the law."[14] Detention on remand may be ordered within 48 hours of the arrest,[15] only after a hearing in presence of the defendant and defence counsel,[16] and only when the following three-prong test is met:

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8 See, *inter alia*, *Musuc v. Moldova*, ECtHR judgment of 6 November 2007, paragraph 37.

9 See Monica Macovei, The Right to Liberty and Security of the Person. A Guide to the Implementation of Article 5 of the European Convention on Human Rights (Council of Europe Human Rights Handbook (No. 5), 2002), page 6.

10 Article 14(2) ICCPR; Article 6(2) ECHR; Article 3(1) PCPCK.

11 See *Saadi v. The United Kingdom*, ECtHR judgment of 29 January 2008, paragraph 66.

12 Article 9(1) ICCPR.

13 Article 5(1) ECHR.

14 Article 13(1) PCPCK.

15 Article 212(4) PCPCK. See also Article 29(2) of the constitution.

16 Article 282 PCPCK.

- there is a grounded suspicion that the person has committed a criminal offence;
- there is a risk that the suspected person: (i) will flee or his or her identity cannot be established; (ii) will destroy or forge evidence, influence witnesses or injured parties or accomplices; or (iii) will repeat the criminal offence; and
- the alternative non-custodial measures provided in the code are insufficient to ensure the presence of the accused, the successful conduct of the proceedings and prevent re-offending.[17]

A further guarantee, of particular importance, is that the rulings on detention must contain detailed reasoning as to why deprivation of liberty is necessary in the specific circumstances of the case.[18] Lastly, the law also incorporates the "no longer than necessary" principle, by prescribing that "[a]ny deprivation of liberty and in particular detention on remand in criminal proceedings shall be reduced to the shortest time possible."[19] All these safeguards contained in the legal framework of Kosovo mirror internationally recognized standards on the right to liberty and security of person.

Of note, the measure of house detention, although technically distinct from detention on remand, should be applied in observance of the same procedural standards. This general rule is reflected in both the Kosovo legal framework and in international law.[20] Other measures, alternative to detention, are regulated by less stringent procedures.

To ensure that the right to liberty is effectively safeguarded in Kosovo, in full compliance with the international and local legislation, the legal provisions regulating the application of detention in the course of criminal proceedings must be strictly followed in all cases.

III. REQUESTS FOR DETENTION AND DETENTION HEARINGS

A. Timing of detention hearings

According to the ECHR, "Everyone arrested or detained […] shall be brought promptly before a judge."[21] The European Convention does not define "promptly", and defers the identification of specific timeframes to domestic law.[22]

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17 Article 281(1), subparagraphs (1-3), PCPCK.

18 Article 283(1) PCPCK.

19 Article 5(3) PCPCK.

20 For the Kosovo legal framework, see Articles 278(7), 281(1) and 283(1), PCPCK, all three considered in conjunction. For international law, see *Vachev v. Bulgaria*, ECtHR judgment of 08 July 2004, paragraph 64, holding that house arrest amounts to a deprivation of liberty and should thus be applied with the observance of all procedural guarantees enshrined in Article 5 ECHR.

21 Article 5(3) ECHR.

22 The ECtHR has indicated, however, that a police arrest in excess of four days would in principle violate the "to be brought promptly before a judge" guarantee contained in Article 5(3) ECHR; some exceptions can be acceptable in extraordinary circumstances, e.g. when it is technically impossible to promptly bring the arrestee before the judge (as when arrested at sea etc.). See *Brogan v. UK*, ECtHR judgment of 29 November 1988, paragraphs 58-62.

Until December 2008, the PCPCK prescribed that any person arrested by the police must be brought before a pre-trial judge within a period of 72 hours, or be released. Following some legislative amendments,[23] the Code now provides that the detention of a person arrested by the police "may not exceed forty-eight hours from the time of arrest. On the expiry of that period the police shall release the detainee, unless a pre-trial judge has ordered detention on remand."[24] The legislative amendment which shortened the maximum term of police custody from 72 to 48 hours is welcome from a human rights perspective, since it reduces the period of time that an arrested individual can be held in police custody, without judicial oversight over his or her condition.

The OSCE carried out its focused monitoring of detention hearings in the first nine months of the year 2008, when the 72-hour rule was still in force, and as such, it was the observance of this 72-hour rule that was analysed. Monitoring revealed that in the vast majority of cases (over 95%),[25] detention was ordered within that legally prescribed time-frame. This is a very satisfactory result, and the police, prosecutors and pre-trial judges should be commended for it.

Slight deviations have been noted only in exceptional cases, where faulty communications between the pre-trial judge, prosecutor and/or defence counsel were to blame.

> In one case involving a suspect arrested on charges of legalization of false content[26] before a municipal court from the Prizren region, handled in June 2008, the contracted defence counsel was initially informed by the prosecutor that the case would proceed in regular procedure, meaning without detention. The prosecutor then changed his mind and decided to request detention, but apparently did not inform the defence counsel. When the pre-trial judge called the defence counsel to the hearing, the latter was in another municipality and took two hours to arrive to the court. This was not only time lost by the prosecutor and pre-trial judge, but has also in the meantime resulted in the elapse of the period of police arrest, so that the detention order, when finally imposed, came one and a half hours after the expiry of the maximum allowed period of police custody.

That this period of "limbo" was relatively short is of little relevance, since the ECtHR had found a violation of the right to liberty even where a person had been held in custody for

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[23] See Article 5 of the law on Amendment and Supplementation of the Provisional Criminal Procedure Code of Kosovo, No. 2003/26, published in the Official Gazette No. 44 of 22 December 2008. Of note, the amendments omitted Article 14(2) PCPCK, which continues to state that any person deprived of liberty should be brought before a judge within 72 hours of the arrest. Nevertheless, the 48-hour rule set by the amended Article 212(4) PCPCK should be regarded as prevailing since it is subsequent in time. Also of note, the constitution requires in article 29 that the defendant be brought before a judge within 48 hours, while also allowing the pre-trial judge another 48 hours to decide on detention.

[24] Article 212(4) PCPCK.

[25] These statistics are based on the OSCE's direct monitoring and analysis of 125 cases involving detention on remand proceedings before the Kosovo municipal and district courts, between 1 January 2008 and 30 September 2008.

[26] Article 334, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003, with subsequent amendments (PCCK).

just 40 minutes after his detention had become unlawful due to the expiry of the legally-prescribed period of detention.[27] Under ECtHR's case-law, it is up to the authorities responsible for detention to arrange all administrative formalities swiftly and to take all necessary precautions to ensure that the permitted duration of detention is not exceeded.[28] In the case described above, the detention hearing should have been commenced earlier, and the defence counsel should have been informed about the detention hearing in due time.

Overall, no significant problems were observed with the timing of detention hearings during the monitoring period. The OSCE has continued to monitor detention hearings, albeit less intensively, also after the enactment of the new 48-hour rule for police custody. It is axiomatic that the reduction of the police arrest term from 72 to 48 hours has forced law enforcement agencies to act more swiftly in cases warranting detention. Nonetheless, and despite some initial confusion as to the standard that should be applied,[29] it appears though that Kosovo police officers and prosecutors have adjusted well to the new 48-hour rule, and continue to duly abide by the legally prescribed time limits for bringing arrested persons before a judge.

