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Organization for Security and Co-operation in Europe

Department of Human Rights and Rule of Law

Legal System Monitoring Section

KOSOVO

THE RESPONSE OF THE JUSTICE SYSTEM TO THE MARCH 2004 RIOTS

DECEMBER 2005

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GLOSSARY

DJA	Department of Judicial Administration
DOJ	Department of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
KFOR	Kosovo Force
KJI	Kosovo Judicial Institute
KLA	Kosovo Liberation Army
KPC	Kosovo Penal Code
KPS	Kosovo Police Service
LSMS	Legal System Monitoring Section
OMiK	OSCE Mission in Kosovo
OSCE	Organization for Security and Co-operation in Europe
PCC	Provisional Criminal Code of Kosovo
PCPC	Provisional Criminal Procedure Code of Kosovo
SPU	Special Police Unit
SRSG	Special Representative of the Secretary-General
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
WPU	Witness Protection Unit

EXECUTIVE SUMMARY

Between 17 and 19 of March of 2004 a wave of riots swept through Kosovo, with significant consequences for the already tense inter-ethnic relations in the region. While the political effects of the riots have been examined in depth elsewhere, this report focuses instead on the way the justice system in Kosovo dealt with the criminal cases that arose out of the March 2004 riots. As the response to criminal acts by the justice system is crucial in any society where the rule of law prevails, in the particular cases arising from the March riots the level of that response on the part of the Kosovo prosecutorial and judicial authorities carries an extra weight, bearing in mind its importance for a future in Kosovo where crimes are indeed punished and different communities are able to cohabit and to redress their problems through the use of an effective court system.

After monitoring the court cases related to the crimes committed during the March 2004 riots, the OSCE verified that there were numerous problems affecting criminal investigations. These problems are described in Chapter Two of this report. Generally, the OSCE has noted that there were difficulties with gathering evidence, resulting from a number of factors, including the intimidation of witnesses, the unwillingness of witnesses to testify before a court of law, the displacement of injured parties who had no participation in the court proceedings, and the loss of important material evidence. Difficulties in gathering evidence resulted both in delays in adjudicating many riot-related cases, aggravated by an often poor cooperation between the police and the prosecution dealing with the investigations, as well as in a low number of court cases and convictions in relation to the large number of participants in the riots and the scale of the events that took place throughout Kosovo in March 2004.

Besides the problems in gathering evidence and conducting an effective and timely investigation, the manner in which the courts in Kosovo have handled the riot-related cases also raises concerns regarding the charging and sentencing practices adopted. Chapter Three of this report focuses on these issues, analysing the problems of inadequate charging, by which the accused were charged with crimes that had no correspondence with the facts of the case, and the improper use of plea agreements negotiated between judges and/or the prosecution and the defence without a clear legal basis for it. These practices resulted in lenient sentences issued by the courts in many cases, sentencing the accused with the minimum penalty or even below the legal threshold. The OSCE has also noted an improper use of mitigating and aggravating circumstances in unreasoned decisions.

The last part of the report provides a statistical overview of the riot-related cases. As of 18 November 2005, out of the 426 persons charged with criminal offences related to the riots, 209 persons had been convicted while 12 were acquitted. There are 110 cases still pending and the charges have been dropped in 95 cases.

Overall, given the consequences of the March 2004 riots in terms of deaths, damage of property and displacement of ethnic minorities, the OSCE is of the opinion that although judicial system has addressed these cases, the response was not strong enough. The justice system failed to send out a clear message to the population condemning this type of violence. Such a response does not serve as a sufficient deterrent from engaging in public disorder on a similar massive scale and therefore does not fulfil the full potential of the preventive function of the justice system.

CHAPTER ONE

INTRODUCTION

This report was prepared by the Legal System Monitoring Section (LSMS), which is part of the Department of Human Rights and Rule of Law (hereinafter the Department) of the OSCE Mission in Kosovo (hereinafter the OSCE). The OSCE functions under the auspices of the United Nations Interim Administration in Kosovo (UNMIK) as the Institution-building Pillar.

Mandate of LSMS

United Nations Security Council Resolution 1244 authorised the UN Secretary-General to establish an international civil presence in Kosovo that would provide an interim administration. One of the main responsibilities of the international presence is "*protecting and promoting human rights*."[1]

Pursuant to the report of the UN Secretary-General to the UN Security Council of 12 July 1999, the role of institution-building within UNMIK was assigned to the OSCE, with one of the tasks of the Institution-building Pillar being human rights monitoring. The report expressly instructed UNMIK to develop co-ordinated mechanisms to facilitate human rights monitoring and the due functioning of the judicial system.[2]

A Letter of Agreement, dated 19 July 1999, between the Under-Secretary-General for Peacekeeping Operations of the United Nations and the Representative of the Chairman-in-Office of the OSCE, stated that the OSCE should develop mechanisms to ensure that the courts, administrative tribunals and other judicial structures operate in accordance with international standards of criminal justice and human rights.[3] Within the OSCE, the Department has the responsibility to monitor and report upon the judicial system in terms of human rights and the rule of law. Within the Department, LSMS is tasked with the role of monitoring cases in the justice system, assessing their compliance with international standards, and reporting on matters of concern.

Background to the March 2004 Riots

In March 2004, a number of protests,[4] and acts of civil disobedience[5] occurred in Kosovo. Between 17 and 19 March of that year, the situation took a dramatic turn for the worse, as a wave of riots swept through Kosovo.

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[1] United Nations Security Council Resolution 1244, 12 June 1999, para. 11/j.

[2] Report of the UN Secretary-General to the UN Security Council, *On the United Nations Interim Administration in Kosovo*, S/1999/779, 12 July 1999, para. 87.

[3] Justice Circular 2001/15 *OSCE Monitors Access to Court Proceedings and Court Documents*, 6 June 2001, reaffirmed that the LSMS trial monitors have access to all criminal court proceedings and documents, with a few exceptions. This was amended by Justice Circular 2004/6, 30 September 2004, which asserted that LSMS also has access to civil and administrative proceedings and court documents in accordance with an agreement between Police and Justice Pillar of UNMIK and the OSCE. This Circular was intended to enhance the understanding of the judiciary with regard to the OSCE's mandate, and to ensure that the trial monitors maintain complete coverage in criminal, civil and administrative proceedings.

[4] On 5 March 2004, a dialogue between Prishtinë/Priština and Belgrade on technical issues for the Kosovo Standards Implementation Plan was followed by protests in Prishtinë/Priština. On 16 March 2004 a peaceful rally was held in downtown Prishtinë/Priština to protest the arrest of former KLA commander Fatmir Limaj. Similar protests were held in Mitrovicë/Mitrovica, Pejë/Peć, Prizren and elsewhere.

[5] On 15 March 2004, as a response to the UNMIK decree on customs that invalidated the former Yugoslav law on customs, groups of Kosovo Serbs blocked two boundary crossings at the

These riots appeared to have been sparked by events of the previous day. On the 16th of March, three Albanian boys drowned in the Ibar River, near Çabrë/Čabra, Zubin Potok municipality. The media reported that a fourth boy, who had been with them but survived, claimed that the four boys had been chased into the river by Serbs from a nearby village and a dog. On the night of 16 March, Kosovo media reported the disappearance and presumed drowning of the three boys. Despite appeals for caution from UNMIK Police, television reports quickly and firmly attributed the deaths to an attack by Serbs, giving this incident the immediate potential to heighten already tense ethnic relations in Mitrovicë/Mitrovica and elsewhere in Kosovo.[6]

On 17 March, protests over these deaths began in Mitrovicë/Mitrovica and soon escalated into an inter-ethnic conflict between Kosovo Albanians and Kosovo Serbs near the main Ibar river bridge, which connects the divided northern and southern areas of the city. By the end of the day, related protests in every major town in Kosovo had transformed into violent riots against members of minorities, law enforcement authorities, and security forces.

According to UNMIK police reports, 33 major riots were counted, in which it is estimated that approximately 51,000 persons were involved.[7] The persons involved in these riots were of a variety of ages and social statuses. However, the majority of those who were charged with criminal offences and minor offences were young people, mostly unemployed, and of low educational background. In the majority of cases, the age of persons charged with riot offences is around 18 – 19 years old, with the oldest being 77 years old and the youngest 15 years old; furthermore, their educational background varies from illiterate to, in very few cases, higher education.[8]

Scope of the report

The present report deals exclusively with criminal cases and minor offences cases,[9] which have arisen from the March 2004 riots and that have been concluded until the end of

administrative boundary with Serbia near Zubin Potok and Leposaviq/Leposavić. The next day, in response to an armed attack in Caglavica/Čaglavica that resulted in the wounding of a Kosovo Serb student, the Prishtinë/Priština-Gjilan/Gnjilane and Prishtinë/Priština–Skopje highways were blocked at Graçanicë/Gračanica and Caglavica/Čaglavica by Kosovo Serb residents of these enclaves.

[6] Article 2.2 of the Temporary Media Commissioner Code of Conduct for Broadcast Media states that "Broadcasters will not broadcast any material that encourages crime or criminal activities or which carries imminent risk of causing harm, such harm being defined as death, or injury, or damage to property or other violence". In the *Temporary Media Commissioner's Report: An Inquiry into the Performance of Kosovo-Wide Television*, 16-17 March 2004, 23 April 2004, the Temporary Media Commissioner stated "[p]rudent, calm and accurate journalism might have denied organized elements a pretext to riot, loot and burn, and might have helped lessen the scale and intensity of violence that did occur." It should be mentioned that this case has been investigated by an international prosecutor with the assistance of the police. However, due to the absence of sufficient evidence to substantiate these allegations, the international prosecutor involved in this case decided not to request that a judicial investigation be opened.

[7] V.I.P. Daily News Report, 23 March 2004 "UNMIK police spokesman […] said that the police supposed that some 51,000 people were involved in 33 riots." Also see *Collapse in Kosovo – International Crisis Group (ICG) Europe Report* No. 155, 22 April 2004, p. 15.

[8] This information is based on the review of personal data of more than 120 court documents (indictments, decisions, etc.).

[9] For the purpose of this report, criminal cases shall be understood as the ones involving charges under the PCC and/or the FRY CC or the KPC and following the procedure established by the PCPC. Minor offences cases involve acts qualified as minor offences by the law (e.g. Article 18 of the Law on Public Peace and Order, *The Official Gazette of the SAP Kosovo*, no. 13/81) and following the procedure established by the Law on Minor Offences (*The Official Gazette of the SAP Kosovo*, no. 23/79).

November 2005.[10] It focuses on certain problems that were noted in regard to the gathering of and access to evidence, on issues regarding the unwillingness of witnesses to provide evidence and their possible intimidation, as well as on delays in the processing of riot-related cases. Furthermore, this report provides an analysis of certain charging and sentencing practices encountered in riot-related cases. Lastly, a statistical overview of the number of riot-related cases per court in the regions is presented as an annex to this report. These statistics are based on OSCE records and they do not represent official statistics on riot-related cases.

It should be noted that the information provided in this report was mainly collected through the OSCE monitoring of criminal proceedings held before the minor offences, municipal and district courts throughout Kosovo. Additionally, some of the information contained in this report was also collected through interviews of police investigators and conversations held between the OSCE and judges and prosecutors.

