



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

**Monitoring Department, Legal System Monitoring Section**

**Four Years Later**

**Follow up of March 2004 Riots Cases before the  
Kosovo Criminal Justice System**

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## EXECUTIVE SUMMARY

The dramatic and violent events of March 2004 were a serious setback to Kosovo's struggle to become a tolerant multi-ethnic society that respects the rights of non-majority communities and the rule of law.

Deeds cannot be undone, but proper legal action must follow. One test of whether a modern society adequately guarantees the protection of human rights and the rule of law is whether the justice system ensures that individuals who participated in ethnically motivated violence, such as that which occurred in March 2004, face justice.

For this reason, the OSCE closely monitored and then re-monitored cases related to the March 2004 riots. The OSCE published a first report in December 2005, while this report covers the developments since December 2005 until March 2008.

In this context, the OSCE continues to note many of the same shortcomings stressed in a previous report of December 2005. Kosovo courts still have difficulties in securing witness statements (both private citizens and police officers).<sup>1</sup> Witnesses failed to appear before the court and contradicted their previous statements. There is a widespread failure to charge and sentence alleged perpetrators according to the appropriate criminal offence and the gravity of the act. Courts often did not account for an ethnic motive as an aggravating factor underlying many of the crimes committed. Defendants guilty of serious criminal acts such as setting religious monuments on fire or causing injuries to people (including police officers) often received lenient sentences whose execution in many cases was even suspended.<sup>2</sup> The OSCE also noted new problems, such as with appellate proceedings.

The OSCE is also concerned about the low number of prosecutions. Based on UNMIK statistics,<sup>3</sup> from March 2004 until April 2008, 242 individuals were indicted (206 before local and 36 before international prosecutors) in relation to the March 2004 events. In addition, 157 people faced charges before the minor offences courts. Since December 2005, there have only been 21 new cases (involving 42 defendants). Thus, since March 2004 police and prosecutors have brought charges against only approximately 400 persons. More than 50,000 people reportedly participated in the riots,<sup>4</sup> and the Kosovo Police Service received approximately 1,400 complaints in

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<sup>1</sup> Witness protection and co-operation are general problems in the Kosovo criminal justice system (see OSCE Mission in Kosovo, *Witness security and protection in Kosovo: assessment and recommendations*, November 2007).

<sup>2</sup> A "suspended sentence" is a punishment alternative to detention. A judge can suspend a sentence in order to give the perpetrator a reprimand which achieves the purpose of a punishment by pronouncing a sentence without executing it (Provisional Criminal Code of Kosovo, ("Provisional Criminal Code"), promulgated by UNMIK Regulation No. 2003/25, *On the Provisional Criminal Code of Kosovo*, 6 July 2003, Article 42).

<sup>3</sup> Information provided to the OSCE by an UNMIK Department of Justice official on 30 April 2008.

<sup>4</sup> According to the International Crisis Group, UNMIK police counted 33 major riots involving an estimated 51,000 participants. International Crisis Group, *Collapse in Kosovo*, Europe Report No. 155, 22 April 2004, page 15. The OSCE is aware that this estimate does not reveal how many people actually committed crimes during the riots, as many "participants" may have only been observers. However, if 50,000 people participated in the riots, and 1,400 complaints were filed with the Kosovo Police Service, it seems reasonable to estimate that more than 400 individuals may have committed criminal offenses.

relation to alleged crimes committed during the events.<sup>5</sup> Thus, many perpetrators may never face punishment.<sup>6</sup>

Criminal trials not only shed light on past events, but also ensure that criminals face justice and the rights of victims are protected. The low number of prosecutions fails to adequately fight impunity and send a clear message that ethnic violence such as that of March 2004 will not be tolerated. It also erodes public confidence and weakens the rule of law when those who commit crimes do not face justice.

## 1. INTRODUCTION

On 17 and 18 March 2004, a wave of violent riots swept through Kosovo, triggered by two incidents perceived as ethnically-motivated acts.<sup>7</sup> Demonstrations, although seemingly spontaneous at the outset, quickly focused on Kosovo Serbs throughout Kosovo. 19 people were killed (11 Kosovo Albanians, eight Kosovo Serbs), more than 900 persons were injured (including 65 international police officers and 58 Kosovo Police Service officers), and more than 800 buildings destroyed or damaged (including 29 churches or monasteries).<sup>8</sup> By one estimate, more than 50,000 people participated in the riots.<sup>9</sup>

The Legal System Monitoring Section<sup>10</sup> of the OSCE Mission in Kosovo (“the OSCE”) has closely monitored the investigations and trials from March 2004 until present. With its monitoring of 73 cases (Municipal, District and Minor Offences

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<sup>5</sup> Offences included 19 murders, 14 attempted murders, 36 aggravated assaults, 83 assaults, 629 arsons, 121 burglaries, 247 criminal damages, 33 lootings, 12 grenade attacks, 20 robberies, and 153 thefts (source: UNMIK, Note to the media - Update on prosecutions and convictions related to the March 2004 riots, 14 March 2008).

<sup>6</sup> The Human Rights Committee expressed its “concern[s] about the continuing impunity enjoyed by some perpetrators of [...] ethnically motivated crimes perpetrated since June 1999, including those committed in March 2004” (see Human Rights Committee, Concluding observations of the Human Rights Committee, Kosovo (Serbia), U.N. Doc. CCPR/C/UNK/CO/1, 14 August 2006, paragraph 12). The Secretary-General of the United Nations also noted that “no significant progress has been made in investigating and prosecuting cases related to the violence of March 2004” (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707, 1 September 2006, paragraphs 18 and 26). The Secretary-General also stressed that “Greater efforts are needed to conclude the remaining prosecutions relating to the violence of March 2004. Those prosecutions need to be designated as a high priority. Local leaders should publicly call for witnesses to come forward because progress is hampered by the failure of witnesses to testify” (*Id.*, paragraph 33).

<sup>7</sup> The first incident was the shooting of a Kosovo Serb youth in the village of Čaglavica/Çaglavicë (part of the Prishtinë/Priština Municipality) on 15 March, which led to a blockade by Kosovo Serbs of the main Prishtinë/Priština-Skopje road just outside Prishtinë/Priština. The second incident, on 16 March, was the death of three Kosovo Albanian children by drowning in the river Ibër/Ibar near the town of Zubin Potok (Mitrovicë/Mitrovica region).