Police officers, prosecutors and pre-trial judges should be commended for their vigilant observance of the rule prescribing the issuance of detention orders within the legally prescribed time-frame. To ensure that detention on remand is always imposed within 48 hours from the time of police arrest, the co-operation between the police, prosecutors and pre-trial judges should be kept at high levels and, if need be, further enhanced.

B. Delayed police reports

For prosecutors to be able to draft adequately-reasoned requests for detention, they should receive the respective police reports as soon as possible. The OSCE is concerned that in

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[27] See *K.-F. v. Germany*, ECtHR judgment of 27 November 1997, paragraph 73.

[28] *Ibidem*, paragraph 72. See also *Giulia Manzoni v. Italy*, ECtHR judgment of 01 July 1997, paragraph 25.

[29] The confusion arose out of the fact that the constitution, adopted on 15 June 2008, prescribed the 48-hour rule for bringing arrested persons before a pre-trial judge, while the PCPCK continued to prescribe the 72-hour rule. Only in December 2008 the PCPCK was amended and brought in line with the 48-hour rule mandated by the constitution (except for Article 14 of the PCPCK, which strangely was left un-amended and which to-date continues to prescribe the 72-hour rule). Until the December 2008 amendments to the PCPCK, Kosovo police, prosecutors and judges were not certain as to which rule to follow: the constitutionally-prescribed 48-hour rule or the PCPCK-prescribed 72-hour rule. During that period, some law enforcement and judicial officials followed the 48-hour rule, arguing that the constitution has supreme legal force and over-rides all conflicting legislation, while others continued to abide by the 72-hour rule, arguing that the PCPCK prevails as *lex specialis* over the constitution. In an attempt to settle this confusion and to bring some uniformity to the practice of ordering initial detentions, some Chief district prosecutors issued instructions to all subordinate prosecutors ordering the observance of the constitutional rule; such instruction, however, was rescinded shortly thereafter, pending corresponding amendments to the PCPCK. The confusion was finally cleared in December 2008 when the PCPCK was amended and brought in line with the constitutionally prescribed 48-hour rule. Since then, this rule is uniformly followed by all Kosovo police officers, public prosecutors and pre-trial judges.

several monitored cases Kosovo police officers failed to provide the prosecutor with a copy of the police file without delay.

Based on information available to the OSCE, the police brought cases to the prosecution on average 46 hours after the arrest – a satisfactory indicator given that during the period under monitoring the 72-hour rule for police arrests was in effect. Nonetheless, the OSCE monitored at least 15 cases where the police brought the cases to prosecutors some ten hours before the elapse of the period of initial arrest. Furthermore, in at least three of the monitored cases, police reports were brought to prosecutors two hours or less before the expiry of the police arrest term.

> In a case before the Pejë/Peć district court, the police arrested a defendant on suspicion of murder[30] on 17 August 2008. The police brought the criminal report to the public prosecutor's office only two hours before the expiry of the arrest term. The prosecutor quickly drafted a request for detention and the defendant was brought before a pre-trial judge a further one-and-a-half hours later. This inevitably led to a breach of the then-applicable 72-hour time limit for the issuance of the ruling on detention, since 30 minutes are hardly enough for a judge to hold a detention hearing and hand down an adequately-reasoned ruling on detention.

Late delivery of police reports leaves prosecutors with insufficient time to carefully review the police file and to draft a request for detention supported with relevant and sufficient arguments, forcing them to proceed with scantly reasoned requests for detention. In fact, in order to comply with the limits prescribed by the law, in such cases prosecutors cannot file but a standard request based on a template containing a reformulation of the legal grounds for detention and only some abstract reasoning. That, in turn, affects defence counsel's ability to effectively challenge the need for detention, and also pre-trial judges' capacity to order detention through a well-reasoned ruling.

Accordingly, police officers should always submit their reports to prosecutors as soon as possible and without any unjustified delays.

C. Unreasoned prosecutor's requests for detention

According to international human rights standards, there is a presumption in favour of releasing a defendant pending trial.[31] The ECtHR has held that "detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty."[32] Thus, unless there are relevant and sufficient reasons for ordering detention against a defendant, he or she should either be imposed a more lenient measure or be investigated and tried at liberty.

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30 Article 147 PCCK.
31 Article 5(1) ECHR.
32 See *Labita v. Italy*, ECtHR judgment of 6 April 2000, paragraph 152.

A corollary of this principle, which can be called "presumption of liberty," is that the burden is on public authorities – and, more specifically, the prosecutor – to prove that detention is necessary in the specific circumstances of the case. If the prosecutor fails to establish that need, the defendant must be released.

In accordance with international standards, the PCPCK provides that detention on remand can only be ordered by the pre-trial judge upon a "written application" of the public prosecutor and after a hearing.[33] At the hearing, the public prosecutor must "state the reasons for his or her application for detention on remand."[34]

The OSCE has noted that in some monitored cases prosecutors failed to substantiate the "grounded suspicion" that the defendant had committed a crime, which is the first condition to be examined by the pre-trial judge before imposing detention. Many prosecutors addressed the "grounded suspicion" element only in passing, without providing facts warranting the grounded suspicion that the defendant committed a crime, and focused their request on the existence of the three conditions for detention under Article 281(1)2(i-iii) PCPCK.[35]

With regard to those conditions for detention (the elements required under points (i)–(iii) of Article 281(1)2 PCPCK), the OSCE has found that in more than half of all the monitored cases, prosecutors failed to substantiate their requests for detention with adequate reasons. The arguments put forward by prosecutors were often vague, theoretical, abstract and formulaic, and failed to illustrate with convincing and specific reasons why the defendants in the cases at hand should have been deprived of liberty.

The following may serve as examples of insufficiently reasoned requests for detention:[36]

> In a case before the Pejë/Peć district court, involving two defendants suspected of unauthorized purchase, possession, distribution and sale of dangerous narcotic drugs and psychotropic substances,[37] on 30 June 2008 the public prosecutor filed a motion to impose detention on remand with the following reasoning: "The first legal ground is justified with the fact that if the above stated defendants are free there is a risk that they might flee and obstruct the normal conduct of criminal proceedings. The second legal ground is justified with the fact that if the defendants are free, they might influence the witnesses […]. The third legal ground

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33 See Article 282(1) PCPCK.

34 See Article 282(5) PCPCK. In practice, in many cases prosecutors include all their arguments in favour of detention in their written request, and then simply refer to it at the detention hearing.

35 This is very often the case in the Pejë/Peć region, for instance, where prosecutors usually file the proposal for detention together with the ruling to initiate investigations. Although this is *per se* legitimate, the OSCE noted many cases where Pejë/Peć prosecutors addressed the issue of the grounded suspicion in the ruling to initiate investigations, and the issue of the three grounds in the request for detention. However, these are two distinct acts, and the grounded suspicion element should be equally well established in the request for detention too.