[10] The OSCE has noted that a number of riot-related cases have been received by the civil courts in Kosovo, but the civil courts' handling of these cases is not addressed in this report.

CHAPTER TWO

PROBLEMS WITH GATHERING EVIDENCE AND DURATION OF PROCEEDINGS

Given the disparity between the estimated number of persons involved in the March riots (approximately 51,000[11]) and the number of persons facing riot-related charges before a court, which to the knowledge of the OSCE, is 426 persons, it may easily be deduced that only a small fraction of the persons involved in the riots was actually prosecuted. This chapter outlines certain problematic issues that were observed during these proceedings.[12]

First of all, investigations have been hindered by the fact that a large number of witnesses were reluctant to come forward to testify, or appeared before the investigating authorities but gave conflicting statements. Secondly, in many cases the injured parties did not effectively participate in the criminal proceedings. Thirdly, a number of witness statements for the prosecution were not secured. Although the special circumstances after the riots impeded to a certain degree gathering important evidence, it also appears that the investigative authorities may not have been sufficiently proactive in securing witness and injured party statements. Lastly, many riot-related cases have suffered considerable delays at various stages of the proceedings.

1. The problem of possible intimidation in criminal cases related to the riots

To the extent that thousands were present during the riots, thousands would have seen the events unfold and could have recognised the perpetrators of criminal acts, it is of some concern that there was no abundance of witnesses for the prosecution of riot-related cases.[13] The reasons for the unwillingness to assist the authorities in the investigation of criminal acts related to the riots may range from a lack of a sense of civic duty and even sympathy towards the reasons for and/or the participants in the riots, to the fear of intimidation and reprisal. The OSCE acknowledges that it is difficult to make a clear assessment of the particular reasons in all riot-related cases where there have been indications that witnesses were unwilling to come forward to testify or avoided giving incriminating evidence. To this extent, the following sub-section presents certain examples of monitored cases in which the OSCE observed signs of unwillingness of witnesses to give evidence incriminating the defendants.

Witness intimidation in Kosovo has affected numerous criminal proceedings in the past, particularly those of a sensitive or high profile nature. Having concerns for this phenomenon, the OSCE has given accounts of problems related to the protection of witnesses in the criminal justice system in Kosovo in previous public reports.[14] In recognising that the intimidation of injured parties and witnesses severely undermines the investigation and prosecution of serious crimes in Kosovo, and that it constitutes a significant obstacle to the establishment of the rule of law in Kosovo, the law provides for a variety of legal measures to

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[11] See *supra* footnote 7.

[12] It is worth mentioning that on 6 April 2004 new criminal legislation has entered into force, and all the investigations initiated after that date were conducted under the new Provisional Criminal Procedure Code of Kosovo. Also cases in which the indictment was filed after 6 April 2004 followed the new criminal procedure regime. See Article 550 PCPC, *a contrario*.

[13] In conversations with the OSCE, investigators from Operation Thor (the special police unit formed to investigate the crimes connected to the March 2004 riots), international prosecutors, and members of the judiciary have also indicated that it has been very hard to find witnesses willing to testify regarding the criminal acts that occurred during and after the events.

[14] See in particular the OSCE Mission in Kosovo 5th Review on Criminal Justice System titled *Protection of Witnesses in the Criminal Justice System* (March 2002-April 2003). The issue was revisited in the OSCE 6th Review of the Criminal Justice System titled *Crime, Detention, and Punishment* (December 2004), pp. 74 *ff.*

protect injured parties and witnesses so that they may participate in proceedings without fear or risk to their security.[15]

As regards riot-related cases, apart from observations made by the OSCE during trial monitoring activities, many professionals in the justice system have made reference to witness intimidation as one of the major problems for the investigations, and arguably the most difficult to overcome. In certain instances, it has been suggested that even injured parties who are members of minority groups were not inclined to testify in court against suspects, since some injured parties expressed the intention to continue living in Kosovo and were thus afraid for their security in case they incriminated suspects.

In proceedings connected to the riot violence, witness protection measures based on the criminal procedure code were indeed used, albeit in a limited number of high profile cases, all of which were handled by international prosecutors. According to the Head of the Witness Protection Unit,[16] this Unit has not been involved in the protection of any witnesses in connection with riot cases within the reporting period.

1.1 Examples of unwillingness of witnesses to provide their statements

In the following examples the OSCE observed in witnesses signs of unwillingness to give forthright testimony and to co-operate with the investigating authorities. What is of most concern is that most of these witnesses were police officers.

> In a case before the Pejë/Peć District Court against a person charged with leading the riots of 17 of March 2004 in Deçan/Dečani, several witnesses were interviewed during the investigative hearings, some of them being local KPS officers and others international police officers. All these witnesses were at the centre of town when the riots occurred, but while the international police officers all identified the defendant as the leader of the crowd inciting the people with the use of a bullhorn to attack and destroy UN property, most KPS officers stated that the defendant did not instigate the riots and simply tried to calm the mob down. This clear contradiction between the testimonies of local and international police officers, all of them having witnessed the same facts, but seemingly having seen different things, invites suspicion as to the truthfulness of some of the police officers' statements. As a result of these contradictions, the prosecution was not able to gather enough consistent evidence to support an indictment and had to terminate the investigation against the defendant.

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[15] Measures that are foreseen in the criminal procedure include: omitting or expunging names; non-disclosure of records; efforts to conceal features or physical description; assignment of pseudonyms; closed sessions of court proceedings to the public; orders to defence counsel not to reveal the identity of the witness; orders for the temporary removal of the accused from the courtroom; anonymity. See UNMIK Regulation 2001/20 *On the Protection of Injured Parties and Witnesses in Criminal Proceedings*, dated 19 September 2001 (as amended by UNMIK Regulation 2001/1), as implemented through Administrative Direction 2002/25, dated 13 November 2002. This Regulation has been superseded by UNMIK Regulation 2003/26 On the Provisional Criminal Procedure Code of Kosovo (PCPC), dated 6 July 2003. The PCPC regulates the system of witness and injured parties protection measures in its Articles 168 to 174. Furthermore, under certain circumstances, the physical protection of witnesses may be provided by a specialised police unit known as the Witness Protection Unit (WPU). Operations of this Unit include the provision of secure shelter facilities in Kosovo until a witness has given testimony and the transfer of the witnesses to another country following trial. The WPU was set up in June 2001 under the authority of the UNMIK Police Commissioner to establish and administer a witness protection programme (see Memorandum dated 28 June 2001 from the Police Commissioner to the Deputy Commissioners for Operations, Administration and Planning and Development approving the establishment of the WPU).

[16] See *supra* footnote 15, *in fine.*

In evaluating the facts in the above example, one must bear in mind the background of witness intimidation in the Pejë/Peć region and the fact that the defendant was a well-known public figure. It cannot be excluded that some witnesses (mainly KPS officers) may have feared testifying against the defendant, and hence gave conflicting testimony on apparently incontrovertible facts.

> In another case before the Pejë/Peć District Court, two defendants faced charges of leading the crowd during the riots in Pejë/Peć, inciting national, racial, religious or ethnic hatred, and illegal weapon possession. During the investigative hearings several police officers were heard. Throughout their cross-examination during the investigative hearings their testimonies were confusing, vague and contradictory with the statements they had previously given before the police. The OSCE noticed that the witnesses displayed an apparent nervousness when answering questions about the defendants. Some witnesses identified the defendants among the crowd as leaders, whereas others said they did not see them. Others even contradicted themselves, first saying that they had seen them and then denying that they had. It is worth mentioning that both defendants are well-known public figures in the region. Nevertheless, certain high ranking KPS officers stated that they did not even know who the defendants were, while others denied having seen them anywhere near the crowd.

These reactions on the part of local police officers, who must be familiar with prominent public figures in their region, and who have a special obligation to co-operate with the judiciary in the search for the truth, are troubling.

> In yet another case, before the Municipal Court in Gjilan/Gnjilane, two defendants were charged with causing general danger in that they damaged and then burned a vehicle belonging to a Kosovo Serb KPS officer. In his investigative statement, the injured party testified that he personally saw the destruction of certain cars and he identified as an eyewitness one of the defendants burning his car. The injured party added that the other accused was later identified damaging the car in question in a video recording. It is of interest that in the main trial the injured party denied having identified one of the accused at the critical time of the offence and insisted that both accused were identified by his colleagues after watching the video tape. Asked by the prosecutor why he was contradicting himself and whether he was under pressure, the injured party stated that he was nervous at that time, that he forgot what he said and because he was under stress, he probably made a mistake. He confirmed that his investigative statement was read back to him before he signed it.[17]

In assessing the reasons why the officers in the aforementioned cases appeared to be unwilling to give their statements, one should also have due regard for the fact that in at least one case related to the riots a protected witness was a KPS officer. In the following example, the concerns of even international members of a Special Police Unit were made very clear:

> In a case before the Pejë/Peć District Court the accused was charged with leading the crowd in obstructing official persons from performing their duty. His actions allegedly prevented a Special Police Unit (SPU) from reaching a certain location in time to stop the destruction the crowd caused in a Serbian enclave. The majority of the prosecution witnesses who saw what happened and identified the defendant as the leader of the crowd were SPU officers. However, their commander informed the prosecutor that these officers would testify only on the condition of the protective measure of total anonymity; the reasons for this were the fear of reprisals against the

[17] It is of interest that the court, in its verdict, mentioned as evidence the investigative statement of the injured party and not his testimony during trial. The court did not assess the discrepancies between these statements on this important fact.

SPU witnesses and the fact that their testimony could impede them in their everyday interactions with the local population.[18]

As illustrated above, in multiple criminal proceedings related to the riots, the circumstances indicate that police officers, not excluding internationals, were hesitant to provide their testimony to the authorities. Despite the fact that this unwillingness could be due to a variety of reasons, one cannot exclude the fact that even police officers may be subject to intimidation preventing them from fully co-operating with the investigating authorities.

1.2 Examples of problems encountered in the implementation of witness protection measures in proceedings related to the riots

As mentioned previously, to the knowledge of the OSCE, witness protection measures have been used in a small number of cases, all of which could be considered high profile cases and were handled by international prosecutors. Despite problems that may continue to exist in the implementation of such measures in general, this sub-section of the report deals with a few particular issues that arose in the implementation of these measures in one riot-related case.