<sup>8</sup> See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2004/348, 30 April 2004, pages 1 and 2 (available at [www.un.org/Docs/sc/sgrep04.html](http://www.un.org/Docs/sc/sgrep04.html)).

<sup>9</sup> Source: Reuters, *U.N. details wide scale of Kosovo violence*, press report of 22 March 2004. See also International Crisis Group, *Collapse in Kosovo*, Europe Report No. 155, 22 April 2004.

<sup>10</sup> Pursuant to its mandate, the Legal System Monitoring Section, part of the Monitoring Department of the OSCE Mission in Kosovo, monitors the justice system in Kosovo for compliance with domestic and international human rights standards, and recommends sustainable solutions to ensure that these standards are respected.

Courts) pending between December 2005 and March 2008,<sup>11</sup> the OSCE now follows up on a first report of December 2005.<sup>12</sup>

## 2. SUMMARY OF THE FIRST MARCH RIOTS REPORT

In December 2005, the OSCE released its first report focusing on the response of the Kosovo judicial system to the March 2004 riots.<sup>13</sup> First, the report dealt with problems in gathering evidence. The OSCE outlined possible witness intimidation issues and concerns about the security of judges and prosecutors. Moreover, it stressed problems in gathering evidence due to displacement of witnesses and injured parties, international police officers leaving Kosovo upon completion of their mission, and witnesses failing to appear before court. Another concern was delays.

Second, the report analyzed the charging and sentencing practice of the Kosovo courts and noted the inadequate charging of some perpetrators (who were charged with too lenient offences) and the use of a plea bargaining procedure<sup>14</sup> (not permitted under Kosovo law).<sup>15</sup> Regarding sentencing, the OSCE observed a trend towards leniency, noting cases of sentencing below the minimum foreseen by law. Moreover, the report assessed the use of mitigating and aggravating circumstances, concluding that the courts often failed to account for aggravating circumstances (such as the ethnic motive, or the way the offence had been committed). In addition, courts failed to justify the imposition of sentences below the minimum with the application of special mitigating circumstances.

The report concluded that “the investigative and judicial authorities did not pursue these cases as diligently as required” and that “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 behavior and appear not to have deemed the criminal cases arising from the March 2004 riots as very serious.”<sup>16</sup>

## 3. EVIDENCE GATHERING DIFFICULTIES

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<sup>11</sup> Annex I to this report contains UNMIK statistics on the overall prosecution of March 2004 riots cases and additional information on cases monitored by the OSCE for this report. Annex II contains a table showing information regarding the sentencing practice of the Kosovo courts related to the March 2004 riots cases monitored by the OSCE.

<sup>12</sup> OSCE Mission in Kosovo, *The response of the justice system to the March 2004 riots*, December 2005.

<sup>13</sup> Of note, the OSCE also included a short overview of investigations and trials involving March 2004 riots in an earlier report (see OSCE Mission in Kosovo, *Crime, Detention and Punishment*, October 2004, pages 100-103).

<sup>14</sup> Frequently used in legal systems from the common law legal tradition, plea bargaining is “[a]n agreement between 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 example, 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” (*Oxford Dictionary of Law*, Oxford University Press, fifth edition, p. 368).

<sup>15</sup> According to the UNMIK Department of Justice, the concept of plea bargaining, although not regulated, has been “developed into *jurisprudence* in Kosovo courts.” However, Kosovo does not have a legal system involving judicial precedents whereby legal decisions bind lower courts and create new law. Thus, in the opinion of the OSCE, unless specifically established under Kosovo law, plea bargaining is not permissible even if recognized in “*jurisprudence*.”

<sup>16</sup> See OSCE Mission in Kosovo, *The Response of the Justice System to the March 2004 Riots*, December 2005, page 34.

In the first report, the OSCE concluded that difficulties in securing evidence created the largest impediment to successful prosecution. This has not substantially changed. Although many witnesses and injured parties came forward to testify before the Kosovo courts, the OSCE still noted many difficulties in securing incriminating statements at trial. Some witnesses, including police officers, failed to appear before the court, while others changed their statements provided during the investigation. Both had serious negative effects on the strength of the prosecution's case.

### 3.1. Witnesses failing to appear before court

Under Kosovo law, witnesses have a *duty* to appear before the court.<sup>17</sup> Moreover, the Provisional Criminal Procedure Code of Kosovo ("Criminal Procedure Code") establishes that if duly summoned witnesses fail to appear without valid justification, the court may compel the witnesses to appear and fine them up to 250 Euros.<sup>18</sup>

Despite these legal requirements, the OSCE has noted cases, especially in the Mitrovicë/Mitrovica region, where witnesses failed to appear and testify, including police officers who were eye-witnesses (or victims) of the incidents, and whose testimony was crucial to the prosecution.

In a case before the Mitrovicë/Mitrovica Municipal Court, a defendant was charged with attacking official persons performing official duties.<sup>19</sup> At the trial, two properly summoned Kosovo Police Service officers failed to appear eight times between March 2007 and January 2008. In the same case, two other police officers failed to appear three times. Another officer, allegedly injured by the defendant on 17 March 2004, failed to appear on three separate occasions between March and August 2007.

In a trial which began on 28 February 2007 before the Mitrovicë/Mitrovica District Court, a defendant faced charges for participation in a group that commits a criminal act,<sup>20</sup> grave acts against general security,<sup>21</sup> and aggravated theft.<sup>22</sup> The court properly summoned as witnesses/injured parties 40 members of the Ashkali community in Vushtrri/Vučitrn. However, on 28 February and 4 April 2007 the court postponed the trial session because none of the witnesses/injured parties appeared. Whereas some had been displaced after the riots, and their whereabouts were unknown, others simply failed to appear. Therefore, on 16 May 2007 the

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<sup>17</sup> Article 158(3), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, *On the Provisional Criminal Procedure Code of Kosovo*, 6 July 2003 ("Provisional Criminal Procedure Code").