36 Unless otherwise stated, all translations are unofficial.

37 Article 229 PCCK.

is justified with the fact that according to the nature of the offence, it results that if the defendants are free they might repeat the offence or complete any similar act. The public prosecutor considered also other measures but concluded that the detention measure is the most adequate measure for ensuring the evidence that supports grounded suspicion."

In a case involving a defendant charged with kidnapping,[38] on 16 March 2006 a Gjilan/Gnjilane district public prosecutor filed a request for detention stating that "there is grounded fear if [the defendant] would be free he may flee by crossing the Kosovo border without any interference." The invoked risk of flight was left completely unsubstantiated, but the prosecutor did fortunately adduce and substantiate other grounds for detention.

In a case before the Prizren municipal court, involving two defendants charged with the crimes of causing general danger[39] and fraudulent evasion of duty,[40] on 6 June 2008 the municipal public prosecutor filed a request for detention, which contained the following reasoning: "The reasons for the detention order consist of provisions of Article 281 paragraph 1 subparagraph 1 and 2 point (i) and (ii), taking into account that there is grounded suspicion that the defendants committed the criminal offence, the investigative proceedings against them are on-going, and that if the defendants are released they may obstruct the progress of the criminal procedure, that is, they may flee or destroy, hide, change or falsify evidence of the criminal offence therefore I believe that there are sufficient legal reasons to order detention against the defendants."

The above examples are representative of a great number of requests for detention filed by Kosovo prosecutors. They illustrate how prosecutors often times only paraphrase the provisions of Article 281 PCPCK, without linking them to the specific circumstances of the case, and without providing concrete arguments showing that the detention of defendants is indeed necessary. Lastly, in very few of the monitored cases did prosecutors convincingly show (or argue) that measures other than detention would be insufficient to achieve the same purposes as detention on remand. This, however, is a necessary pre-condition for applying detention,[41] and must therefore be established convincingly in each case, along with the other conditions set by the law.

One reason why prosecutors often fail to issue properly-reasoned requests for detention could be that the police sometimes bring the police reports quite late, close to the expiry of the period of initial arrest, thus leaving insufficient time to draft an adequate request.[42] In

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38 Article 159 PCCK.
39 Article 291(1) PCCK.
40 Article 92(b), UNMIK Regulation 2004/1 on the Customs Code of Kosovo, 30 January 2004).
41 Article 281(1)3 PCPCK.
42 In any event, although many times the request for detention was drafted on the same day the hearing was held, and the police report was also delivered to the prosecutor on that same day, the public prosecutor must have been aware of a potential need for defendant's detention some three days before the hearing, that is, at the moment of defendant's arrest (see Article 212(2) PCPCK), and as such the prosecutor could have initiated investigations sooner.

addition, the OSCE observed that some delays are attributable to the prosecution's registry offices, which occasionally take a long time to register the police file and transmit it to the competent prosecutor; in such cases, the internal organization of the prosecution's offices – rather than the police, or the respective prosecutor – is at fault. Overall, however, the responsibility for preparing adequately reasoned requests for detention lies squarely with the prosecutors.

In sum, in most cases monitored by the OSCE, prosecutors failed to substantiate their requests for detention with sufficient factual information supporting the need for detention on remand. Also, most requests to extend detention were similarly noted to lack proper reasoning; in fact, many such requests simply referred to the original application to impose detention, without any or much further elaboration on the continuing need for detention.

The insufficient reasoning in prosecutor's requests for detention makes it more difficult for the defence counsel to rebut the need for detention, and also complicates the pre-trial judge's task of issuing a well-reasoned ruling ordering detention, if appropriate. Prosecutors should therefore make an effort to improve their reasoning skills, and should support all their requests for detention with adequate reasons corroborated with specific factual circumstances. Since the burden of proving that detention is necessary falls on the prosecutor, and bearing in mind the presumption in favour of liberty, pre-trial judges should reject requests which fail to show that the grounds for detention exist.

D. Poor performance of defence counsel

The PCPCK prescribes that during detention hearings defendants must always be assisted by defence counsel.[43] The OSCE noted that courts ensured this right in 97% of the monitored cases, which is a very satisfactory overall result.

At the same time, however, the OSCE is concerned about the quality of legal representation afforded to defendants who risk detention. In approximately one third of the monitored cases, defence counsel failed to counter prosecutors' proposal for detention with reasoned arguments. In several cases defence counsel's arguments consisted of mere petitions to the judge not to impose detention against their clients, unsupported by convincing reasons.

Even more concerning is the fact that, in some monitored cases, defence counsel did not even object to prosecutor's proposal for detention, and instead adhered to it.

> In a case before the Mitrovicë/Mitrovica district court, on 28 February 2008 a pre-trial judge held a detention hearing against a defendant suspected of aggravated murder.[44] At the hearing, the court-appointed defence counsel raised the issue of the defendant's possible mental illness but agreed with the prosecutor that the circumstances and dangerousness of the criminal offence warranted his client's

[43] Article 73(1)2 PCPCK.
[44] Article 147 PCCK.

> detention on remand. The lawyer did not object to detention and did not suggest any alternative involving medical treatment. The defendant himself had to intervene and state that he did not feel mentally sick, and that he objected to detention on remand. Pre-trial detention was applied and subsequently extended in the case.

Also of note, the OSCE observed that on average, lawyers appointed by the court had a poorer performance than defence counsel chosen by the defendants.[45]

While it is true that the burden of proof in establishing the need for detention rests with the prosecutors, defence counsel do play a crucial role in safeguarding an individual's right to liberty, and thus should be active and efficient in their efforts to rebut prosecutors' arguments for detention. Defence counsel are not obliged to disagree with all prosecutor's proposals, but they should always try to support the interest of their clients, and should exercise their professional duties responsibly and with due diligence.[46]

Part of the reason why in over one third of the cases monitored the defence counsel failed to effectively rebut prosecutors' requests for detention lies in the limited time which defence counsel often are afforded to prepare for the detention hearing. The OSCE has noted in several monitored cases that defence counsel were appointed by the court just minutes before the detention hearing started. Once at the hearing, the counsel were delivered copies of prosecutor's ruling to initiate investigations and of the request for detention on remand. Such timing hardly enables defence counsel to prepare and put forward an adequate defence for their clients. International human rights standards prescribe that everyone has a right to adequate time and facilities to prepare a defence.[47] Similarly, the PCPCK provides that "[t]he defendant shall have the right to have adequate time and facilities for the preparation of his or her defence."[48]

Another issue is the access which defence counsel may or may not be granted to the prosecutor's file so as to be able to prepare arguments to challenge the need for detention. In order to allow defence counsel to effectively exercise their duties, and to ensure equality of arms,[49] international standards prescribe that defence counsel should be given access to the documents in the investigation file which are essential in order to challenge effectively the lawfulness of detention.[50] Even though it may be necessary to keep some parts of the investigation file secret in the context of an on-going criminal investigation,

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[45] For more details see the OSCE LSMS Monthly report: Poor performance of court appointed defence counsel affects defendants' trial rights and violates defence counsel's due diligence duty (January 2009).