> In a case before the District Court in Gjilan/Gnjilane, the defendants were charged with participating in a crowd committing a criminal offence, while some of them were additionally charged with aggravated murder and illegal weapons' possession. The court issued protective orders for certain witnesses upon the proposal of the prosecutor.[19] During the hearing of a protected witness in the main trial, upon the question of the presiding judge, the witness stated that he/she was approached by a journalist of a daily newspaper the day before this hearing, while waiting in the corridor of the courthouse. The witness confirmed that the journalist interviewed him/her and that his/her picture was taken. The presiding judge declared in court that the journalist in question would face consequences for having taken a photo inside the court without permission. It is of particular concern that, as the court noted, this witness gave testimony during trial which was entirely different than the one he/she gave during the investigation. It should be mentioned that the main trial, including the sessions in which protected witnesses testified, was held in public session and not *in camera*.
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> In the same case, the same newspaper reported on the statement given by another protected witness. The initials of this witness were mentioned in the newspaper article, together with a piece of information that could lead to the identification of the address of the witness. It may be reiterated that the protective order issued at the beginning of the main trial demanded that even the initials of the protected witnesses were not to be disclosed, particularly to the media.[20]

A number of issues are of concern in this case. First of all, it is unclear to what degree the witness who had his/her picture taken and those who rejected the protective measures during trial were properly consulted by the prosecutor and the court prior to the imposition of protective measures. Regarding the witness whose picture was taken it is also not clear whether he/she was adequately informed about what kind of conduct was expected of him or her in connection with the protection of his or her identity. Although the law does not necessarily require the agreement of the injured party or witness for the protective measures

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[18] No such measures were granted to the SPU officers, who eventually agreed to testify without them.
[19] At the beginning of the main trial, the protective order consisted in that the witnesses referred to with initials in the indictment would benefit from the measures that a) their personal data would not be mentioned in the court, and b) that neither the names nor the initials of the witnesses were to be disclosed, especially to the media.
[20] See *supra*, footnote 19.

to be imposed, it may be argued that such an agreement is particularly important for the proper implementation of these measures. Indeed, it may be a misuse of resources if protective measures are imposed by the court but the intended protected witness is the one that does not fully comply with them. On the one hand, conduct which could lead to revealing one's identity, or which indeed reveals it, could imply that the witness did not actually fear intimidation; on the other hand, such behaviour could also imply that the witnesses did not perceive the protective measures as adequate to prevent intimidation.

Additionally, it appears that the witness who was approached by the journalist was in the corridor of the courthouse while waiting to testify: this raises the question of why this witness was not afforded a more secluded space to wait, instead of remaining in a public location where one is more vulnerable to being identified and connected with criminal proceedings.

Moreover, there seems to be confusion whether there was indeed any action taken to examine the conduct of the journalist, pursuant to what the presiding judge declared in open court. The presiding judge stated in court that the guards filed a report to the President of the District Court and that the latter stated that he would take action. However, in an interview with the OSCE, the President of the Court claimed that he had not been informed about this incident either by the guards or by the presiding judge. Lastly, the publication in a newspaper of at least one article disclosing the initials of the protected witness breached the protective measure.

1.3. Issues regarding the security of judges and prosecutors

The OSCE did not come across any concrete examples of intimidation of judges or prosecutors in connection with the handling of riot-related cases. Nevertheless, in their conversations with the OSCE, a number of judges and prosecutors, both local and international, claimed that there was fear of intimidation, especially for local judges, were they to handle certain riot-related cases. The OSCE has also received information that in some proceedings against alleged leaders of the riots there were attempts to appoint local judges for the confirmation of the indictment hearing and for the main trial. However, local judges were reluctant to be involved in these proceedings, at least as confirmation or presiding judges.

International judges and prosecutors were involved in the most sensitive riot-related cases. Therefore, it appears that the local judiciary and prosecutorial authorities were not fully put to the test to prove that they were able to deal with sensitive inter-ethnic violence cases effectively, without the involvement of international judges and prosecutors.

2. Issues related to gathering evidence in riot-related cases

In addition to the reluctance of witnesses to come forward to testify, gathering evidence in riot-related criminal cases was further impeded by a variety of other factors. These include the fact that a large number of persons were displaced as a result of the violence, and as a consequence may not have been properly heard by the justice authorities. Furthermore, certain international members of law enforcement authorities and of security forces who witnessed the riots left the Mission area, while the investigating and prosecutorial authorities did not secure statements from them that could be used in court. Additionally, it appears that the testimony of police officers and of members of security forces was sometimes difficult to obtain.

It is noteworthy that in the late fall of 2004, the Serbian Ministry of the Interior provided to the UNMIK Department of Justice, and in turn to Operation Thor, one index volume and 46 volumes of information and statements collected from Kosovo Serbs who fled to Serbia proper following the riots. This material was in Serbian, so its translation was arranged into English and Albanian. The index volume was translated first so as to provide some guidance in how to utilise the information. Material that was connected to previously opened investigations was added to the relevant files. In December 2004, the management of Operation Thor changed, and cases which could be turned over for prosecution to courts were thereby referred to the courts; all other files continued to be investigated until Operation Thor was disbanded in March 2005. Investigations for riot-related cases are now handled by the Regional Crime Squads.

2.1 Difficulties in obtaining evidence as a result of displacement due to the violence

During the riots, it is estimated that around 4,200 persons were internally displaced or left Kosovo as a result of the violence.[21] Consequently, many injured parties and witnesses to criminal acts were not easily accessible to the authorities at the different stages of the proceedings. However, it appears that in a number of cases the authorities may not have adequately pursued securing the testimony of such persons.

> In a case before the Municipal Court of Gjilan/Gnjilane, the accused was convicted on 28 June 2004 for the criminal offences of participating in a crowd committing a criminal offence and of participating in a group obstructing official persons in performing official duties. The defendant was found to have participated in a crowd which entered the yard of a house where Kosovo Serbs resided, and which caused serious bodily injuries to two Kosovo Serbs. At no point during these proceedings were the injured parties heard, mostly because they were displaced, while the court did not make additional efforts to find them. It is of interest, however, that in another criminal case another accused stood trial for the same set of facts and for the injury of the same victims,[22] but before the District Court of Gjilan/Gnjilane. It is known from this case that the investigative judge and the prosecutor, both internationals, met with the injured parties in Serbia proper on 17 June 2004; one of the injured parties was summoned and appeared for the main trial of the second defendant.

It is unclear to what extent the court in the first case knew the whereabouts of the injured parties before the conclusion of the main trial. If the authorities in this case did not know the whereabouts of the injured parties, this may denote a lack of information sharing between court authorities dealing with related cases. If, on the other hand, the court knew the whereabouts of the injured parties, but did not pursue hearing them, then this may indicate that there was a lack of commitment by the prosecutorial and judicial authorities to thoroughly investigate the case.

> In a second example before the Municipal Court in Gjilan/Gnjilane, one accused was charged on 24 May 2004 with aggravated theft and causing general danger. According to the indictment, on 17 and 18 March 2004 the defendant entered the house of a Kosovo Serb (unidentified in the indictment) and stole items. In relation to the second count, the indictment describes how, on 17 March 2004, the defendant allegedly set on fire the house of a Kosovo Serb (identified in the indictment) by using petrol, causing considerable material damage and endangering human life. At no point during the proceedings were the injured parties heard. Regarding the second count, in the receipt of summonses dated 22 June 2004 it is written that the injured party was displaced in Serbia. During the main trial, the prosecutor amended the indictment by withdrawing the second charge and qualifying the first criminal offence as a crime of receiving stolen goods.

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[21] See *UNHCR Global Report 2004*, p.248.

[22] The accused in this second case was charged with inciting hatred, discord or intolerance between ethnic groups living in Kosovo, in co-perpetration causing general danger by fire or other kind of energy resulting in serious bodily injury, as well as causing general danger resulting in substantial material damage.

In this case, the court did not even attempt to identify one of the injured parties. Furthermore, regarding the injured party, who was identified in the indictment, due to the fact that he was displaced in Serbia, he was not heard during the proceedings. It is also of concern that, during the trial, neither the judge acknowledged the absence of the injured party, nor did the public prosecutor display any concern about the fact that the injured party was not present and could not be heard.

2.2 Difficulties in obtaining evidence as a result of persons completing their Mission

The OSCE has further observed that in certain proceedings, the investigating authorities may not have proactively sought evidence from international police officers and KFOR soldiers, who eventually completed the duration of their assignment and departed from the Mission area. On certain occasions, the investigating authorities failed to obtain such statements in time, which could be used in court, and it appears that the courts have not made substantial efforts to bring such witnesses from abroad to testify in person during the trial. This resulted in dropping criminal charges due to lack of evidence in the following cases.

> In a case before the Municipal Court in Pejë/Peć against a defendant who had allegedly participated in a crowd committing a criminal offence, the police unit of Operation Thor handed the case to the public prosecutor with the express mention that the sole evidence against the suspect was the testimony of a certain KFOR soldier who would be leaving the Mission within a short time. The officer from Operation Thor expressly urged the prosecutor to interrogate the soldier before the date he was due to complete the Mission, in the presence of the defendant's defence counsel, in order to ensure that such testimony could be used as evidence in court.[23] However, the KFOR soldier left the Mission without giving his testimony and as a result, the prosecutor could not gather the necessary evidence to support an indictment and so the case was dropped.

In this example, either because the police handed the case to the prosecutor too late or because the latter was not diligent enough in taking the necessary steps to summon and interrogate the witness, the witness left the Mission without giving his testimony and the case had to be dropped.

> In a second example before the District Court in Prizren, the indictment was filed on 18 June 2004 charging an accused person with the criminal offences of attempt to cause general danger, attacking an official person while executing official duties, and of participating in a crowd committing a criminal offence. An international police officer was heard as a witness by the investigating judge on 8 April 2004, in the absence of the defence counsel or the defendant; in his statement, the witness clearly identified the accused as the person who attempted to cause general danger. At the 21 July 2004 confirmation hearing, the accused pleaded not guilty to all three offences. At the beginning of the trial session, the public prosecutor amended the indictment by withdrawing the first charge of causing general danger, due to the fact that the sole witness for the first count had left the Mission.

In this case, the defence counsel was not even invited to attend the investigative hearing of this important witness for the prosecution. The indictment proposed the hearing of this witness during trial. However, it seems that the authorities did not take into account the fact that the witness would be leaving the Mission area. Furthermore, no appropriate measures were taken to ensure that he was properly cross-examined by the defence prior to his departure, so that his investigative statement could be used during trial. On the other hand,

[23] Article 156(2) PCPC.

returning the witness to Kosovo in order to hear his testimony before the court does not appear to have been contemplated before the prosecutor dropped the relevant charges.

2.3 Difficulties in obtaining evidence as a result of witnesses not appearing before the court and not providing the required evidentiary material

In a considerable number of cases, police officers did not appear before the court to give their evidence, although duly summoned.[24]

> In a case before the Municipal Court in Gjilan/Gnjilane, the accused was charged with participating in a crowd committing a criminal offence and participating in a group obstructing official persons in performing official duties. During the investigation, apart from the accused, two KPS officers gave their statements to the public prosecutor. These two witnesses were properly summoned to give their testimony during the main trial; nevertheless they failed to appear before the court. Without further inquiring as to the reason for the witnesses' absence, the court decided with the consent of the parties that, for the sake of efficiency of the proceedings, they would not hear these witnesses, but read into the record their statements given during the investigative proceedings.[25]
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> In a case before the Municipal Court in Prishtinë/Priština, the defendants were charged with attempted theft in co-perpetration. A KPS officer was regularly summoned as witness for the main trial held on 23 September, but he did not appear before the court. No justification was put forward as to the absence of this officer, and the court took no actions to compel the appearance of the witness. Instead, the public prosecutor withdrew his proposal to hear this witness, and the court approved it without further discussion.[26]
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> In another case before the Gjilan/Gnjilane Municipal Court, the accused was charged with attempted aggravated theft. Two KPS officers gave their evidence during the investigation before the public prosecutor in the absence of the defendant or any defence counsel. They were further properly summoned for the main trial session scheduled for 20 May 2004. Of the two officers, only one appeared for that session, and he was orally summoned to come to court on 31 May 2004. In the latter session, neither of these officers appeared, while the case file lacks a receipt of summonses for the second officer. With the consent of the parties, and in order not to delay the proceedings, the court decided to read the statements of these officers into the record. The accused objected to these statements. It may be noted that these two statements essentially formed the basis for finding the accused guilty as charged.