<sup>18</sup> Article 167(1), Provisional Criminal Procedure Code. Moreover, according to Article 167(2), "[i]f even then the witness refuses to testify, he or she may be imprisoned. This imprisonment shall last for as long as the witness refuses to testify or until his or her testimony becomes unnecessary, or until criminal proceedings terminate, but shall not exceed one month." Members of armed forces and the police may not be imprisoned, but their refusal to testify shall be reported to their respective commands (Article 167(4), Provisional Criminal Procedure Code).

<sup>19</sup> Article 317(2), Provisional Criminal Code.

<sup>20</sup> Article 200(2), Criminal Law of the Socialist Autonomous Province of Kosovo, 28 June 1977 ("Criminal Law of Kosovo").

<sup>21</sup> Article 157(3), Criminal Law of Kosovo.

<sup>22</sup> Article 253(1)(3) and (4), Provisional Criminal Code.

court decided to hold the subsequent trial sessions without the injured parties.<sup>23</sup>

In a case before the Gjilan/Gnjilane Municipal Court involving proceedings against a defendant for attempted aggravated theft allegedly committed against a Kosovo Serb in the aftermath of the March 2004 riots, a Kosovo Police Service officer, properly summoned as a witness, failed to appear at two consecutive trial sessions, on 25 May and 20 June 2006.<sup>24</sup>

In the above mentioned cases, the court authorities relied exclusively on the summons procedure rather than other available means, such as ordering that the witness be brought to court by force or imposing a fine. As a result, several witnesses, including Kosovo Police Service officers, violated their duty to testify<sup>25</sup> and impeded the prosecution of likely perpetrators of the March 2004 riots.<sup>26</sup>

### 3.2. Inconsistent witnesses

In several cases witnesses, who had provided incriminating statements against suspects before the investigating authorities, contradicted their declarations during the main trial.

In a case before an international panel of the Prizren District Court, two defendants faced charges of inciting national, racial, religious, ethnic hatred, discord, or intolerance,<sup>27</sup> causing general danger,<sup>28</sup> grave acts against general security,<sup>29</sup> and participating in a group that commits a criminal act.<sup>30</sup> On 19 February 2007, a prosecution witness substantially changed a prior statement given to the police. In reply to the prosecutor's question, he stated that he had not been intimidated, but did not explain what led him to retract his evidence. Similarly, another prosecution witness, in a session held on 21 February 2007, changed the statement provided to the police and to the international prosecutors on previous occasions. He persistently denied the

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<sup>23</sup> Of note, at the trial session of 1 November 2007, five injured parties finally appeared before the court, but provided statements which were exculpatory for the defendant. The injured parties stated that the Kosovo government had built new houses for them, adding that "they never saw the defendant and do not know him." On 19 December 2007 the court eventually found the defendant guilty of participation in a group that commits a criminal act, acquitting him of the other charges.

<sup>24</sup> Of note, there was no need for additional summons, since on 9 August 2006 the accused pled guilty to the charge against him, thus ending to the evidentiary proceedings.

<sup>25</sup> Police officers failing to respond to court summons should face disciplinary proceedings (see Kosovo Police Service Policy and Procedure Manual, Rules of Conduct and Behaviour, Policy No. P-1.16, Rule I and Rule III-R. See also Policy for Court Appearances of Kosovo Police Service Officers, 1 October 2002, paragraph IV.A.2).

<sup>26</sup> The OSCE also observed difficulties in obtaining evidence as a result of persons completing their mission, as again noted in the first March Riots report. For example, in a case related to the March 2004 riots, on 13 December 2005 the Mitrovicë/Mitrovica Municipal Court acquitted two defendants for lack of evidence, *inter alia* because two international police officers completed their mission and could not testify before the court.

<sup>27</sup> UNMIK Regulation 2000/4, *On the Prohibition Against Inciting to National, Racial, Religious or Ethnic Hatred, Discord or Intolerance*, 1 February 2000, Sections 1.3 and 1.4.

<sup>28</sup> Article 157(1), Criminal Law of Kosovo.

<sup>29</sup> Article 164(1), Criminal Law of Kosovo.

<sup>30</sup> Article 200(1), Criminal Law of Kosovo (only one of the two defendants was charged with this criminal offence).

content of his previous statements and even refused to acknowledge his signature.

In a case before the Prishtinë/Priština District Court, two defendants faced charges of causing general danger.<sup>31</sup> At the trial session of 15 October 2007, the court heard the testimony of a police officer who, during the investigation, had identified in a photo line-up<sup>32</sup> one of the defendants as a participant to the incidents of 17 March 2004 in Ferizaj/Uroševac. However, during the court session, the police officer told the court that he could not confirm that the defendant was among the perpetrators.<sup>33</sup> The prosecutor asked him to explain the changes in his statement,<sup>34</sup> but the presiding judge did not allow the question.<sup>35</sup>

It is unclear whether changes in the testimony were due to lapse of time, lack of interest/confidence in the course of justice, agreements with the defendants, or fear and intimidation.<sup>36</sup> In any case, the courts failed to conduct detailed inquiries as to the reasons why witnesses changed their testimony and to offer protective measures when necessary. Prosecutors did not use any other means (such as threatening to press charges against them for false testimony)<sup>37</sup> to force witnesses to reconsider their declarations. Of concern, several Kosovo Police Service officers were among the witnesses who provided testimony that contradicted prior statements.<sup>38</sup>

On a more positive note, the OSCE also monitored a case where the court (an international panel) ordered punitive measures against non co-operative witnesses:

The case, before an international panel of the Prishtinë/Priština District Court, involved proceedings against five defendants for the alleged crimes of participating in a group that commits a criminal act,<sup>39</sup> serious criminal acts against public security,<sup>40</sup> and inciting to national, racial, religious, or ethnic hatred, discord or intolerance.<sup>41</sup> On 15, 21 and 22 November 2007 eight prosecution witnesses testified before the court but changed the statements they had previously given to the police. Therefore, at the close of

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<sup>31</sup> Article 291, Provisional Criminal Code.

<sup>32</sup> The officer also provided the prosecutor with an accurate description of the defendant's physical appearance.