[46] See Articles 6 and 8, Code of Professional Ethics of Advocates, Kosovo Chamber of Advocates, Prishtinë/Priština, 7 July 2007 (Code of Professional Ethics).

[47] Article 6 ECHR. This basic requirement of a fair trial should be construed, in the case of a detention hearing, in conjunction with the need to hold the detention hearing promptly, within the time-limit set by the law.

[48] Article 12(1) PCPCK.

[49] In *Shishkov v. Bulgaria*, ECtHR judgment of 9 January 2003, paragraph 77, the European Court has held that detention hearings "should in principle meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial," including such principles as adversarial proceedings and equality of arms.

[50] See *Musuc v.* Moldova, ECtHR judgment of 6 November 2007, paragraph 53.

confidentiality cannot be maintained at the expense of substantial restrictions of the rights of the defence, and thus information which is essential to assess the lawfulness of detention should be made available in an appropriate manner to the suspect's lawyer.[51]

Therefore, prosecutors and pre-trial judges should ensure that defence counsel are granted access to the necessary documents from of the case-file, to the extent possible during an on-going investigation, so that they are able to effectively challenge the need for detention. Defence counsel should also be notified of the planned detention hearing as soon as possible, so as to have time to properly prepare for it. In turn, defence counsel should perform their duties diligently and responsibly, and not merely put forward standardized and formulaic statements.

E. Absence of detention hearing in some cases

According to international human rights standards, every arrested person has the right to be "brought promptly before a judge."[52] This means that the defendant must physically appear before a judge, typically in a detention "hearing."[53] This guarantee safeguards against police mistreatment and against the arbitrary assertion of state power, and provides an arrested person with an opportunity to object to his or her deprivation of liberty.[54]

The PCPCK contains similar provisions. It prescribes that detention can be imposed only after a hearing;[55] that the arrested person must be brought before a pre-trial judge and informed of his/her rights;[56] that defence counsel must be present at the hearing;[57] and that the defendant must have the opportunity to respond to prosecutor's reasons for requesting detention.[58]

Despite these clear legal provisions, the OSCE has noted that in some cases judges imposed detention on remand without holding a hearing involving the defendant or his or her counsel.

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[51] See *Lamy v. Belgium*, ECtHR judgment of 30 March 1989, paragraph 29. See also *Garcia Alva v. Germany*, ECtHR judgment of 13 February 2001, paragraphs 39-43.

[52] Article 9(3) ICCPR and Article 5(3) ECHR have almost identical language: "Anyone arrested or detained [on a criminal charge] shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release […]."

[53] The case-law of the ECtHR clearly indicates that when the prosecutor asks for detention on remand against an arrested person "a hearing is required" (see *Wloch v. Poland*, ECtHR judgment of 19 October 2000, paragraph 126). The Court also found a violation of Article 5(3) of the Convention even where an arrest warrant was issued by a court in the presence of the defence counsel, but without the defendant himself being brought before the court (see *McGoff v. Sweden*, ECtHR judgment of 26 October 1984, paragraph 27).

[54] According to the European Court of Human Rights, "The very purpose of Article 5 [is] to protect the individual from arbitrariness" (*Kurt v. Turkey*, 15/1997/799/1002, ECtHR judgment of 25 May 1998, paragraph 122).

[55] See Article 282(1) PCPCK.

[56] Article 282(2) PCPCK.

[57] Article 282(3) PCPCK. According to Article 282(4) PCPCK, if the defendant does not engage a defence counsel, the court must provide one *ex officio*.

[58] Article 282(5) PCPCK.

In a case before the municipal court in Vushtrri/Vučitrn, on 18 July 2008 the police arrested a defendant for allegedly having committed three criminal offences of light bodily harm.[59] On 21 July 2008, the prosecutor filed a proposal for imposing the measure of mandatory psychiatric treatment in custody, containing a motion to impose detention on remand. On the same date, a three-judge panel without holding a hearing in the presence of the defendant and the defence counsel, issued a decision imposing detention on remand for one month.

In a case before the Prizren district court, on 11 May 2008 the police arrested a defendant on charges of grievous bodily harm.[60] On 14 May 2008, the prosecutor filed an indictment containing a motion for detention. On the same date, a three-judge panel ordered detention on remand for one month. Neither the defendant nor the defence counsel were heard by the court.

In a case before a municipal court in the Prishtinë/Priština region, a defendant was arrested by the police on 15 July 2008 on suspicion of having committed the crimes of aggravated theft,[61] causing light bodily harm,[62] and damage to movable property.[63] On the same day, the prosecutor interrogated the defendant and filed an indictment containing a proposal for detention on remand. A panel of the municipal court imposed detention on remand for one month, without holding a hearing with the arrested person and the defence counsel.

In a case before the Prizren municipal court, on 4 January 2008 the police arrested a defendant for having allegedly attacked officials performing official duties.[64] On 7 January 2008, the prosecutor filed an indictment containing a motion to impose detention on remand. On the same date, the court granted the motion and ordered detention for one month, without having held a hearing in the presence of the defendant and the defence counsel.

In the above cases, courts ordered detention on remand without holding a hearing in the presence of defendants and their defence counsel. Applying detention without the defendant being brought before a judge violates both the Kosovo legal framework and international human rights standards.

[59] Article 153 PCCK.
[60] Article 154 PCCK.
[61] Article 253 PCCK.
[62] Article 153 PCCK.
[63] Article 260 PCCK.
[64] Article 317 PCCK.

The OSCE has reported on this worrying practice in the past.[65] It seems that some judges and prosecutors were/are of the opinion that courts need not hear the arrested person (or defence counsel) if the prosecutor's request for detention is contained in an indictment[66] filed before the expiry of the police arrest.[67] In their opinion, the three-judge panel can then decide "on paper" based on the prosecutor's proposal contained in the indictment, without having to conduct a hearing with the defendant and his or her defence counsel.

Such an interpretation of the law conflicts with international standards and with the legal framework of Kosovo. The receipt of a request for detention contained in the indictment does not relieve the judicial authorities of the duty to hold a hearing on the request for detention on remand. Article 306(4) PCPCK serves to establish that a motion for ordering detention on remand contained in the indictment should be ruled on by a three-judge panel (as opposed to a single pre-trial judge, as is normally the case), and it does not suspend the general requirement of Article 282 PCPCK that detention can only be imposed following a hearing.

Following the publication of its report on this specific issue, the OSCE has noted that the practice of applying detention without a hearing was commendably discontinued in the courts from Mitrovicë/Mitrovica region; in the Gjilan/Gnjilane region too, detention is always imposed after a hearing involving the defendant and his counsel. At the same time, the practice of ordering detention without holding a proper hearing continues largely unabated in the courts from Prishtinë/Priština, Prizren and Pejë/Peć. In those regions, in cases where the request for detention is contained in the filed indictment, a panel of three judges still decides on detention without holding a hearing with the participation of the defendant and his or her counsel. Many prosecutors and pre-trial judges as well as defence counsel continue to erroneously interpret Article 306 PCPCK as allowing for such a procedure.