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[24] Article 158(1) PCPC states that "[a] person shall be summoned as a witness if there is likelihood that he or she may give information about the criminal offence, the perpetrator and important circumstances relevant for the criminal proceedings." The second paragraph of the same provision establishes a general obligation for any person summoned as a witness to respond to the summons and, unless otherwise provided by the PCPC, to testify. In relation to the KPS, it should be noted that the Policy and Procedure Manual, establishes a policy for court appearances of KPS officers stating that "[i]f a KPS officer is ordered to appear in court, he/she is obliged to appear at the time and place stated." See *Kosovo Police Service Policy and Procedure Manual*, Policy Development KPS Policy Section, policy number P-1.41, effective from 1 October 2002.

[25] After reading these statements, the defence counsel objected to them. It is worth mentioning that the counsel did not justify his objection with any legal arguments. On 28 June 2004, the accused was convicted and sentenced to six months imprisonment.

[26] On 23 September 2004, the court imposed the educational measure of intensive supervision by their parents on the two defendants, both juveniles.

In the cases above, the KPS officers failed to appear as witnesses when properly summoned, without presenting any valid justification to the court. In addition to the fact that courts did not take any lawful measures to compel their appearance, seemingly giving priority to the prompt conclusion of the cases, it is also of concern that KPS officers failed to provide their full co-operation to the justice authorities when required.

Lastly, in certain cases, it appears that KFOR did not provide evidence which would support the complaints against defendants.

> In a case before the Minor Offence Court in Gjilan/Gnjilane, the suspect was charged according to Article 18(10) of the Law on Public Peace and Order.[27] He denied having participated in the protests on 18 March 2004, or having thrown stones towards KFOR, although he was arrested by KFOR. The court summoned a KPS officer twice to appear before the court, in April and in December 2004; the officer failed to appear when summoned.[28] The court dismissed the case on 20 December 2004 due to lack of evidence. The OSCE was informed by the judge that KFOR had promised that they had a film available and pictures which they would bring to court in order to identify the defendant. However, nothing was presented to the court. Furthermore, the President of the Minor Offence Court added that, apart from contacting KFOR, the court also contacted the police regional commander to adduce more evidence, but the commander replied that there was none.
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> In another case before the Minor Offence Court in Gjilan/Gnjilane the suspect was charged under Article 18(10) of the Law on Public Peace and Order.[29] He was heard by the court on 19 March 2004, and stated that he participated in the protests but did not admit having thrown stones towards KFOR. The only witness in this case, a KPS officer, testified on 8 December 2004 that on the critical day she had merely accepted and prepared the case involving the defendant, which was brought by KFOR. The KPS officer stated that she asked KFOR to bring evidence substantiating the offence, but no evidence was submitted. On 28 of December 2004 the court suspended the proceedings due to the lack of evidence.[30]

This lack of cooperation between KFOR and the judicial system is a matter of serious concern, given that during the March riots KFOR was largely involved in restoring public peace and order and therefore many soldiers would have witnessed a number of criminal offences and/or collected evidence that could have been very helpful to the courts.

2.4 Other issues in relation to gathering evidence

The OSCE has also received information from police investigators which raises serious concerns about gathering evidence relating to riot incidents. It appears that, in certain cases, injured parties were questioned several times by different police officers.[31] It may be expected

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[27] Article 18(10) of the Law on Public Peace and Order (*The Official Gazette of the SAP of Kosovo*, no. 13/81) foresees that "[b]y imprisonment up to 2 months will be punished for minor offence […] the one that underestimates a state body, associated labour organization, organization and other self-managing community, disturbs or insults an official person in official duty, which was undertaken within his authority."

[28] According to the judge, the police officer came to the court and informed him that he only drafted the police report and prepared the case. However, this was not recorded in any record available in the case file.

[29] See *supra* footnote 27.

[30] The proceedings were suspended pursuant to Article 198(1), item 8 of the Law on Minor Offences (*The Official Gazette of the SAP Kosovo, no.23/79)*.

[31] It also appears that a number of obtained statements were of poor quality and incomprehensible, hence subsequently assigned officers were actually compelled to re-hear the witnesses.

that an officer subsequently assigned to a case, in addition to reading previously obtained witness statements, may want to directly hear a witness's testimony. However, on certain occasions it seems that previously obtained statements of injured parties and witnesses were missing from the case file. This is alarming in that it does not only reveal that there may have been a lack of co-ordination,[32] organisation and even professionalism within the police authorities, but it may also raise suspicions that obtained evidence was intentionally removed from or not included in a given case file. Moreover, it has been alleged that other types of evidence, such as photographic evidence, were also absent from case files, although there is information suggesting that such evidence had been submitted to the police authorities. If such allegations are indeed substantiated, it is unclear whether such loss of evidentiary material is due to disorganisation or any other cause.

Of additional concern is the distress that injured parties and witnesses seemingly have felt when repeatedly asked to provide their account of the events. This would also beget a lack of confidence in the capacity of the police authorities to properly investigate incidents.

In riot situations it is generally accepted that video evidence can play a major role in the response of the criminal justice system.[33] Video footage may be used as evidence in a variety of ways, including: a) providing an overall picture of a riot situation within which individual offences were committed; b) identifying individuals who participated in the riots or orchestrated and led the actions of the crowd or group; and c) portraying the actions of the law enforcement and security forces responding to the riots.[34]

In the March 2004 riots some video footage was indeed available, and video evidence was made use of in certain criminal cases. However, the video recordings may not have played such an important evidentiary role. According to Operation Thor officials, due to the reason that most of the video recordings were made by the media and by certain KFOR contingents, there were problems with using these video recordings as evidence. In fact, media video footage focuses on the sensation created by the riots rather than facts which could constitute court evidence. On the other hand, video recordings made by KFOR were sometimes of poor quality or were not shared with the investigating authorities. According to Operation Thor, there was no video recorded by the local police, and it further appears that the law enforcement authorities in Kosovo lack officers trained and specialised in gathering video evidence in such civil disturbance circumstances.[35]

Notwithstanding the fact that video evidence can prove very useful in criminal proceedings regarding riot-related offences, it should not be considered on its own as sole evidence for offences against public order. Experience both from Kosovo and from other jurisdictions

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[32] Seemingly there was no proper hand-over of the cases from the Regional Crime Squads (RCS) to Operation Thor, while some RCS refused to hand over cases.

[33] See Alan Carling, Darrel Davies, Amritha Fernandes-Bakshi, Neil Jarman, and Peter Nias, *Fair Justice for All? The Response of the Criminal Justice System to the Bradford Disturbances of July 2001*, published by The Programme for a Peaceful City, University of Bradford in association with The Joseph Rowntree Charitable Trust (2004) [hereinafter "Bradford Report"] available at <http://betterbradford.org.uk/Documents/Fair%20Justice%20For%20All.pdf> (last accessed 10 August 2005). On page 16 of this document the authors submit that: "[i]t is hard to overstate the importance of the video evidence for the entire course of the criminal justice response to 7/7/01 [date of the Bradford Disturbances] […] It is quite possible that no Riot charges at all could have been brought with any prospect of securing a conviction in the absence of video, and very likely that the number of such charges would have been heavily restricted, to a maximum of about 20 cases, rather than the 178 which were in fact brought."

[34] See the Bradford Report, *supra*. Such information was also provided to the OSCE by the former Head of Operation Thor.

[35] The OSCE was also told that such officers trained in video evidence gathering usually exist in the forensic teams of other jurisdictions.

amply indicates that, even when video evidence is available, it is of little use if there is no broad consent for the criminal justice process. In examples from other jurisdictions, video evidence has proved most effective when, following a poster or other identification campaigns, members of the public were prepared to turn in the suspects to the authorities or encouraged the suspects to surrender themselves to the police.[36] As regards the March 2004 riots in the Kosovo context, it can be safely stated that the public did not demonstrate this broad consent to the criminal proceedings.

3. Delays in riot-related cases

Out of 426 riot-related cases, 110 are still pending. The majority of the cases have therefore been completed, however, the OSCE has noted delays in a number of proceedings.

During the March 2004 riots an unusually high number of incidents occurred in a very short period of time. Obviously, these cases created an additional burden on the already heavy workload of the police, prosecutorial, and court authorities. Hence, to a certain degree, it may have been expected that this bulk of cases would cause further delays in the administration of justice. Nevertheless, despite the fact that these cases should have been treated as a priority by the justice system,[37] the OSCE has observed that on many occasions, the competent authorities may not have taken all the appropriate steps to ensure that the completion of these cases was accomplished in a reasonable time.

Operation Thor was formed in May 2004 and was mandated to investigate the crimes linked to the March riots. At the end of 2004, Operation Thor had investigated or was investigating approximately 1,200 criminal riot incidents. According to information received from the management of Operation Thor, this unit was faced with a number of problems in its investigations of riot-related incidents. First of all, the highest number of staff assigned to this Operation unit was 140, of which approximately 90 were designated investigators.[38] It has been held by representatives of Operation Thor that the number of investigators was too low to properly handle all assigned cases.

Another issue of concern is the fact that not all investigators met the professional requirements of their position, as regards English language skills and actual investigation experience. Furthermore, a number of investigations have been affected by interruptions occurring due to the fact that investigators would complete their contract and depart from the Mission. Operation Thor also set up an electronic database in which every action regarding a riot-related case was to be recorded.[39] Apart from receiving input, this database could have also served to retrieve information from one investigation that would be useful to another. However, the OSCE was told by representatives of Operation Thor that this database was actually unused, but also unusable.[40]

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[36] See the Bradford Report, *supra* footnote 33, pp. 16-17.

[37] The Rule of Law Standards state that UNMIK Police (both CIVPOL and KPS) should investigate crimes without fear or favour and any gender bias, with special priority to the investigation of crimes of violence committed during the events of 17-19 March 2004 (Standard 1.1 of the Rule of Law Standards – Kosovo Standards Implementation Plan). Furthermore, there has been an overall impression that the judiciary acknowledges that these cases should be treated as a priority. Also in this regard, the European Court of Human Rights has stated that "[a]cts motivated by ethnic hatred that lead to deprivation of life undermine the foundations of [democratic] societies and require particular vigilance and an effective response by the authorities." See *Nachova and Others v. Bulgaria*, European Court of Human Rights, 43577/98 and 43579/98, 26 February 2004, paragraph 155.

[38] It should be understood that these numbers were fluctuating during the life of this Operation.

[39] About 16 persons from Operation Thor were tasked to input information into the unit's database.

[40] The database was difficult to use mostly due to problems with the English language skills of the persons providing the information and those inputting it had, as well as because a case would have multiple entries with different spelling, etc.

In summary, Operation Thor could have achieved more effective results if it had the proper resources, support, organisation, as well as co-ordination with other police units. One of the consequences of the aforementioned shortcomings would be delays during the police investigations of riot-related offences. Another grave consequence would be the failure to provide adequate evidence for the prosecution of cases.