<sup>33</sup> Of note, the suspect's physical appearance (very short and bald) makes him easily recognizable.

<sup>34</sup> According to Article 364, Provisional Criminal Procedure Code.

<sup>35</sup> The prosecutor might have been able to overcome the inconsistencies by forcing the officer to admit that the defendant sitting in the courtroom looked similar to the person that the officer had previously identified on photos. Of concern, the judge prevented the prosecutor from asking a legitimate question, and consequently prevented the prosecutor from stressing the inconsistencies in the officer's statements.

<sup>36</sup> As the OSCE has previously reported, witness intimidation is a problem that the Kosovo authorities must address as a top priority (see OSCE Mission in Kosovo, *Witness security and protection in Kosovo: assessment and recommendations*, November 2007). See also the recent Human Rights Watch report, *A Human Rights Agenda for a New Kosovo*, February 2008, page 2.

<sup>37</sup> Article 307, Provisional Criminal Code.

<sup>38</sup> In addition to being a criminal offence, this behaviour also violates the Kosovo Police Service Policy and Procedure Manual, Policy for Court Appearances of Kosovo Police Service Officers, P-1.41, Paragraph IV.C.2.c, and may therefore give rise to an internal investigation and a disciplinary proceeding.

<sup>39</sup> Article 200, Criminal Law of Kosovo.

<sup>40</sup> Article 164, Criminal Law of Kosovo.

<sup>41</sup> Section 1, UNMIK Regulation 2000/4.

the main trial, the panel referred the case file to the prosecutor<sup>42</sup> to investigate and ultimately initiate criminal proceedings against the witnesses for false statements.<sup>43</sup>

Courts and prosecutors should make more frequent use of these punitive measures, since they may help persuade future witnesses to co-operate and testify truthfully.

#### **4. DELAYS**

Under domestic law, courts must carry out proceedings without delay.<sup>44</sup> International standards similarly prohibit unjustified delays and prescribe that trials must be held within a reasonable time.<sup>45</sup> This guarantee underlines “the importance of rendering justice without delays which might jeopardize its effectiveness and credibility.”<sup>46</sup> In criminal cases, it also avoids that individuals “remain too long in a state of uncertainty about their fate.”<sup>47</sup>

In Kosovo, the lack of capacity of the justice system and the case backlog contribute to delays in investigating and prosecuting criminal cases.<sup>48</sup> However, the gravity and scale of the incidents that occurred during the March 2004 riots imposed a duty on public authorities to act with the utmost diligence in investigating and prosecuting alleged perpetrators. Nevertheless, often cases were not completed in a timely fashion.

In particular, despite the recommendations in the first March Riots report, the OSCE continues to note (a) unjustified delays in transmitting police reports related to “new” cases; (b) delays in starting main trials after the confirmation of the indictment; and (c) unjustified court delays in issuing first instance verdicts.

##### **4.1. Withholding “new” police reports**

International standards place the obligation to diligently investigate human rights abuses on “public authorities,”<sup>49</sup> which includes both police and prosecutors. Under domestic law, investigations should be conducted by the competent prosecutor, who shall “supervis[e] the work of the judicial police in investigating persons suspected of

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<sup>42</sup> Pursuant to Article 338(3), Provisional Criminal Procedure Code.

<sup>43</sup> Article 307, Provisional Criminal Code. Of note, on 25 January 2008 the court found the defendants guilty and sentenced them to imprisonment ranging from two to eight years.

<sup>44</sup> Article 5(2), Provisional Criminal Procedure Code.

<sup>45</sup> Article 6(1), European Convention on Human Rights, and Article 14(3)(c), International Covenant on Civil and Political Rights.

<sup>46</sup> European Court of Human Rights, *H. v. France*, 10073/82, Judgment, 24 October 1989, paragraph 58. Moreover, as time passes, victims and witnesses may become reluctant to testify and their memories may fade.

<sup>47</sup> European Court of Human Rights, *Stogmüller v. Austria*, 10073/82, Judgment, 10 November 1969, paragraph 5.

<sup>48</sup> Note, however, that authorities have a duty to “organize their legal systems so as to allow the courts to comply with the requirements of Article 6(1) including that of trial “within a reasonable time”. The European Court of Human Rights, *Zimmerman and Steiner v. Switzerland*, 8737/79, Judgment, 13 July 1983, paragraph 29.

<sup>49</sup> According to the Human Rights Committee, when investigating serious human rights violations, public authorities must “exercise due diligence to prevent, punish, investigate or redress the harm caused” (see Human Rights Committee, General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, paragraph 8).

committing criminal offences.”<sup>50</sup> However, prosecutors usually cannot begin an investigation until the police submits a report on the alleged crime. Under the Provisional Criminal Procedure Code, as soon as the police obtain knowledge of a suspected criminal offence prosecuted *ex officio* either through the filing of a criminal report or in some other way, they shall without delay, and no later than 24 hours from the receipt of this information, inform the public prosecutor. Thereafter, the police must provide additional reports and supplementary information as soon as possible.<sup>51</sup>

However, the OSCE has observed instances where the police transmitted to the prosecutor case files as late as three and a half years after the March 2004 riots.

In September 2007, UNMIK police transferred to the Prizren Municipal Prosecutor a new case related to the March 2004 riots, involving 13 suspects. The police alleged that the suspects had committed the crime of causing general danger.<sup>52</sup> However, on 5 October 2007 the Prizren Municipal Court dismissed the summary indictment filed by the Municipal Prosecutor against one of the defendants, since the statute of limitations for the alleged offences had expired.<sup>53</sup> It is likely that the ten remaining cases, which share identical alleged facts, will also be dismissed if they receive the same legal qualification.

On 23 November 2006, the police submitted to the Gjilan/Gnjilane Minor Offences Court three police reports involving alleged disturbance of public peace and order in Gjilan/Gnjilane during the March 2004 riots. The court dismissed the cases because of lack of evidence. The charges should have been dismissed in any case, since the two-year statute of limitations had expired.<sup>54</sup>

It is unclear why the police took so long to complete the investigation and transfer the files to the competent authorities, resulting in unjustified delays in the criminal proceedings. In the worst case, the case was dismissed because of lapse of time.<sup>55</sup>

#### **4.2. Delays in starting the main trial**

According to the Criminal Procedure Code, immediately upon receiving the indictment, the judge must check whether it complies with the law.<sup>56</sup> If so, the judge

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<sup>50</sup> Article 46(1), Provisional Criminal Procedure Code.