Both international law and the Kosovo legal framework require that detention be applied only through a hearing in which the defendant and his counsel appear before a pre-trial judge and present their case. Courts must always decide on detention in the presence of the defendant and his defence counsel, including in cases where detention has been requested through a motion contained in the indictment. Moreover, the detention hearing should in principle meet, as far as possible during an on-going investigation, the basic requirements of a fair trial, which means that the defence should be afforded in an appropriate manner access to documents from the investigation file which are essential to effectively challenge the need for detention.[68] Failure to bring arrested persons before a judge violates their

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[65] See the OSCE LSMS Monthly Report of July 2008: Detention on remand without a hearing in the presence of the defendant. The failure of courts to maintain accurate trial minutes.

[66] As allowed by Article 306(4) PCPCK.

[67] Article 212(4) PCPCK.

[68] In *Shishkov v. Bulgaria* (ECtHR judgment of 9 January 2003, paragraph 77) the European Court has held that "In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required. In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial."

fundamental right to liberty. Moreover, a judicial deliberation taken without hearing the defendant also violates the right to defend oneself and the principle of equality of arms.[69]

The still rather wide-spread practice of imposing detention without holding a proper hearing with the defendant and his or her counsel, with the judge taking the decision "on paper," is a grave violation of applicable international law and of the Kosovo legal framework and should be immediately discontinued.

IV. REASONING OF RULINGS ON DETENTION

The OSCE has reported in the past on the inadequate reasoning of rulings imposing detention on remand.[70] It noted with concern the poor justification of rulings on detention, both initial and on extension, despite the fact that both international law and the Kosovo legal framework clearly require full reasoning.[71]

Four years after its last report on the topic, the OSCE sees only limited improvements in the reasoning of rulings on detention issued by Kosovo courts. In the vast majority of monitored cases, Kosovo pre-trial judges failed to properly justify decisions imposing detention on remand, thus falling short of the legal standards set forth in the Kosovo legal framework and international human rights standards.

Taking onto account the observed recurring flaws and considering also the complexity of this issue, the reasoning of rulings on detention shall be reviewed and analyzed separately in Part II of this Report. That section will analyze in detail the international standards and the Kosovo practice as regards the ordering of initial detention, extended detention, house detention, and alternatives to detention.

V. MISAPPLICATION OF DETENTION IN SUMMARY PROCEEDINGS

In summary proceedings, i.e. cases involving crimes for which the principal punishment is a fine or imprisonment of up to three years,[72] detention on remand can be applied only "exceptionally."[73] The exceptional character of detention in such cases is reflected in the more exacting restrictions which the law places on the application of detention on remand

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[69] Fair trial requirements, which should in principle be met also in the course of proceedings aimed at ascertaining the lawfulness of one's detention (see ECtHR's judgment in the case of *Shishkov v. Bulgaria*, quoted above), include the principles of adversarial proceedings and equality of arms (see Article 6 ECHR).

[70] See the OSCE Review of the Criminal Justice System (April 2003-October 2004): Crime, Detention and Punishment, (October 2004), page 32; see also the OSCE Review of the Criminal Justice System (1999-2005): Reforms and Residual Concerns (March 2006), page 52.

[71] For international law, see *Belchev v. Bulgaria*, ECtHR judgment of 8 April 2004, paragraph 82. For Kosovo's legal framework, see Article 283(1) PCPCK and also the Justice Circular 2000/27, of 19 December 2000.

[72] Article 461 PCPCK.

[73] See Article 463(1) PCPCK.

in summary proceedings, as compared to ordinary proceedings.[74] The rationale behind that is obvious – since a deprivation of liberty must always be regarded as exceptional, the application of detention on remand in cases involving less serious offences should be circumscribed by even more stringent safeguards. For that reason Article 463(1)2 PCPCK sets some minimum thresholds in the form of punishments (years of imprisonment) as to the offences for which detention on remand can be applied in summary proceedings.[75]

The OSCE has noted that detention is sometimes requested by prosecutors and imposed by judges in summary proceedings cases involving crimes for which detention cannot be applied at all under the law.

> In one case before the Prizren municipal court involving a defendant suspected of having committed the crime of threat,[76] on 19 August 2008 the municipal public prosecutor filed the accusatory proposal and requested that the defendant be detained on remand. The prosecutor relied on Article 463(1)2 in conjunction with Article 281(1)2(iii) PCPCK, i.e. based on a grounded suspicion that the suspect had committed the offence, and the danger of him re-offending, since the latter was already a suspect on another recent case in which he was charged with the crime of light bodily harm.[77] In a detention hearing held the same day, the court granted the prosecutor's motion and placed the defendant under a one-month detention on remand.

In the case above, since the public prosecutor did not also invoke the risk of flight, detention on remand could be contemplated only if the crime invoked was punishable by two or more years, as Article 463(1)2(ii) PCPCK expressly demands. The defendant, however, was suspected of a crime which carried a punishment of a fine or imprisonment of up to one year.[78] Since the suspected criminal offence was punishable by a maximum of one year, and since the only risk invoked was that of re-offending (and not also that of flight), detention on remand could not have been applied under Article 463(1)2(ii) PCPCK. Nevertheless, the prosecutor requested detention on remand based on the same

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74 See Article 463 PCPCK vis-à-vis Article 281 PCPCK.

75 The drafting technique of Article 463 PCPCK suggests that these thresholds only apply to summary proceedings on cases where detention is contemplated on the ground of a risk of suborning witnesses or obstruction of evidence, or on the ground of a risk of re-offending, but not also on the ground of risk of flight – Article 463(1)1 PCPCK, referring to cases involving the risk of flight, has no caveats and thus applies to all summary proceedings cases, irrespective of the punishment applicable. That in and of itself raises some questions and concerns, as the law seems to allow the detention of a person suspected of having committed a violent crime punishable by less that 2 years when there is a risk that he or she may flee (Article 463(1)1 PCPCK), but not when there is a risk that he or she may re-offend (Article 463(1)2(ii) PCPCK). That is not an entirely logical stance since the danger of the defendant repeating a violent crime (even if that crime is punishable by less than 2 years, i.e. is not very serious) is arguably not less significant than the risk of the defendant escaping after the [first] crime, if not more so.

76 Article 161(2) PCCK.

77 Article 153 PCCK.

78 See Article 161(2) PCCK.

exact provision of the law and the pre-trial judge granted the prosecutor's request and placed the defendant under a one-month detention on remand.[79]

> In another case before the Gllogoc/Glogovac municipal court, four defendants were placed in detention on remand and seven others were placed in house arrest for almost one month on charges of light bodily harm[80] and participation in a brawl.[81] Since those charges provide for a maximum punishment of up to one year, and since the risk of flight had not been invoked as a ground for detention, neither detention on remand nor house detention[82] could have been applied under Article 463 PCPCK in this case.