> In a case before the Municipal Court in Pejë/Peć, the defendant was charged in a summary indictment with the offence of participating in a group obstructing official persons in performing official duties. The police officer's report which outlines the actions that the police took to interview the suspect and other persons apparently as witnesses is dated 12 April 2004. The Police Investigation Report dated 6 June 2005 addressed to the Municipal Prosecutor in Pejë/Peć describes in general the events that occurred on 17 March 2004 and simply reiterated what the suspect had given as a statement to the police. This report made a general conclusion that "[f]rom all the evidences that police gathered regarding the committing of crime […] cannot be proved beyond doubt against [the suspect]. The undersigned investigator recommends the closure of this case." Despite this, the municipal prosecutor filed a summary indictment on 27 June 2005. The main trial session was held promptly thereafter, on 14 July 2005, in which the statement of a police officer given on 12 April 2004 was read, the photo-documentation was viewed, and the accused gave a statement denying any criminal responsibility. The public prosecutor, who was different than the one who submitted the indictment, upheld that there was no evidence to suggest that the accused had committed a criminal act, and the court rendered an acquitting verdict on the same date.

It is unclear what other investigating actions the police authorities took between April 2004 and June 2005. No further concrete investigative actions are mentioned in the 6 June 2005 Police Investigation Report.[41] Despite the fact that the police may have generally anticipated gathering additional evidence for the prosecution of this case, it also can not be excluded that the investigating authorities failed to handle this riot-related case with the expediency required, at least pursuant to the actions under the rule of law standards.[42]

On several occasions, delays were caused not only due to the conduct of the police, but also of the court authorities and other agencies supporting the courts.

> In a case before the District Court in Mitrovicë/Mitrovica, the defendant was charged with aggravated theft and unlawful possession of weapons. In his statement before the investigating judge on 24 March 2004, the defendant admitted having committed both criminal acts and was placed in pre-trial detention. The only witness examined in this case was heard two months later, on 28 May 2004. The indictment was filed on 28 July 2004, and on the following day the accused was unconditionally released from detention. The hearing on the confirmation of the indictment was initially scheduled to be held on 24 November 2004, four months after the filing of the indictment. The accused did not respond to the summons for this date, nor did he respond to the summons for the hearing subsequently scheduled for 2 December 2004. It appears

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[41] However, the investigator who finally provided the Police Investigation Report informed the OSCE that he interviewed the suspect himself on 4 February 2005, as he did not have complete confidence in the investigation done previously.

[42] See *supra* footnote 37. Furthermore, it is noteworthy that one prosecutor filed a summary indictment based on evidence which was previously deemed by the police investigator and subsequently by the prosecutor during trial to be inadequate to support the prosecution of this suspect. Despite the fact that the first prosecutor could indeed file a summary indictment on the basis of a criminal report alone [Article 462(2) PCPC] it would have probably been expected from this prosecutor to substantiate his opinion that this evidence was adequate; no such reasoning was provided in the summary indictment.

that the court relied exclusively on the summonsing system instead of using other available means, such as ordering that the accused be brought to court by force.[43] On 24 January 2005, the accused was detained on remand in relation to another criminal offence. The prisoner transport unit failed to transport him to the court for the confirmation hearing scheduled for the third time for 7 February 2005, because, according to the chief of this unit, their vehicles are improper for long journeys. The confirmation hearing finally took place on 9 February 2005, at which the accused pleaded guilty to both counts. Although the indictment was confirmed and became final on 11 February 2005, the main trial was held only on 20 June 2005, four months later, [44] where again the accused pleaded guilty.

Despite the fact that this case was not complicated, and considering that the accused admitted his guilt from the beginning of the investigation, it nevertheless took one year and three months to complete the proceedings.

4. Recommendations

- The OSCE reiterates its recommendations relating to witness protection issues, which are included in previous Reviews of the Criminal Justice System.[45] More specifically, the OSCE recommends that:

    - The Special Representative of the Secretary-General should issue an administrative direction to introduce a mandatory obligation on the courts and prosecutors to inform any witnesses who may be under threat, of the available witness protection measures.

    - The Provisional Criminal Code should be amended to make explicit that it is a criminal offence to breach an order for protective measures.

    - The Kosovo Judicial Institute and the Kosovo Chamber of Advocates in co-operation with the Criminal Defence Resource Centre should continue to provide training for judges, prosecutors, and lawyers on the use of protective measures in court proceedings.

    - A public information campaign should be launched by the UNMIK Police and Justice Pillar to reassure the public that there are means by which the authorities can protect witnesses in Kosovo.

    - The competent authorities should impose and enforce adequate sanctions against public servants, lawyers and others who disclose, as well as media who publish, confidential details about protected witnesses.

    - Prosecutors and judicial authorities should investigate, prosecute and punish assaults or threats against witnesses.

    - Political leaders should intensify their efforts to encourage all Kosovans to cooperate with the investigating and court authorities in solving crimes, including inter-ethnic crime.

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[43] See Article 270(1) PCPC.

[44] Note that Article 319(2) PCCK provides that "[t]he presiding judge shall schedule the main trial as soon as the indictment becomes final. If he or she fails to schedule the main trial to commence within one month from when the indictment becomes final, he or she shall inform the president of the court of the reasons for this…"

[45] See the OSCE 5th Review of the Criminal Justice System titled *Protection of Witnesses in the Criminal Justice System* (March 2002-April 2003), p.26; and the OSCE 6th Review titled *Crime, Detention, and Punishment* (December 2004), p. 77.

- In addition to the protective measures ordered under the Provisional Criminal Procedure Code, when there is evidence that witnesses have been threatened and are willing to relocate within Kosovo or to a third country, investigating, prosecutorial and judicial authorities should apply for physical protection of witness to the Witness Protection Unit.
- The Witness Protection Unit should ensure that protected witnesses are provided with the necessary protection before, during and after the court proceedings.
- The Witness Protection Unit and/or KPS officers working at the court should ensure that immediately after giving his/her testimony the witness is escorted to a secure place and is not left in public areas of the court building.
- The OSCE further recommends that the investigating authorities take all necessary measures to obtain statements from witnesses and injured parties who may not be available for court for the main trial proceedings, in a form that can be used during the main trial as evidence. Additionally, the prosecutorial authorities should be prepared to propose, and courts should consider, more seriously attempting to bring witnesses back to Kosovo to testify in person, should their direct testimony be deemed important for the outcome of a case.
- Judges and prosecutors should file a complaint with the Professional Standards Units against KPS officers who fail to attend court without justification when summoned as witnesses.
- The OSCE recommends that the judicial authorities take all appropriate measures available to ensure that cases are dealt with in a reasonable time.
- The Police Commissioner should take all appropriate steps to ensure that a sufficient number of police officers, distributed accordingly throughout Kosovo, are specially trained in gathering evidence through video recording.

CHAPTER THREE

CHARGING AND SENTENCING

The present Chapter deals with issues related to charging and sentencing practices in riot-related cases. The first and second sections will focus on concerns related to inadequate charging, guilty pleas and plea bargaining. The third section will address problems in certain sentencing practices, some of which have been reported by the OSCE in previous reports,[46] such as the wrongful use of aggravating and mitigating circumstances as well as the lack of reasoning provided in cases of mitigated punishment.

1. Inadequate charging

One of the problems identified among the riot-related cases was that, in a number of indictments, there were discrepancies between the alleged behaviour of the accused and the qualification of the criminal offence. In fact, in some cases, acts that as described in the indictment would qualify as a criminal offence or as a criminal offence of higher gravity were not prosecuted. As a result, the charges were inadequate in light of the circumstances described in the indictment and did not reflect the extent of the accused's alleged responsibility.

> In a case before the Pejë/Peć District Court, the 5 November 2004 indictment charged the accused with unauthorised control and possession of a weapon.[47] However, in addition to the facts pertaining to this charge, in the indictment it is specifically stated that, on 17 March 2004 the accused was identifiable from a video film, "speaking through a megaphone making a short speech calling UNMIK and Serbs 'the enemy' and that the people are 'in a state of war' and leading the crowd in chanting." Although these facts would suggest that the accused may have been responsible for additional criminal offences,[48] the indictment did not contain any additional charges and was confirmed on 16 December 2004 as initially filed by the prosecution.[49] Notwithstanding the alleged active participation of the accused in the March events, the charge in the indictment was not related to the riots.
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> In another case before the Gjilan/Gnjilane Municipal Court, two defendants were charged with causing general danger in a place of a large gathering.[50] In the indictment, filed on 7 April 2004, it is mentioned that on 17 March 2004 the defendants pulled a private vehicle, owned by a Kosovo Serb police officer, out of a parking place, broke all the windows, turned it upside down and set it on fire. On 2 June 2004, a panel of three local judges found the defendants guilty for the crimes described in the indictment and sentenced each of them to five months imprisonment. Nevertheless, the described factual circumstances would also constitute a crime of damage to movable property.[51]

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[46] See OSCE Mission in Kosovo 6th Review of the Criminal Justice System, *supra* footnote 14.
[47] Article 328(2) PCC.
[48] Such as, participating in a crowd committing a criminal offence (Article 320 PCC), participating in a group obstructing official persons in performing official duties (Article 318 PCC), and inciting national, racial, religious or ethnic hatred, discord or intolerance (Article 115 PCC).
[49] On 8 April 2005 the court found the accused guilty as charged and sentenced him with a fine of 300 Euro. Among others, the court considered the following factors as mitigating circumstances: *"[t]he importance of this matter is very small, the act is of small importance and low danger, […] lack of consequences, non importance of the circumstances in which the criminal act was committed [..]."*
[50] Article 291(1) and (3) PCC, punishable by imprisonment of six months to five years.
[51] Article 260 PCC. The fact that the vehicle in question belonged to a KPS officer of Serbian ethnicity could also have been of relevance for a charge under the mentioned provision, if there was evidence to

In a third example before the Municipal Court in Prishtinë/Priština, six defendants were charged on 23 June 2004 with participating in a crowd committing a criminal offence,[52] in that, through their joint actions, they caused general danger and damaged property to a large extent. According to the indictment, the defendants had participated in the protests that took place in Obiliq/Obilić, where a number of houses of Kosovo Serbs were burned by the rioters. It is worth mentioning that during the investigations, one of the defendants admitted that he and other protestors threw stones, damaged and demolished seven to eight houses thought to belong to Serbs. On 28 October 2004, the accused were found guilty as charged.[53]

Despite the fact that the conduct of the defendants clearly demonstrated that there was an element of ethnic hatred in their actions, the local prosecutor did not additionally or alternatively charge them with the criminal act of inciting ethnic or religious hatred by means of damaging the belongings of another person.[54] A similar concern was identified in the following example:

On 25 January 2005, the local prosecutor filed a summary indictment with the Pejë/Peć Municipal Court charging the accused with participation in a group obstructing official persons in performing official duties.[55] The summary indictment claimed that on 17 March 2004 the accused joined the crowd which was moving towards Bellopole/Belo Polje and which later burnt property owned by Kosovo Serbs and threw stones at KFOR and international police officers. In this case, the actions of the accused would have also constituted the crime of inciting ethnic or religious hatred by means of damaging the belongings of another person.[56]

Apart from not reflecting the extent of the defendants' alleged responsibility, the lower charges brought against them in the aforementioned examples resulted in more lenient sentences in each particular case.