<sup>51</sup> Article 200(2), Provisional Criminal Procedure Code.

<sup>52</sup> Article 291, Provisional Criminal Code.

<sup>53</sup> Of note, the statute of limitations expired because the Municipal Prosecutor charged the defendant with too lenient of an offence in light of the alleged facts. The facts supported indictment for the crimes of inciting national hatred (Article 115, Provisional Criminal Code), including aggravating circumstances of paragraph (3) or (5) of Article 291. More serious punishments carry longer statute of limitations (see Article 90, Provisional Criminal Code).

<sup>54</sup> See Article 27(4), Law on Minor Offences (Official Gazette of the Socialist Autonomous Province of Kosovo, no. 23/79).

<sup>55</sup> Although four years have passed since the March 2004 riots, the OSCE is aware that the Kosovo Police Service and UNMIK Police still possess case files on investigations of several alleged perpetrators in the March 2004 riots. Since these cases have not been transferred to the prosecutors, the cases have not started yet (OSCE interview with a district prosecutor and with prosecution employees). See also Commission of the European Communities, *Kosovo under UNSCR 1244 - 2007 Progress Report*, COM(2007)663, 6 November 2007, according to which the police task force investigating on the March 2004 riots still has 750 cases “under review” (at page 46).

must immediately schedule the confirmation hearing.<sup>57</sup> Furthermore, the presiding judge must schedule the main trial as soon as the indictment becomes final, or within one month at the latest from when the indictment becomes final.<sup>58</sup>

The OSCE observed in several cases that the judges scheduled trials significantly outside the time period required by the Criminal Procedure Code. This resulted in unreasonable delays in the cases, and delayed the possible punishment of persons involved in the March 2004 riots.

In a case before the Prizren Municipal Court, on 29 June 2007 the judge confirmed an indictment filed almost three years before, on 6 August 2004.<sup>59</sup> The trial did not begin until 11 October 2007.

In a case before the Pejë/Peć Municipal Court, on 16 May 2004 the prosecutor filed a summary indictment charging a defendant with participation in a group obstructing official persons in performing official duties.<sup>60</sup> The main trial started on 21 February 2006, almost two years later.<sup>61</sup>

#### **4.3. Written verdicts issued with excessive delays**

According to the Provisional Criminal Procedure Code, the judgment shall be drawn up in writing within 15 days of its announcement if the accused is in detention on remand, and within 30 days in other instances.<sup>62</sup> The court must then serve a copy of the judgment on the prosecutor, defendant, and the injured party.<sup>63</sup>

The OSCE has monitored cases where courts issued written verdicts several months after the announcement of the verdict.

In a case before an international panel of the Gjilan/Gnjilane District Court, six defendants were tried for crimes including murder,<sup>64</sup> attempted murder,<sup>65</sup> and causing general danger.<sup>66</sup> On 19 May 2005 the panel announced its verdict, sentencing the defendants with punishments from two and a half to

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<sup>56</sup> Article 306(2), Provisional Criminal Procedure Code.

<sup>57</sup> See Article 309(1), Provisional Criminal Procedure Code. In summary proceedings (where no confirmation hearing takes place), the judge must schedule the main trial immediately after establishing that the indictment complies with the law (see Article 466(2), Provisional Criminal Procedure Code).

<sup>58</sup> Article 319(2), Provisional Criminal Procedure Code. The presiding judge otherwise must inform the president of the court who will then, if necessary, take steps to schedule the main trial.

<sup>59</sup> The indictment charged the defendant with participating in a crowd committing a criminal offence (Article 320(1), Provisional Criminal Code).

<sup>60</sup> Article 318, Provisional Criminal Code.

<sup>61</sup> Of note, the case involved summary proceedings, for which the law establishes the “immediate” scheduling of the main trial (Article 466(2), Provisional Criminal Procedure Code).

<sup>62</sup> Article 395(1), Provisional Criminal Procedure Code. However, “[i]f a judgment is not drawn up within that time the presiding judge shall inform the president of the court of the reasons for this. The president of the court shall take the necessary measures for the judgment to be drawn up as soon as possible, but no later than thirty days from its announcement if the accused is in detention on remand and forty-five days in other instances” (*id.*).

<sup>63</sup> Article 395(3), (4) and (5), Provisional Criminal Procedure Code.

<sup>64</sup> Article 146, Provisional Criminal Code.

<sup>65</sup> Articles 146 and 20, Provisional Criminal Code.

<sup>66</sup> Article 291, Provisional Criminal Code.

16 years of imprisonment. However, the court did not issue the written verdict until 29 November 2006, more than 18 months later.<sup>67</sup> Of particular concern is that three defendants were in detention on remand throughout this time.<sup>68</sup>

In a case before the Prizren Municipal Court, on 15 September 2004 the court convicted a defendant of two counts of attacking an official person performing official duties,<sup>69</sup> and one count of participating in a crowd committing a criminal offence. However, the court only provided him with the written verdict on 3 February 2006, more than 16 months later.<sup>70</sup>

The delayed drafting and service of the written verdict unfairly extended the proceedings. Such delays are not attributable to the complexity of the case or to the defendant's conduct, and therefore have no justification.<sup>71</sup> Consequently, the judicial authorities violated the "reasonable time" guarantee which, under international standards, also applies to appeal proceedings.<sup>72</sup> Moreover, since the defendants could not file an appeal against the verdict before receiving it in writing, they were deprived of their fundamental right to an effective remedy for a substantial period of time.<sup>73</sup>

## 5. SENTENCING

The March 2004 riots caused substantial threat and harm to life, general security, and ethnic tolerance in Kosovo.<sup>74</sup> The courts had a duty to send a strong message to the Kosovo population that such incidents will not be tolerated.