In the cases presented above, prosecutors' requests for and courts' rulings on detention were in clear breach of the rules regulating the application of detention in summary proceedings. As such, detention in those cases was applied in violation of the Kosovo legal framework, resulting also in a violation of applicable international human rights standards.[83]

In every case with summary proceedings, public prosecutors and pre-trial judges should carefully consider whether or not the law allows for the application of detention measures.

VI. LENGTH OF PRE-TRIAL DETENTION

According to international human rights law, everyone arrested or detained is "entitled to trial within a reasonable time or to release pending trial."[84] The ECtHR has repeatedly emphasized that "continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty."[85] The Court has also established that for a continued detention to be lawful, there must be, besides a persistent reasonable suspicion that the person arrested has committed an offence, also "other grounds," "relevant and sufficient," adduced by judicial authorities; and the competent authorities must display "special diligence" in the conduct of proceedings.[86]

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79 The 15-day time-limit of detention on remand in summary proceedings prescribed by Article 463(2) PCPCK did not apply to this case because the prosecutor requested detention through the filing of his summary indictment (while the 15-day time-limit applies to detention on remand before the filing of the indictment).

80 Article 153(1)4 PCCK.

81 Article 155(1) PCCK.

82 House detention must be applied under the same rules as detention on remand, see Articles 278(7), 281(1) and 283(1) PCPCK, all three considered in conjunction. See also ECtHR's judgment on the case of *Vachev v. Bulgaria* (Judgment of 8 July 2004, paragraph 64) similarly equating house detention to detention on remand.

83 Under Article 5(1) ECHR, a detention is lawful only if it is applied in compliance with the domestic law.

84 Article 5(3) ECHR.

85 See Punzelt v. the Czech Republic, ECtHR judgment of 25 April 2000, paragraph 73.

86 See *Labita v. Italy*, ECtHR judgment of 6 April 2000, paragraphs 152 and 153.

The ECtHR has declined to set a maximum length of a "reasonable" detention period, stating that the reasonableness of a period of detention should be assessed with reference to the specific circumstances of each case.[87] The Court has accepted that a lengthier detention can be justified in cases involving particularly complex crimes,[88] and/or multiple suspects, particularly un-co-operative ones.[89] Conversely, the ECtHR has not accepted justifications for lengthy detentions such as long periods of inactivity in the handling of a case prior to trial,[90] delays caused by experts,[91] understaffing,[92] inadequate working practices,[93] and difficulties arising from the need to protect the identity of a protected witness.[94]

The PCPCK similarly provides that "[a]ny deprivation of liberty and in particular detention on remand in criminal proceedings shall be reduced to the shortest time possible."[95] The Code also requires that any imposed detention be terminated when the reasons that necessitated it cease to exist, or be replaced with a more lenient measure if conditions for that are met.[96] The PCPCK further sets strict limits on the length of detention. An initial ruling can order a defendant's detention for a maximum period of one month from the day he or she was arrested.[97] The Code also limits the maximum length of detention prior to the filing of the indictment to three months for cases involving crimes punishable by less than five years imprisonment, and to six months for cases involving crimes punishable by at least five years.[98] Only in exceptional circumstances can these maximum allowed terms be extended, by up to six months respectively.[99]

These provisions are not always respected in practice, however. The OSCE has noted violations of the legally allowed length of detention both in initial rulings on detention, and in rulings to extend detention.

> In one case involving a defendant charged with attacking official persons performing official duties,[100] on 7 January 2008 a pre-trial judge from the Prizren municipal court, after a non-public session held in the absence of the defendant and his counsel, issued an initial ruling on detention for a period of two months. This despite the fact that Article 284(1) PCPCK clearly states that the initial ruling

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87 See *Stögmüller v. Austria*, ECtHR judgment of 10 November 1969.
88 See, for instance, the case of *W v. Switzerland*, ECtHR judgment of 26 January 1993, concerning an extensive fraud scheme involving the management of sixty companies.
89 See *W v. Switzerland*, ECtHR judgment of 26 January 1993.
90 See *Assenov a. o. v. Bulgaria,* ECtHR judgment of 28 October 1998.
91 See *Clooth v. Belgium,* ECtHR judgment of 12 December 1991.
92 See *Stögmüller v. Austria*, ECtHR judgment of 10 November 1969; see also *Muller v. France*, ECtHR judgment of 17 March 1997.
93 See *Assenov a. o. v. Bulgaria,* ECtHR judgment of 28 October 1998.
94 See *Clooth v. Belgium,* ECtHR judgment of 12 December 1991.
95 Article 5(3) PCPCK.
96 Article 268(1-3) PCPCK.
97 Article 284(1) PCPCK.
98 Article 284(2) PCPCK.
99 Article 284(3) PCPCK.
100 Article 317 PCCK.

on detention on remand may only impose detention for a maximum period of one month.

Some problems have also been noted with regards to the observance of a proper length of detention in summary proceedings cases. Considering the lower gravity of the suspected crime,[101] in such cases the PCPCK limits the period of detention on remand before the filing of the summary indictment to 15 days.[102] This limit, however, is not always respected in practice.

Following violent protests which took place on 9 January 2009 during a congregation at a Mosque located in the Lower Zabeli village, municipality of Gllogoc/Glogovac, four defendants were placed in detention on remand (on 9 January 2009), and seven others were placed in house arrest (on various dates ranging from 9 to 14 January 2009). All defendants stayed in detention on remand/house arrest until 5 February 2009. Since the summary indictment on that case was only filed on 3 February 2009, their detention exceeded the maximum allowed 15-day detention term in summary proceedings prior to the filing of the indictment. As such, their detention after the expiry of the initial 15 days was in contravention of Article 463(2) PCPCK and also in violation of Article 5(1) ECHR.[103]

In a case involving a Kosovo Albanian male suspected of having inflicted light bodily harm[104] to a Kosovo Serb male, the defendant was initially arrested by the police and then placed in house detention by the Ferizaj/Uroševac municipal court for the period of 5 February 2009 to 2 March 2009. The summary indictment was only filed on 8 May 2009. Since the measure of house detention must be applied with the observance of the same guarantees as detention on remand,[105] and since the summary indictment in this case was filed much later than the elapse of the initial 15 days of house detention, the defendant's house detention after the first 15 days was unlawful under Article 463(2) PCPCK and Article 5(1) ECHR.

In a case before the Mitrovicë/Mitrovica municipal court, on 16 January 2009 a defendant suspected of light bodily harm[106] and damage to movable property[107] was placed under a one-month detention on remand through a ruling of an European Union Rule of Law Mission (EULEX) pre-trial judge based on a request filed by an EULEX prosecutor. The defendant continued to be kept in detention even after the expiry of the initial 15 days, despite the fact that the summary indictment against him had not yet been filed. On 2 February 2009 the

[101] Summary proceedings apply in cases involving criminal offences for which the principal punishment is a fine or imprisonment of up to three years, see Article 461 PCPCK.
[102] Article 463(2) PCPCK.
[103] Under Article 5(1) ECHR, a detention is lawful only if it is applied in accordance with the domestic law.
[104] Article 153 PCCK.
[105] Article 278(7) PCPCK. See also See *Vachev v. Bulgaria*, ECtHR judgment of 08 July 2004, paragraph 64.
[106] Article 153 PCCK.
[107] Article 260 PCCK.

defence counsel filed a motion petitioning the court to terminate his client's detention and substitute it with the measure of attendance at police station; nonetheless, the defendant remained in detention. In the course of an investigative hearing held on 11 February 2009, the defence counsel once more raised the issue of defendant's unlawful continued detention and again drew prosecutor's attention to the clear provisions of Article 463(2) PCPCK. After the conclusion of that hearing, the EULEX prosecutor filed a motion with the court to impose an alternative measure against the defendant; on that same day the EULEX pre-trial judge rendered a ruling terminating the defendant's detention on remand and ordering his immediate release. In this case, the defendant was unlawfully kept in detention for more than one week, and was released only after the defence counsel's repeated motions for release from detention.