2. Guilty pleas and plea bargaining

The PCPC and the PCC introduced new provisions regulating guilty pleas both at the confirmation hearing[57] and during the trial.[58] A guilty plea is generally defined as a formal statement by which the defendant admits his or her guilt. According to the law applicable in Kosovo, for a guilty plea to be valid, a number of conditions have to be fulfilled, namely, the defendant must understand the nature of the guilty plea, the plea shall be voluntary and must be supported by the facts of the case and evidence submitted by the prosecution.[59] The entering of a guilty plea is also a mitigating circumstance to be taken into account by the court when determining the punishment of a criminal offence.[60]

Different from the guilty plea is the concept of plea bargaining. Frequently used, for example in the United States of America, plea bargaining can be defined as "[a]n agreement between

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suggest ethnic bias since Article 260(2) PCC provides for a more serious penalty in cases where the damage was motivated by bias relating to ethnicity.

[52] Article 320(1) PCC.

[53] Four of the accused were sentenced to eight months imprisonment while the other two were sentenced to six months imprisonment, suspended for two years.

[54] Article 115(3) PCC.

[55] Article 318(1) PCC.

[56] See *supra* footnote 54.

[57] Articles 314 and 315 PCPC.

[58] Articles 358 and 359 PCPC.

[59] Article 315 PCPC.

[60] Article 64(1) PCC.

the prosecution and the defence as a result of which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution (for instance, to drop a more serious charge against the accused) or when the judge has informally let it be known that he will minimize the sentence if the accused pleads guilty."[61] Differently from other justice systems,[62] in Kosovo plea bargaining is neither explicitly allowed nor regulated by the PCPC. However, notwithstanding the silence of the law in this regard, certain provisions in the Code have been interpreted by some international judges and prosecutors dealing with riot-related cases as allowing for plea bargaining.

The PCPC introduced new provisions determining that in rendering a ruling to dismiss or confirm the indictment and in rendering the judgment, "the court shall not be bound by any agreement between the public prosecutor and the defence regarding the modification of the charges or the guilty plea."[63] These provisions are ambiguous because, while referring to the possibility for the prosecution to enter into "agreements" with the defence, the law does not regulate such practices or provide any guidance under which conditions the agreements may be made, who shall/may participate in the negotiations and their consequences in terms of the rights of injured parties.[64]

Furthermore, in regard to amendments of the indictment, the PCPC states that "[i]f the prosecutor finds in the course of the main trial that the evidence presented indicates that the factual situation as described in the indictment has changed, he or she may modify the indictment orally during the main trial[…]."[65] This language seems to indicate that it was the legislator's intention to limit the possibility for amending the indictment, to situations in which the factual circumstances of the case changed. Therefore, it is not clear whether an indictment can lawfully be amended after the confirmation hearing, merely as a result of plea bargaining.

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[61] See *Oxford Dictionary of Law*, Oxford University Press, fifth edition, p. 368.

[62] See, for instance, Article 231 of the Criminal Procedure Code of Bosnia and Herzegovina which states as follows:

"(1) The suspect or the accused and the defense attorney, may negotiate with the Prosecutor on the conditions of admitting guilt for the criminal offence with which the accused is charged.

(2) In plea bargaining with the suspect or the accused and his defense attorney on the admission of guilt pursuant to Paragraph 1 of this Article, the Prosecutor may propose an agreed sentence of less than the minimum prescribed by the Law for the criminal offence(s) or a lesser penalty against the suspect or the accused.

(3) An agreement on the admission of guilt shall be made in writing. The preliminary hearing judge, judge or the Panel may sustain or reject the agreement in question.

(4) In the course of deliberation of the agreement on the admission of guilt, the Court must ensure the following: a) that the agreement of guilt was entered voluntarily, consciously and with understanding, and that the accused is informed of the possible consequences, including the satisfaction of the claims under property law and reimbursement of the expenses of the criminal proceedings;

b) that there is enough evidence proving the guilt of the suspect or the accused;

c) that the suspect or the accused understands that by agreement on the admission of guilt he waives his right to trial and that he may not file an appeal against the pronounced criminal sanction.

(5) If the Court accepts the agreement on the admission of guilt, the statement of the accused shall be entered in the record. In that case, the Court shall set the date for pronouncement of the sentence envisaged in the agreement referred to in Paragraph 3 of this Article within three (3) days at the latest.

(6) If the Court rejects the agreement on the admission of guilt, the Court shall inform the parties to the proceeding and the defense attorney about the rejection and say so in the record. Admission of guilt given before the preliminary proceeding judge, preliminary hearing judge, the judge or the Panel is inadmissible as evidence in the criminal proceeding.

(7) The Court shall inform the injured party about the results of the negotiation on guilt."

[63] Article 316(6) and 386(3) PCPC.

[64] Article 315(2) states that "[i]n considering the guilty plea of the defendant, the judge may invite the views of the […] injured party." However, this article refers to guilty pleas and does not establish an obligation for the judge to do so. See also Article 359(3) PCPC.

[65] Article 376(1) PCPC.

Despite the ambiguity of the law as regards the admissibility of plea bargaining, in a number of riot-related cases monitored by the OSCE the defendants pleaded guilty following an agreement with the prosecution or the trial panel that the indictment would be amended and/or a lower sentence would be applied. The following cases exemplify such practices:

> One case before the Prizren District Court involved charges of inciting national, racial, religious or ethnic hatred, discord or intolerance,[66] causing general danger,[67] damage, destruction and unauthorised removal from Kosovo of protected monuments or objects,[68] and participating in a crowd committing a criminal offence.[69] Following a request by the defence counsel of one of the three defendants, on 14 December 2004, there was an informal meeting in the office of the international presiding judge[70] in which a guilty plea agreement was reached and afterwards executed during the trial session. The three defendants were sentenced as follows: two and a half years of imprisonment, two years of imprisonment suspended for a five year period, and 22 months of imprisonment suspended for a period of five years, respectively.[71]

In the view of the OSCE, the participation of two members of the trial panel in the informal meeting during which the plea bargaining was discussed is not foreseen by the applicable criminal procedure law. As mentioned above, the PCPC establishes that the court is not bound by any agreement between the public prosecutor and the defence regarding the modification of the charges or the guilty plea, but does not regulate the role of the judge during the actual negotiation of the agreement. Furthermore, the participation of judges in such meetings may undermine their impartiality if case they are asked to express their consent on the content of the agreement.

> A second example comes from the Pejë/Peć District Court and involves one accused initially charged with participation in a crowd that commits a criminal offence,[72] participation as a leader in a group obstructing official persons in performing official duties,[73] obstructing official persons in performing official duties,[74] and inciting national, racial, religious or ethnic hatred, discord or intolerance.[75] Pursuant to an agreement with the defence, under which the defendant pleaded guilty in relation to the counts of participation in a crowd committing a criminal offence and obstructing official persons in performing official duties, the international prosecutor amended the indictment during the confirmation hearing, held on 1 February 2005, to include

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[66] Article 115(3) PCC.
[67] Article 291(1) and (5) PCC.
[68] Article 289(1) and (2) PCC.
[69] Article 320(1) PCC.
[70] The participants in this meeting were the presiding judge, one lay judge, the public prosecutor, and the defence counsels.
[71] The crimes taken into consideration were, for the first defendant, two counts of inciting national, racial, religious or ethnic hatred, discord or intolerance (Article 115(3) PCC), one count of causing general danger (291(1) and (5) PCC) and one count of participating in a crowd committing a criminal offence (Article 320(1) PCC); for the second defendant one count of inciting national, racial, religious or ethnic hatred, discord or intolerance (Article 115(3) PCC), causing general danger (291(1) and (5) PCC) and one count of participating in a crowd committing a criminal offence (Article 320(1) PCC); and for the third defendant one count of inciting national, racial, religious or ethnic hatred, discord or intolerance (Article 115(3) PCC) and one count of causing general danger (291(1) and (5) PCC). The sentences applicable to the crimes in question range from a fine to twelve years imprisonment.
[72] Article 320(1) PCC, punishable by imprisonment of three months to five years.
[73] Article 318(2) PCC, punishable by imprisonment of one to five years.
[74] Article 316(3) PCC, punishable by imprisonment of three months to five years.
[75] Article 115(2) as read with (1) PCC, punishable by imprisonment of up to eight years.

> only the charges for which the defendant had pleaded guilty.[76] During the main trial, the defendant again pleaded guilty and was convicted to six months imprisonment by a mixed panel composed by one international judge (presiding) and two local lay judges.

In this case, as a result of these agreements, the accused benefited from favourable treatment: not only did the amendment of the indictment to drop several charges have an impact on his sentence, but also, in accordance with the applicable criminal law, the entering of a guilty plea was considered a mitigating circumstance by the trial panel when determining the punishment.[77]

> In a third example from the Pejë/Peć District Court one accused was charged on 1 October 2004 with illegal possession of a weapon,[78] participation as leader in a group that prevents an official person from performing official duties,[79] and falsifying documents.[80] In regard to the first charge, according to the indictment, on 17 March 2004 the accused allegedly used a "Molotov Cocktail," "by throwing it down upon tires in the road which had apparently been doused with an accelerant, causing the tires to burst into fire." As a result of an agreement with the defence, at the beginning of the main trial the international prosecutor amended the enacting clause of the indictment, in that instead of "weapon" the words "dangerous device" were used to qualify the "Molotov Cocktail". On 14 January 2005, the accused was sentenced by a panel of local judges to one year of imprisonment for the crime of leading a group obstructing official persons in performing official duties (the minimum penalty applicable to this crime), and to three months' imprisonment for the crime of falsification of documents.

It is interesting to note that despite the absence of new facts justifying the amendment of the indictment, the international prosecutor modified the qualification of the object used by the accused. At the same time, the trial panel failed to explain in the written verdict why a "Molotov Cocktail" would not fall under the definition of a weapon pursuant to the PCC. In fact, the verdict merely refers that "there is no criminal offence [illegal possession of a weapon] because the Prosecutor omitted the phrase *brandishing of a weapon* […]." As a result of the amendment of the indictment, the court considered that the conduct of the accused in relation to the use of the mentioned "dangerous device" was already covered by the criminal offence of participating as a leader in a group that prevents an official person from performing official duties. However, since the definition of this criminal offence in the PCC does not make any reference to the means used in obstructing the official persons in performing the official duties, the conclusion of the court does not seem to be correct.[81]

Apart from the questionable legality of these practices, it has to be taken into account that, at least in some of the cases, the reasons why the prosecution has entered into such agreements were related to the fear of intimidation of witnesses and the high probability that the evidence gathered during the investigations would not be corroborated during trial. One international prosecutor has told the OSCE that, in relation to the third example mentioned above, the reason for entering into an agreement was to avoid exposing witnesses during public trials.

[76] The court acknowledged this agreement in the written verdict by stating that "[t]he Court notes […] that as a result of the guilty plea two of the original four charges were dropped."
[77] It is noteworthy that indictment appeared to contain strong evidence supporting the charges. Among other evidence, the Public Prosecutor had originally requested for the following evidence to be assessed during the trial: the testimony of thirty four witnesses, three video films and photographs.
[78] Article 328(1) PCC.
[79] Article 318(2) PCC.
[80] Article 332(3) PCC.
[81] It is also worth mentioning that the use of the dangerous device was not even assessed as an aggravating circumstance by the court.