Lenient sentencing was one of the main criticisms contained in the first March Riots report.<sup>75</sup> Despite the recommendations in that report, the OSCE continues to observe that courts generally imposed lenient sentences.

In the majority of cases, courts imposed sentences near, or even below, the legal minimum. Moreover, courts often suspended the execution of these sentences, thus replacing already low sentences with an alternative punishment.

In many monitored cases, the cause of low sentencing may have been the failure to consider the ethnic motive as an aggravating circumstance. In other cases, courts imposed low sentences because prosecutors charged persons with crimes less serious than those supported by the alleged facts.

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<sup>67</sup> Of note, to date the Supreme Court has still not ruled on the appeals filed by the accused.

<sup>68</sup> This raises additional concerns as to the lawfulness of the defendants' detention. The European Court of Human Rights has repeatedly held that the continuing detention of a suspect is unlawful unless "the competent national authorities displayed special diligence in the conduct of the proceedings" (see *Labita v. Italy*, 26772/95, Judgment, 6 April 2000, paragraph 170).

<sup>69</sup> Article 184(1) and (2), Criminal Law of Kosovo.

<sup>70</sup> Of note, the Prizren District Court issued the appellate decision a year later, on 26 January 2007.

<sup>71</sup> See European Court of Human Rights, *Šakanovič v. Slovenia*, 32989/02, Judgment, 13 December 2007, paragraph 39.

<sup>72</sup> See Human Rights Committee, General Comment No. 13, "Equality before the courts and the right to a fair and public hearing by an independent court established by law", 13 April 1984, paragraph 10. See also European Court of Human Rights, *Delcourt v. Belgium*, 2689/65, Judgment, 17 January 1970, paragraph 25.

<sup>73</sup> See Article 13, European Convention on Human Rights.

<sup>74</sup> See Chapters XIII, XV and XXV of the Provisional Criminal Code.

<sup>75</sup> See first March Riots report, page 27.

Lenient sentencing and undercharging are endemic problems in the Kosovo justice system.<sup>76</sup> However, that still does not justify the courts in issuing punishments in March 2004 riots cases that do not adequately reflect the gravity of the crimes committed.

### 5.1. Ethnic motives ignored

According to the European Court of Human Rights, “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. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.”<sup>77</sup>

Kosovo domestic law establishes that one of the factors to be considered when determining punishment is “the motives for committing the act.”<sup>78</sup>

However, the OSCE notes that the courts widely failed to account for ethnic motive as an aggravating factor in cases related to the March 2004 riots.

In a case before the Prishtinë/Priština District Court, on 7 March 2007 the court found a defendant guilty of burning a house belonging to a Kosovo Serb during the March 2004 riots in Fushë Kosovë/Kosovo Polje. The court convicted him of aggravated causing general danger (a crime carrying punishment from one to eight years),<sup>79</sup> and sentenced him to one year and six months of imprisonment. Despite the obvious ethnic motive of the defendants, in determining the sentence the court stated: “The court while measuring the length of the sentence of the accused [...] assessed all the important circumstances for measuring and determining the sentence.”

In another case before the Mitrovicë/Mitrovica Municipal Court, on 20 December 2005 a juvenile defendant was convicted for participating in a crowd committing a criminal offence. The court found that there were “no special aggravating circumstances” in the case, and sentenced the defendant to two months of community service.<sup>80</sup>

In the above examples, the courts did not account for the ethnic motive as an aggravating factor, despite the clear ethnic motivation in the crimes committed. Of concern, the OSCE observed one example to the contrary:

In a case related to the March 2004 riots before the Lipjan/Lipljane Municipal Court involving three defendants charged with participation in a group that

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<sup>76</sup> See OSCE Mission in Kosovo, *Protection of Witnesses in the Criminal Justice System* (April 2003), page 43; see also OSCE Mission in Kosovo, *Crime Detention and Punishment* (December 2004), page 39.

<sup>77</sup> See European Court of Human Rights, *Nachova and Others v. Bulgaria*, 43577/98 and 43579/98, Judgment, 24 February 2004, paragraph 158.

<sup>78</sup> Article 64(1), Provisional Criminal Code.

<sup>79</sup> Article 291(5), Provisional Criminal Code.

<sup>80</sup> See Article 28, Juvenile Justice Code of Kosovo, promulgated by UNMIK Regulation 2004/8, *On the Juvenile Justice Code of Kosovo*, 20 April 2004.

commits a criminal offence,<sup>81</sup> on 5 June 2007 the court convicted and sentenced the defendants to punishments from four to six months of imprisonment. Surprisingly, the court considered a *mitigating* circumstance “the general situation created on 18 March 2004”.

The failure of courts to account for ethnic motives as aggravating circumstances suggests that they viewed the March 2004 incidents as “ordinary” crimes. A stronger message should have been sent that ethnically-motivated violence will not be tolerated.

## 5.2. Wrong qualification of the offence

In some March 2004 riots cases, prosecutors charged defendants with lenient offences, while the factual allegations supported indictments for more serious crimes.

In a case before the Pejë/Peć Municipal Court, the prosecutor on 25 January 2005 charged a defendant with participation in a group obstructing official persons in performing official duties, a crime punishable with a fine or imprisonment of up to three years.<sup>82</sup> However, according to both the indictment and the 21 February 2006 verdict, the group not only obstructed the police, but also threw stones at police officers and set on fire houses belonging to Kosovo Serbs. Therefore, the acts supported charges for more serious offences, such as participating in a crowd committing a criminal offence<sup>83</sup> or attacking official persons.<sup>84</sup>

In another case before the Ferizaj/Uroševac Municipal Court, on 16 July 2004 a judge convicted two accused for participating in a crowd committing a criminal offence. The court was satisfied beyond reasonable doubt that on 17 March 2004 at least one of the defendants threw Molotov cocktails at an Orthodox Church.<sup>85</sup> These facts supported a conviction for the more serious crime of aggravated incitement of national, racial, religious, or ethnic hatred, discord or intolerance,<sup>86</sup> and/or aggravated causing general danger.<sup>87</sup> On 24 July 2007 the District Court in Prishtinë/Priština upheld the first instance verdict.