Kosovo law also provides stricter rules for the application of detention on remand in cases involving juveniles. The Juvenile Justice Code of Kosovo (JJCK) prescribes that the detention on remand of a minor suspect cannot exceed a total of three months.[108] Nevertheless, it has been noted that in some isolated cases minors are kept in detention on remand for periods exceeding the statutory maximum of three months.

In one case from the Prizren region involving a minor suspected of having committed the crime of rape,[109] the juvenile defendant was kept in detention from his initial arrest on 07 November 2007 up until 20 March 2008, thus totalling four-and-a-half months. His continued detention on remand after the expiry of the initial three months was in manifest contravention of Article 64(2) JJCK, and therefore also unlawful under Article 5(1) ECHR.

In summary, detention often appears to last unreasonably long in Kosovo. Some pre-trial judges order detention in manifest breach of the provisions of the PCPCK, while in other cases detention is applied in conformity with the procedural law, but arguably without establishing other "relevant and sufficient" grounds required by international standards to justify a prolonged detention. Judges and prosecutors should more vigilantly abide by the legal provisions regulating the length of detention in the course of criminal proceedings.

VII. OTHER DETENTION RELATED VIOLATIONS

In addition to the problems already mentioned above, the monitoring has also revealed a series of other violations related to the application of detention on remand in the course of criminal proceedings conducted in Kosovo.

For instance, minors are sometimes placed in detention on remand without first undergoing a general medical examination. That contradicts the clear requirements of the law, which states that "a minor must undergo a general medical examination prior to the

[108] Article 64(2), UNMIK Regulation 2004/8 on the Juvenile Justice Code of Kosovo, 20 April 2004; (JJCK).
[109] Article 193 PCCK.

commencement of any period of detention on remand to ensure that his or her health is consistent with detention on remand."[110]

It was also noted that some rulings on detention – both rulings on initial detention and rulings extending detention – incorrectly indicate the period within which they may be appealed against. They may indicate, for instance, that they can be appealed within three days, whereas the law clearly provides that rulings on detention can be appealed against within 24 hours.[111]

Of particular concern is the fact that judges sometimes fail to properly calculate the period of detention and to include it in the sentence of imprisonment, in manifest violation of the provisions of the PCPCK.

> In a case involving three defendants accused of giving bribes[112] and one defendant (a by-then suspended judge) accused of accepting bribes,[113] on 10 July 2007 the Prizren municipal court delivered its verdict finding one defendant guilty, acquitting two other defendants, and rejecting the charge against the fourth defendant. The one defendant who was found guilty was convicted of giving bribes, and sentenced to a term of imprisonment of five months. In sentencing him the court ordered that the period which he had spent in detention on remand (almost one full month) be deducted from that five-month term of imprisonment; the court did not, however, order that the period which he had spent in house detention after being released from detention on remand (a further one-and-a-half months) be similarly deducted from the sentence.

The non-inclusion of the period spent in house detention (alongside the period spent in detention on remand) in the calculation of the sentence which remains to be effectively served by the defendant is a clear and serious violation of the PCPCK, which expressly provides that it is not only the period of detention on remand that must be included in the calculation of a punishment of imprisonment, but also any period of house detention.[114] As such, it is not only the time which a defendant spent in detention on remand but also any subsequent period which he had spent in house detention that must be calculated in (i.e., deducted from) a sentence of imprisonment. Of note, a person whose time spent in detention is not properly counted in the punishment imposed on him or her is entitled to compensation.[115] Kosovo prosecutors and judges should always apply detention in full compliance with the applicable legal provisions and with strict observance of all the safeguards provided by law.

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[110] Article 42 JJCK.
[111] Article 283(3) PCPCK.
[112] Article 344 PCCK.
[113] Article 343 PCCK.
[114] Article 278(7)2 PCPCK, read in conjunction with Article 73(1) PCCK, mandates that any period of house detention must be included in the punishment of imprisonment.
[115] Article 538(2) PCPCK.

VIII. THE SITUATION IN THE NORTHERN MUNICIPALITIES OF THE MITROVICË/MITROVICA REGION

Since political and legal developments following February 2008 in Kosovo, the justice system in the Mitrovicë/Mitrovica region of Kosovo has been functioning only in a limited capacity.[116] The lack of a fully functioning judicial and prosecution system in the northern municipalities severely hampers the rule of law and leads to serious violations of the right to liberty, the right of access to justice, and the right to trial within a reasonable time.[117] As of July 2009, 59 individuals are being held in detention on remand, and 22 individuals in house detention, on the basis of detention orders issued by the Mitrovicë/Mitrovica district court and Mitrovicë/Mitrovica municipal court.[118] Many of them have had their detention continuously extended during the period that the court has been functioning only in a limited capacity. The following cases may serve as examples:

> In a case before the Mitrovicë/Mitrovica district court, a defendant charged with aggravated murder,[119] attempted murder,[120] and unauthorized ownership, control, possession, or use of weapons,[121] in co-perpetration,[122] has been held in detention since 6 February 2007. His trial was at the final stage when the court stopped functioning in February 2008, and no progress has been made since. In the meantime, the court has continuously extended his detention on remand up until the time of writing this report.
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> In another case before the Mitrovicë/Mitrovica district court, a defendant charged with murder[123] and unauthorized ownership, control, possession, or use of weapons[124] has been held in detention since 31 May 2007. His trial had

[116] There are currently no functioning municipal or minor offences courts in Zubin Potok and Leposavić/Leposaviq municipalities. The Mitrovicë/Mitrovica district court functions at a limited capacity on the premises of the Vushtrri/Vučitrn municipal court; this district court also covers the municipalities of Skenderaj/Srbica and Vushtrri/Vučitrn, adding those municipalities to the list of those without a fully-functioning court system. The Mitrovicë/Mitrovica municipal court (covering northern and southern Mitrovicë/Mitrovica and Zvečan/Zveçan) also operates at a limited capacity in Vushtrri/Vučitrn. The region's municipal and district prosecution offices also operate to a very limited degree from the Vushtrri/Vučitrn court building, and are unable to process most crimes which had occurred prior to 21 February 2008 by reason of not having access to the files located in the northern Mitrovicë/Mitrovica court building. This situation has been in existence since 21 February 2008, and the deployment of EULEX judges and prosecutors, operational as of December 2008, has not significantly improved this situation. So far EULEX, operating at the Courthouse situated in northern Mitrovicë/Mitrovica, has completed three criminal cases, and even if they proceed with more additional trials in the near future, practical and legal issues may prevent them from fully replacing the region's judicial system.