This being the case, it is of concern that due to fear of intimidation of witnesses, defendants who allegedly had an active role during the riots were convicted of lesser charges and/or given rather lenient sentences.

3. Sentencing

3.1 General observation – tendency towards leniency

An assessment of the response of the judiciary to the riot-related cases would not be complete without an analysis of the verdicts. Within the reporting period, 316 cases have been concluded resulting in 209 convictions and 12 acquittals. The charges have been dropped in 95 cases. As a general trend, the OSCE has noted that in the majority of the riot-related cases the sentences were close to the minimum applicable penalty.[82]

The following examples show the tendency for leniency in sentencing in cases involving criminal offences against public peace and order.[83]

> In a case before the Pejë/Peć Municipal Court one accused was charged with participating in a group obstructing official persons in performing official duties.[84] According to the summary indictment, on 17 March 2004 the accused participated in a crowd that blocked the movements of the Romanian SPU in Pejë/Peć, obstructing the officers from performing their duties. On 15 April 2005 the accused was sentenced by a local judge to four months imprisonment, suspended for one year.
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> In another example, from the Gjilan/Gnjilane Municipal Court, the accused was charged with participating in a crowd committing a criminal offence[85] and participating in a group obstructing official persons in performing official duties.[86] The indictment describes how, on 17 March 2004, the accused participated in a crowd that entered into the grounds of a church with the intention to set it on fire, before being stopped by KFOR and the KPS. The indictment further mentions that the accused was also in a crowd that entered the yard of the house of a Kosovo Serb and caused serious bodily injuries to two Kosovo Serbs. On 28 June 2004, a panel composed of three local judges found the accused guilty as charged and sentenced him to an aggregate of six months imprisonment: four months for his participation in a crowd committing a criminal offence and three months in relation to his participation in a group obstructing official persons in performing official duties.[87]

The tendency for leniency in sentencing was also observed in riot-related cases involving other types of crimes. The following example displays the same finding in relation to a theft case.

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[82] For instance, in the majority of the cases involving charges of participation in a group obstructing the official persons in performing official duties (Article 318(1) PCC, punishable by imprisonment of up to three years) the sentences were between three and six months imprisonment, generally suspended for a period of one year. Furthermore, in a number of cases in which the defendants were charged with participation in a crowd committing a criminal offence (Article 320(1) PCC, punishable by imprisonment of three months to five years), the sentences varied from four months to one year of imprisonment, in most of the cases suspended for periods of one to two years.
[83] Chapter XXVIII PCPC.
[84] Article 318(1) PCC, punishable by a fine or by imprisonment of up to three years.
[85] Article 320(1) PCC.
[86] Article 318(1) PCC.
[87] The former offence is punishable by imprisonment of three months to five years and the latter by imprisonment of up to three years.

> The case was held before the Municipal Court in Prizren, and involved two accused initially charged with two counts of aggravated theft.[88] On 2 June 2004, the two accused were sentenced, by a local panel, to six months' imprisonment each.[89] On 26 July 2004, an international prosecutor filed an appeal against this decision. Among other reasons, the international prosecutor argued that the qualification of the crime was wrong considering the facts of the case and that the minimum sentence of six months was too low and did not reflect the seriousness of the crime.[90]

The lenient sentences applied in a significant number of cases may, to a certain extent, be explained by the courts' failure to take into consideration aggravating circumstances in riot-related cases. This issue will be addressed in the following sub-section of this report.

3.2 Aggravating and mitigating circumstances considered by the courts

3.2.1 Aggravating circumstances

According to the applicable criminal law, when determining the punishment of the criminal offence the court shall take into consideration all relevant mitigating and aggravating circumstances.[91] Although the law specifies a number of circumstances that should be considered of relevance, this list is not exhaustive and courts are under an obligation to consider other circumstances which are deemed important for the determination of the punishment.[92] The motives for committing the criminal offence, the intensity of danger or injury to the protected value and the circumstances in which the act was committed are considered by the law of particular relevance for calculating the punishment.[93]

One trend noticed in regard to the riot-related cases was that many of the sentences failed to take into account aggravating circumstances. In connection to the March 2004 riot-related cases, some aggravating circumstances could have been that the motive of the crime was to

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[88] Article 253(1) items 1 and 3 of PCC. During the main trial, held on 1 June 2004, the indictment was amended and the prosecutor downgraded the charges from aggravated theft to theft (Article 252(1) PCC). The amendment was done without any justification having been given for this purpose.
[89] The public prosecutor dropped one of the charges in relation to one of the accused while the other accused was acquitted of one of the counts of theft.
[90] The Municipal Court rejected this appeal on the grounds that it had been filed after the deadline of eight days prescribed in Article 400(1) and (2) PCPC. The OSCE is of the opinion that the grounds presented by the court to refuse the appeal are not in compliance with the applicable law. In fact, Article 400(2) PCPC expressly determines that, except in instances from paragraph 4 of the same provision, namely cases in which the accused has been punished by imprisonment, "[i]f a person entitled to appeal fails within the legally stipulated interval [eight days after the date of the announcement of the judgment, according to paragraph one] to announce an appeal, he or she shall be deemed to have waived the right to appeal." Since in the present case both the accused were punished by imprisonment, the eight days deadline to announce the appeal should not have been applied.
[91] Article 64(1) PCC.
[92] In relation to a similar provision in the Criminal Code of the Socialist Federative Republic of Yugoslavia, see Dr. Franjo Bacic, Ljubo Bavcon, Miroslav Djordjevic, Bozidar Kraus, Ljubisa Lazarevic, Momir Lutovac, Nikola Srzentic and Aleksandar Stajic, *Commentary of the Criminal Law of Socialist Federative Republic of Yugoslavia (SFRY)*, (Belgrade, Savremena Administracija, 1978), on Article 41(1) CCY, where it is specifically mentioned that *"[w]hile assessing the mitigating and aggravating circumstances one has to bear in mind that every individual mitigating and aggravating circumstance can only be correctly evaluated in connection to all other circumstances that are important for the assessment of the punishment. An isolated evaluation of the individual mitigating and aggravating circumstance cannot give a real picture of the social danger of the criminal act […]."* [unofficial translation].
[93] See Article 64(1) PCC.

aggrieve a person or an ethnic group by reason of ethnic origin,[94] the use of weapons, the dangerous way in which the offence was committed, or that the act was committed against the police.[95] In fact, some of these aggravating facts could also constitute separate criminal offences.

With respect to the aggravating circumstances applied in individual cases, one of the concerns identified by the OSCE was that, in certain cases, the courts did not assess any aggravating factors.

> In at least three cases before the Municipal Court in Prizren involving charges of participation in a crowd committing a criminal offence,[96] the accused were convicted for having participated in the crowd that on 18 March 2004 attacked and injured 25 KPS officers and six international police officers and destroyed 19 United Nations vehicles and two KPS vehicles in Prizren. No aggravating factors were pointed out in the written verdicts. In these cases, both the target of the criminal offences as well as the intensity of danger would have constituted aggravating circumstances.
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> In a case before the Municipal Court in Prishtinë/Priština, six accused were convicted on 28 October 2004 for participation in a crowd committing a criminal offence.[97] In relation to each of the accused, it is expressly stated in the verdict that "the court did not find any specific aggravating circumstance"(unofficial translation). However, the charges in this case referred to the defendants' participation in a crowd that burned a number of Kosovo Serb houses in Obiliq/Obilić. The fact that the targets of the criminal offence were persons belonging to a minority ethnic group was not assessed by the court as an aggravating circumstance.

In other instances, not only did the court fail to assess relevant aggravating circumstances but the circumstances that were evaluated were already an element of the criminal offence at stake.

> In a riot-related case before the Municipal Court in Pejë/Peć, one accused was charged with participation in a group obstructing official persons in performing official duties.[98] According to the summary indictment, on 17 March 2004, the accused participated in a crowd which on that day blocked a road in Pejë/Peć and therefore obstructed the international police officers from a Special Police Unit in performing their duties. The accused pleaded guilty during trial and was sentenced to four months imprisonment, suspended for one year. The only aggravating circumstance taken into account by the court was the fact that the accused did not show respect for the official persons as he was obliged to by the law. However, this alleged aggravating factor falls within the definition of the criminal offence. In fact, the act of obstructing the official persons in performing official duties already

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[94] See European Court of Human Rights judgment in *Nachova and Others v. Bulgaria, supra* footnote 37, *in fine,* paragraph 158, where the court stated that "treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights […]."

[95] In criminal cases resulting from riots, other jurisdictions have balanced aggravating and mitigating factors applied to each individual case with *collective* aggravating circumstances connected to the context in which the criminal offences were committed, such as, the degree of violence, the scale of the violence, the number of persons engaged, the duration and object of the violence, the extent to which public peace and order was broken and the need for deterrence. See the Bradford Report, *supra* footnote 33, pp. 40-47.

[96] Article 320 PCC.

[97] Article 320(1) PCC. Four accused were sentenced to eight months imprisonment while two were sentenced to six months imprisonment, suspended for two years.

[98] Article 318(1) PCC.

encompasses disrespect for the police authorities and therefore should not have been considered an aggravating circumstance by the court.

In one of the cases that the OSCE has monitored, the court considered the lack of a previous criminal record as a mitigating circumstance, even though the accused had indeed been previously convicted.[99]

> In a case before the Municipal Court in Gjilan/Gnjilane the accused was convicted on 2 June 2004 for attacking official persons performing official duties and sentenced to three months' imprisonment.[100] One of the mitigating circumstances taken into account by the court was the fact that the accused had no previous convictions. However, the OSCE monitored another case in which the same accused was in fact convicted by the District Court in Gjilan/Gnjilane on 10 March 2003 for illegal possession of weapons,[101] and sentenced to one year and six months of imprisonment, suspended for four years. Therefore, not only had the accused been previously convicted, but in March 2004 he was still under the probationary period of this previous sentence.[102]

In this example, the court failed to collect accurate information as regards the previous criminal record of the accused.[103] As a result, a factor that should have been assessed as an aggravating circumstance was instead considered as mitigating.

The OSCE remarks that even if such information may only be disclosed after the presentation of evidence is concluded, the PCPC establishes that "[w]hen the accused has pleaded guilty, all the information regarding previous convictions of the accused shall be read out before the parties make their closing statements."[104] This provision suggests that, from the moment the evidence has been presented, the case file should contain data from the criminal register regarding the criminal record of the accused.

3.2.2 Mitigating circumstances

[99] The OSCE is not aware of the existence of any institution in Kosovo where such information is kept at a central level. According to Article 296 of the Law on the Rules on Internal Activity of the Courts (*The Official Gazette of the SAP of Kosovo*, no. 7/81), there is a book in each municipal and district court where "criminal cases of the municipal and district courts in a first instance about guilt of adult persons" are registered. However, it seems that each court has its book, in which only the convictions by the respective court are registered. This means that a conviction by the Municipal Court in Gjilan/Gnjilane is not reflected in the criminal register of the Pejë/Peć Municipal Court.

[100] Article 317(2) PCC.

[101] Article 199(3) and (1) in connection to Article 22 CCK read with UNMIK Regulation 2001/7, Sections 8.2 and 8.6.