In the above cases, the prosecutor could have brought cases for more serious charges based on the facts alleged in indictments. As a result, several perpetrators received

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<sup>81</sup> Article 320, Provisional Criminal Code.

<sup>82</sup> Article 318, Provisional Criminal Code.

<sup>83</sup> Article 320(1), Provisional Criminal Code. Both the violent attack on police officers and the burning of houses of Kosovo Serbs (which did not lead to criminal charges) should have led to more serious charges.

<sup>84</sup> Article 317(1), Provisional Criminal Code. The offence of participation in a group *obstructing* official persons in performing official duties (Article 318, Provisional Criminal Code), does not include the use of force, an act that amounts to *attacking* official persons (Article 317, Provisional Criminal Code).

<sup>85</sup> Remarkably, even for an incident of this gravity, involving the destruction of religious monuments and the endangerment of people’s lives, the court imposed a sentence (four months) just above the minimum (three months) established by Article 320(1), Provisional Criminal Code. The verdict also acknowledges that the other two defendants participated in the riots of the following day (18 March).

<sup>86</sup> Article 115(3), Provisional Criminal Code (carrying imprisonment from one to ten years).

<sup>87</sup> Article 291(5), Provisional Criminal Code (carrying imprisonment from one to eight years).

low sentences because they were not charged with and convicted for the appropriate criminal offences.

### **5.3. Low sentencing**

According to the Provisional Criminal Code of Kosovo (“Provisional Criminal Code”), “punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender.”<sup>88</sup> Moreover, one of the purposes of punishment is “to deter other persons from committing criminal offences.”<sup>89</sup> The judge, in determining the punishment, must also consider “the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, [and] the circumstances in which the act was committed [...]”<sup>90</sup>

The danger posed on 17 and 18 March 2004 to life, limb, and private property (including religious sites) of non-Albanian communities should have unambiguously called for the imposition of harsh punishments on those who spread ethnic hatred among different ethnic groups in Kosovo. The courts should have sent the message that such incidents must not be repeated.

Instead, the OSCE continued to observe a tendency of Kosovo courts towards leniency, already noted in the first March Riots report.

In a case before the Gjakovë/Đakovica Municipal Court, the judge found five defendants guilty of inciting national, racial or religious hatred, discord or hostility, a crime carrying a minimum punishment of three months of imprisonment.<sup>91</sup> On 31 March 2006 the court sentenced the defendants to a punishment close to the legal minimum (four months) and suspended the sentence for one year.<sup>92</sup>

In another case, before the Lipjan/Lipljane Municipal Court, a defendant faced charges of attacking official persons performing official duties<sup>93</sup> On 5 July 2007 the court sentenced him to the legal minimum (three months of imprisonment) and also suspended the sentence.<sup>94</sup>

As additional evidence of the generally lenient sentencing practice, in only a few cases (only those with international judges) did courts impose sentences above the average punishment allowed by the law. Annex II includes a table illustrating the sentencing practice of the Kosovo courts. Of concern, most punishments were close to the legal minimum.

### **5.4. Sentencing below the minimum**

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<sup>88</sup> Article 64(1), Provisional Criminal Procedure Code.

<sup>89</sup> Article 34(2), Provisional Criminal Code.

<sup>90</sup> *Id.*

<sup>91</sup> Article 134(2), Criminal Code of the Social Federal Republic of Yugoslavia, Official Gazette of the Social Federal Republic of Yugoslavia No. 44 of October 8, 1976.

<sup>92</sup> See following paragraph.

<sup>93</sup> Article 317(1), Provisional Criminal Code.

<sup>94</sup> Of note, the facts alleged in the indictment supported charges for the more serious offence foreseen in Article 317(2), Provisional Criminal Code.

Moreover, despite the recommendations in the first March Riots report, the OSCE still monitored a few cases where the courts imposed sentences below the minimum established by the law, without any explanation of mitigating circumstances.<sup>95</sup>

In a case before the Prishtinë/Priština Municipal Court, the judge established that on 18 March 2004 two defendants stole a car belonging to a Kosovo Serb, taking advantage of the situation created by the ongoing riots. On 12 November 2007, the court convicted them of aggravated theft,<sup>96</sup> an offence carrying a minimum punishment of six months of imprisonment. However, the defendants were sentenced to four and three months imprisonment respectively.

In another case, on 25 July 2005 the Mitrovicë/Mitrovica Municipal Court convicted a defendant for aggravated theft and sentenced him to the legal minimum, six months of imprisonment. On 13 February 2007 the Mitrovicë/Mitrovica District Court reduced the punishment to three months.

In these examples, the courts did not mention any particular reasons or mitigating circumstances which justified a sentence below the minimum allowed by law. The courts did not even acknowledge that the sentences imposed were exceptionally lenient.

### **5.5. Widespread use of suspended sentences**

A “suspended sentence” is a punishment alternative to imprisonment whose purpose, according to the Provisional Criminal Code, is “to give the perpetrator a reprimand which achieves the purpose of a punishment by pronouncing a sentence *without executing it*.”<sup>97</sup> Execution of the sentence is therefore suspended for one to five years. The suspension may be revoked if the defendant commits a new criminal offence within the prescribed period of time.<sup>98</sup>

While suspended sentences aim to spare people responsible for lesser offences from a traumatizing experience such as time in prison, the OSCE is concerned by the overuse of suspended sentences in the context of mass violence cases, such as the March 2004 riots. Of 86 persons who (to the knowledge of the OSCE)<sup>99</sup> in the monitored period were sentenced with imprisonment,<sup>100</sup> 49 (i.e. 56%)<sup>101</sup> received suspended sentences, while only 37 (i.e. 44%) actually served time in prison.<sup>102</sup>

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<sup>95</sup> As required by Article 66 of the Provisional Criminal Code.

<sup>96</sup> Article 253, Provisional Criminal Code.

<sup>97</sup> Article 42, Provisional Criminal Code (emphasis added).

<sup>98</sup> See Article 45, Provisional Criminal Code.

<sup>99</sup> Unless otherwise specified, figures contained in this report were obtained through monitoring activities and do not represent official statistics.

<sup>100</sup> The figure includes both first instance and appellate verdicts.