[117] For more details, see the LSMS Monthly Report December 2008: The Mitrovicë/Mitrovica Justice System: Continuing Human Rights Concerns and recent development.

[118] Information obtained from *Lists of persons held in detention on remand and in house detention*, available with the Mitrovicë/Mitrovica district court and Mitrovicë/Mitrovica municipal court (July 2009).

[119] Article 147 PCCK.

[120] Articles 146 and 20, PCCK.

[121] Article 328 PCCK.

[122] Article 23 PCCK.

[123] Article 146 PCCK.

[124] Article 382 PCCK.

not yet started at the time when the court stopped functioning. His detention on remand has been continuously extended up until the time of the writing of this report.

Many other persons detained based on rulings issued by the Mitrovicë/Mitrovica district or municipal court are in a similar position. This situation raises serious concerns with regards to the observance of their fundamental rights to liberty and to trial within a reasonable time.[125] It should be remembered that any period of detention should be periodically reviewed by a court[126] and that law enforcement agencies, in the case of prolonged detentions, have a duty to show that grounds for detention continue to exist, and to conduct proceedings with "special diligence."[127] Furthermore, any detention should last no longer than necessary[128] and the institutions have a general duty to organise their legal systems so as to enable the courts to comply with the right to trial within a reasonable time.[129] Finally, when faced with a temporary backlog of business, public authorities are obliged to take, with the requisite promptness, remedial action to deal with exceptional situations of this kind.[130]

IX. CONCLUSION

Personal freedom is a fundamental condition which all persons should normally enjoy, and any curtailment thereof should always be considered a measure of last resort, to be applied in strict accordance with the law and for no longer than necessary. This underlying rationale is reflected in both international human rights standards and in the PCPCK.

While Kosovo law provides an adequate normative framework regulating the application of detention in the course of criminal proceedings, well in line with applicable international standards, varied problems still remain as regards the application of detention in practice. Requests for detention filed by prosecutors and rulings on detention adopted by pre-trial judges very often contain insufficient reasoning; detentions in some cases last unreasonably long; and significant problems remain as concerns the application of detention in summary proceedings. In the northern municipalities of the Mitrovicë/Mitrovica region, the lack of a fully functioning judicial system severely hampers the rule of law and leads to serious human rights violations.

Admittedly, detention is a procedural measure whose application is regulated through complex legal provisions, which often require a careful balancing of competing or even conflicting interests. While the authorities have an interest to prevent a defendant's escape, obstruction of justice or re-offending, any deprivation needs to outweigh the presumption in favour of liberty. Kosovo is by far not the only place where measures of detention are

[125] Articles 5 and 6, ECHR.
[126] Articles 212(4) and 284-287 PCPCK.
[127] Article 285(1) PCPCK; see also *Dobrev v. Bulgaria*, ECtHR judgment of 10 August 2006, paragraph 79.
[128] Article 5(3) PCPCK; see also *Labita v. Italy*, ECtHR judgment of 6 April 2000, paragraph 152.
[129] See *Spentzouris v. Greece*, ECtHR judgment of 7 May 2002, paragraph 27.
[130] See *Baggetta v. Italy*, ECtHR judgment of 25 June 1987, paragraph 23.

often applied deficiently in practice, despite the existence of an adequate corresponding legal framework. International monitoring bodies indicate that arrests and detentions without reasonable cause and without existing effective legal remedies unfortunately remain commonplace in the world.[131] On the global level, the UN Human Rights Council has recently confirmed yet again that "an important number of persons deprived of their liberty are frequently unable to benefit from legal resources and guarantees that they are entitled to for the conduct of their defence as required by law in any judicial system and by applicable international human rights instruments."[132] And on the regional European level, ECtHR statistics evidence that violations of the right to liberty and security in the Council of Europe area are among the most common human rights violations, superseded in frequency of occurrence only by breaches of the right to a fair trial and of the right to property.[133]

Kosovo judges and prosecutors should strive to redress the signalled deficiencies in the application of detention measures, by carefully respecting all the legal safeguards provided for in the PCPCK. Compared with the findings of the last OSCE report on the application of detention in Kosovo,[134] judges and prosecutors have made gradual progress in the past few years in ensuring better compliance with the Kosovo legal framework and international human rights standards on the application of detention measures in criminal proceedings. Nevertheless, considerable problems remain, and of particular concern is the fact that many of the violations which the OSCE identified several years ago still persist.

X. RECOMMENDATIONS

To the Assembly of Kosovo:

- Amend Article 14(2) PCPCK in line with Article 212(4) PCPCK so as to exclude any confusion as regards the maximum period that a defendant can be held in police arrest before being brought before a judge.

To the Kosovo Supreme Court:

- In the context of a specific case or through an explanatory legal opinion, clarify that Article 306(4) PCPCK must be read in conjunction with Articles 282 and 287(1) PCPCK, and that detention must always be imposed only after a hearing with the defendant and his counsel, including in cases where the request for detention is contained in the indictment.

To the police:

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[131] See Human Rights in the Administration of Justice. A Manual on Human Rights for Judges, Prosecutors and Lawyers (Professional Training Series No. 9), page 161.

[132] UN Human Rights Council *Report of the Working Group on Arbitrary Detention*, A/HRC/10/21 (16 February 2009), paragraph 45.

[133] See the *Annual Report 2008* of the European Court of Human Rights, pages 133, 139.

[134] See the OSCE Report Kosovo. Review of the Criminal Justice System (April 2003–October 2004). Crime, Detention, and Punishment.

- Always deliver police reports to the public prosecutors as soon as possible, so that they have sufficient time to draft well-reasoned requests for detention, if necessary.

To the prosecutors:

- Only request detention in cases where the law and the specific circumstances of the case warrant such a restrictive measure.
- Always support requests for detention with relevant and sufficient reasons.

To the judges:

- Always schedule and hold, within the legally prescribed timeframe, a detention hearing in the presence of the defendant and defence counsel before deciding on prosecutor's request for detention.

- Provide relevant and sufficient reasons in all rulings imposing detention, in line with applicable international law and the Kosovo legal framework.

- Ensure that courts and all other institutions involved, such as the police, prosecution, forensics institutes, centres for social work etc., act with special diligence and urgency in proceedings involving detained defendants, and prevent unjustified delays.

To the Kosovo Chamber of Advocates:

- Instruct defence counsel to effectively defend their clients' right to liberty through well-grounded arguments and motions.

To the Kosovo Judicial Institute:

- Continue to offer additional training to candidates for prosecutors and judges and to sitting judges and prosecutors on the proper reasoning of requests for and rulings on detention.

- Continue to offer additional training to judges and prosecutors on the application of detention in the course of criminal proceedings in Kosovo.

- Always invite police, probation and correctional officers to participate in trainings on detention.