[102] The OSCE acknowledges that in regard to the first conviction, during the proceedings the accused had provided the court with a wrong surname. However, the criminal record should contain accurate information on the personal data of the perpetrator of a criminal offence, which includes not only the name of the perpetrator but also other information such as his/her date of birth, first and last name of his/her parents, residence, occupation, etc. See *infra* footnote 103 and also Article 218 FRY CPC.

[103] According to the PCC, a criminal record shall contain the "personal data on the perpetrator of a criminal offence, information on the punishment, judicial admonition, measure of mandatory treatment or waiver of punishment imposed on the perpetrator, changes in information on convictions that were entered in the criminal record, and information on sentences served on the expunging of wrongful convictions," Article 89(1) PCC.

[104] Article 375 PCPC. See also Article 354(2) PCPC.

The present sub-section deals with specific mitigating circumstances improperly assessed by the courts.[105]

Among the riot-related cases concluded within the reporting period, 35 accused have pleaded guilty. Generally, in accordance with applicable criminal law,[106] the courts considered the guilty plea as a mitigating circumstance. However, the time of entering the guilty plea was not generally given any particular weight by the courts.[107] Namely, no distinction was made between cases in which the accused entered a guilty plea at a very early stage of the proceedings and other cases, in which the accused only pleaded guilty during the trial.

The OSCE has also identified inconsistencies in the relevance given to the nature of the plea in cases stemming from the same factual circumstances. In the cases described below, one accused who had pleaded guilty was sentenced with a more grievous sentence than the other defendants who pleaded not guilty for the same acts.

> In a number of different criminal cases before the Municipal Court in Prizren, the defendants were charged with participating in a crowd committing a criminal offence.[108] The defendants participated in a group that attacked the UNMIK Regional Police Station, as a result of which 25 KPS officers and six international police officers were injured and two private vehicles were damaged. On 23 February 2005, the only accused who pleaded not guilty was sentenced to six months imprisonment, suspended for two years, while the sentences applied to the other accused, who had pleaded guilty, varied from a minimum of eight months to a maximum of one year.[109]

The use of certain arguably irrelevant facts as mitigating circumstances was another shortcoming found in some of the verdicts.

> In a case before the Prizren Municipal Court, two persons were sentenced on 2 June 2004 to six months' imprisonment each for the theft of two bells and a candlestick from a church. One of the factors that the court considered as a mitigating circumstance was the fact that the crime was committed without a political agenda.

As the OSCE has previously reported,[110] although a political agenda may constitute an aggravating factor, the lack of it should not be considered a mitigating factor when the criminal offence in question is theft.

The inadequate use of mitigating circumstances resulted inconsistencies in sentencing in riot-related cases as well as in lower sentences being applied as a result of a wrongful assessment of alleged mitigating factors.

3.2.3 Insufficient justification in cases of mitigated punishment

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[105] The OSCE has previously reported on this subject in the 6th Review of the Criminal Justice System, *supra* footnote 14, pp. 43-46. The concerns described in the Review are hereby reiterated in relation to riot cases.
[106] Article 64(1) PCC.
[107] In other jurisdictions, the time of entering the guilty plea has been deemed extremely important. See the Bradford report, *supra* footnote 33, where it is stated: "Within each category of guilty plea, defendants who entered the plea as early as possible in the legal process were correspondingly advantaged, compared with those who choose to run their not guilty pleas up to the wire until they can see the colour of the jury's eyes." p. 41.
[108] Article 320(1) PCC.
[109] These sentences were suspended for periods lasting from one to two years.
[110] OSCE Mission in Kosovo 6th Review of the Criminal Justice System, *supra* footnote 14, p. 44.

Another concern in relation to the verdicts is that in a number of cases the sentences were below the minimum established by the law, without any particular mitigating circumstances presented in the verdict as justification.[111] This concern has been noticed in a variety of riot-related cases. In some of the examples listed below, the written verdict contained a general reference to exceptional mitigating circumstances as justification for the punishment below the minimum established by the law. Nevertheless, the courts failed to explain which particular factors they perceived as exceptional mitigating circumstances and the reasons why they were considered relevant in these cases.[112]

> In a case before the Municipal Court in Gjilan/Gnjilane, on 2 June 2004, the accused was convicted, by a local panel, to three months' imprisonment for having attacked official persons performing official duties,[113] a crime which carries a minimum penalty of six months. In its verdict, the court reasons that "[pursuant] to Article 66 PCCK, the court ascertained that there are exceptional mitigating circumstances and that the purpose of the punishment can be achieved through a lenient sentence" (unofficial translation). No particular circumstances were pointed out in the verdict to justify a punishment below the minimum prescribed by the law.
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> In a second example before the Gjilan/Gnjilane Municipal Court, on 23 April 2004, the accused was sentenced to three months' imprisonment, for causing general danger,[114] when the minimum applicable penalty is six months' imprisonment.[115] In this case, apart from not justifying the lesser punishment, the court failed to even mention that the punishment did not comply with the established minimum penalty.
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> A third example comes from the Municipal Court in Kamenicë/Kamenica. On 8 July 2004, the accused was convicted and sentenced to four months' imprisonment for attacking official persons performing official duties.[116] Again in this example the court did not mention any particular mitigating circumstances which could justify a sentence below the minimum determined by the law. In fact, the court did not even acknowledge that the sentence was exceptionally lenient. It is also worth noting that even considering as an aggravating circumstance that the accused had been previously convicted,[117] the court failed to explain why the fact that the accused was a

[111] Article 66(2) PCC allows for a punishment below the limits established by law "when the court finds that there are particularly mitigating circumstances which indicate that the purpose of punishment can be achieved by imposing a lesser punishment." Additionally, Article 396(8) PCPC establishes that "[i]f the accused has been sentenced to a punishment, the statement of grounds shall indicate the circumstances the court considered in determining the punishment. The court shall, in particular, explain by which grounds it was guided […] if it found that it was necessary to reduce or to waive the sentence." See also Branko Petric, *Commentary on the Law on Criminal Procedure* (Belgrade, 2nd edition, Official Gazette of the SFRY, 1986) on Article 357 para. VII (2) where it is stated that "[t]he application of adequate provisions on the moderation of the sentence (Article 42 and 43 of CC SFRY) […] must be specifically and substantially reasoned […]."

[112] See also Articles 402 and 403 PCPC which corresponds to Articles 363 and 364(1) FRY CPC in the previous law.

[113] Article 317(2) PCC.

[114] Article 291(3) in connection with (1) PCC.

[115] The accused was also convicted to three months imprisonment for attacking official persons performing official duties, as per Article 317 (1) PCCK. The punishment applied for the two offences was 5 months imprisonment.

[116] Article 317 (2) PCC, punished by imprisonment of six months to five years.

[117] The accused had been previously been convicted for aggravated theft (Articles 135 KCC) and participating in a group that prevents the official person from performing his official duties (Article 185 KCC).

recidivist was not considered as an impediment for an exceptionally mitigated punishment.[118]

The lack of a proper justification in court decisions involving cases where a mitigated punishment was applied not only breaches the applicable law but also does not serve the purposes of deterrence in relation to each of the accused involved. Furthermore, this practice may also influence the general public's perception of how the judicial system responds to crimes against public peace and order.

4. Recommendations

- The Supreme Court should issue an opinion[119] clarifying whether plea bargaining is allowed under the applicable criminal procedure code and, if so, under which conditions and who should take part in the agreements.

- In appeals decisions, the Supreme Court should stress that verdicts and decisions relating to punishment issued by lower courts must include an adequate justification, particularly when deciding on a mitigated punishment.

- The Kosovo Judicial Institute should offer further training on sentencing, highlighting the need of individualised and detailed reasoning as well as the correct use of mitigating and aggravating circumstances.

- The Kosovo Judicial Institute should continue providing training to public prosecutors and judges as regards the proper and uniform implementation of guilty pleas.

- The Judicial Inspection Unit should investigate cases in which no appropriate reasoning is given for a sentence below the minimum established by the law.

- Before determining the punishment of a criminal offence, judges should obtain accurate information, from all courts, regarding the criminal record of the accused person.

- The Provisional Criminal Procedure Code should be amended and explicitly state that after the evidence is presented during trial, the presiding judge shall request from the competent authority updated information, in regard to the criminal record of the accused. Such information shall be inserted in the court-file.

- The UNMIK Department of Justice, in co-operation with the Ministry of Public Services (Department of Judicial Administration), and the donor community should ensure that a centralised database containing accurate information on the criminal record of all Kosovan population is created and that such information is provided to all courts upon request.

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[118] Article 64(2) PCC enunciates the circumstances that shall be given particular attention by the courts when determining the punishment of a recidivist, the fact that s/he has previously committed a criminal offence of the same type being one of them.
[119] See Article 31(7) of the Law on Regular Courts.

Chapter Four

Conclusion

The discrepancy between the number of participants in the March 2004 violent events and the number of persons who actually faced court proceedings as a result of criminal offences committed during the riots demonstrates that only a small percentage of persons involved faced charges.

From the 316 cases completed thus far, it can be concluded that the investigative and judicial authorities did not pursue these cases as diligently as required. Difficulties in gathering evidence due to the displacement of the injured parties and the recurrent problem of witness intimidation are part of the explanation for the delays in the proceedings as well as the low number of convictions.

Finally, by imposing lenient sentences in the majority of the riot-related cases, courts failed to send out a clear message of condemnation for such violent behaviour and appear not to have deemed the criminal cases arising from the March 2004 riots as very serious. This relatively weak response of the courts to the crimes committed during the March 2004 riots not only contributes to the impression of impunity among the population for such kinds of ethnically motivated crimes but may also be considered inadequate to prevent similar acts of public disorder in the future.

Annexes

Annex 1. Statistical Overview of Riot-Related Cases
18 November 2005

Overall

Court	Number of persons charged	Pending cases	Cases where charges were dropped	Convictions	Acquittals
District Court	46	7	5	32	2
Municipal Court	238	90	55	84	9
Minor Offence Court	142	13	35	93	1
Total	426	110	95	209	12

Prishtinë/Priština region

Court	Number of persons charged	Pending cases	Cases where charges were dropped	Convictions	Acquittals
District Court	11	3	2	5	1
Municipal Court	72	30	13	28	1
Minor Offence Court	12	2	1	9	_
Total	95	35	16	42	2

Gjilan/Gnjilane region

Court	Number of persons charged	Pending cases	Cases where charges were dropped	Convictions	Acquittals
District Court	9	1	1	7	_
Municipal Court	56	13	8	28	7
Minor Offence Court	48	5	26	16	1
Total	113	19	35	51	8

Prizren region

Court	Number of persons charged	Pending cases	Cases where charges were dropped	Convictions	Acquittals
District Court	16	1	_	14	1
Municipal Court	25	11	_	14	_
Minor Offence Court	82	6	8	68	_
Total	123	18	8	96	1

Pejë/Peć region

Court	Number of persons charged	Pending cases	Cases where charges were dropped	Convictions	Acquittals
District Court	4	_	1	3	_
Municipal Court	69	23	34	12	-
Minor Offence Court	_	_	_	_	_
Total	73	23	35	15	-

Mitrovicë/Mitrovica region

Court	Number of persons charged	Pending cases	Cases where charges were dropped	Convictions	Acquittals
District Court	6	2	1	3	_
Municipal Court	16	13	_	2	1
Minor Offence Court	_	_	_	_	_
Total	22	15	1	5	1