<sup>101</sup> The percentage rises to 62.5% if taking into consideration only prison sentences eligible for suspension (i.e. under two years of imprisonment).

<sup>102</sup> Moreover, although the law establishes that a sentence may be suspended for a verification period of up to five years (see Article 43(2), Provisional Criminal Code), the vast majority of the sentences were suspended for either one or two years only.

## 6. PROBLEMS WITH APPEALS

### 6.1. Failure to remedy shortcomings in first instance proceedings

While the first March Riots report was based mainly on monitoring of first instance cases, this report includes 27 appellate cases. Appellate proceedings play a key role in the administration of justice, in that they can help remedy violations and shortcomings of first instance proceedings. The European Court of Human Rights held that “fairness of proceedings must be assessed with regard to the proceedings as a whole”,<sup>103</sup> thus including the appeals stage. The Court recognized that some defects of first instance judgments can be addressed and remedied at the appellate level.<sup>104</sup> Thus, if the appellate courts rectify the shortcomings of the first instance proceedings, there is no violation of Article 6 of the European Convention on Human Rights.

Concerning the March 2004 riots, Kosovo appellate courts often failed to address substantive and procedural violations committed by lower courts. In some cases, possible violations of first instance judgments were left unremedied because of the poor performance of the prosecutor.

In a case before the Ferizaj/Uroševac Municipal Court, the prosecutor filed an appeal against the first instance judgment of 16 July 2004, sentencing three defendants to four months of imprisonment each, for the crime of participating in a crowd committing a criminal offence. The reasoning of the appeal states: “the court upon deciding on conviction did not impose an adequate sentence in this criminal matter” (unofficial translation). The Prishtinë/Priština District Court held a hearing, which the prosecutor, although duly summoned, did not attend. As a result, on 24 July 2007 the Prishtinë/Priština District Court dismissed the appeal.<sup>105</sup>

In this and other cases, the prosecutor’s appeal did not comply with the legal requirement that an appeal should contain “the grounds for challenging the judgment”<sup>106</sup> and an “explanation of the appeal.”<sup>107</sup> The prosecutor’s appeal contained almost no reasoning, thus failing to show the reasons why the appellate court should have amended the first instance verdict.

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<sup>103</sup> See for instance *Sipavičius v. Lithuania*, 49093/99, Judgment, 21 February 2002, paragraph 27.

<sup>104</sup> See for instance *Dallos v. Hungary*, 29082/95, Judgment, 1 March 2001, paragraph 52, where the Court found that there was no violation of Article 6 of the European Convention on Human Rights, since “any defects in the proceedings before the Regional Court were *cured* before the Supreme Court” (emphasis added).

<sup>105</sup> Of note, proceedings before the Prishtinë/Priština District Court lasted more than three years.

<sup>106</sup> According to Article 402 of the Provisional Criminal Procedure Code, “[a] judgment may be challenged: (1) On the ground of a substantial violation of the provisions of criminal procedure; (2) On the ground of a violation of the criminal law; (3) On the ground of an erroneous or incomplete determination of the factual situation; or (4) On account of a decision on criminal sanctions, confiscation of the material benefit acquired by the commission of a criminal offence, costs of criminal proceedings, property claims as well as on account of an order to publish a judgment.”

<sup>107</sup> Article 401, Provisional Criminal Procedure Code.

In other cases, prosecutors failed to announce an appeal within the deadline of eight days established by law,<sup>108</sup> thus leading the appellate court to reject their appeal on procedural grounds.

In one case, the Mitrovicë/Mitrovica Municipal Court on 13 December 2005 acquitted two defendants of aggravated theft.<sup>109</sup> The municipal prosecutor did not announce an appeal within eight days, thus implicitly waiving his right to appeal. Nevertheless, on 12 October 2006 he lodged an appeal, which the Mitrovicë/Mitrovica District Court dismissed as belated.<sup>110</sup>

In this case, the prosecutor did not act with the required due diligence,<sup>111</sup> thus failing to perform his duties “fairly, consistently and expeditiously.”<sup>112</sup> As a result, several possible violations of the first instance proceedings, including the controversial acquittal of the defendants, remained unaddressed.<sup>113</sup>

In other cases, the prosecutor did not even attempt to appeal the first instance verdict, thus failing to remedy procedural or substantive irregularities.

In a case before the Prizren Municipal Court, on 15 September 2004 the trial panel found a defendant guilty of one count of aggravated attacking official persons, one count of attacking official persons, and one count of participating in a crowd committing a criminal offence. The court sentenced him to an aggregate punishment of 20 months of imprisonment, suspended for three years. The defendant subsequently appealed the verdict at the Prizren District Court on procedural grounds. In its judgment of 26 January 2007, the second instance court not only dismissed the defendant’s appeal, but also found that the sentence was too low for the gravity of the defendant’s conduct. However, the lack of appeal by the prosecutor prevented the imposition of a harsher sentence.

Finally, the OSCE also noted instances where the appellate courts committed new violations, such as imposing sentences below the legal minimum.

In a case before the Mitrovicë/Mitrovica Municipal Court, on 25 April 2005 the court found a defendant guilty of participating in a crowd committing a

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<sup>108</sup> See Article 400, Provisional Criminal Procedure Code. Note, however, that if the accused is punished with imprisonment he can appeal the verdict up to 15 days after he receives a copy of the written verdict (see Article 400(2), Provisional Criminal Procedure Code).

<sup>109</sup> Article 200(1), Criminal Law of Kosovo.

<sup>110</sup> The District Court’s decision is dated 15 June 2007. Of note, according to Article 407(2) of the Provisional Criminal Procedure Code, “A belated appeal [...] shall be dismissed by a ruling of the presiding judge of the court of *first instance*” (emphasis added). Therefore, the Mitrovicë/Mitrovica Municipal (not District) Court should have dismissed the appeals.

<sup>111</sup> According to the Human Rights Committee, public authorities must “exercise due diligence to prevent, punish, investigate or redress the harm caused by human rights violations” (see Human rights Committee, General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, paragraph 8).

<sup>112</sup> See Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Guideline No. 12.

<sup>113</sup> Other possible violations included allowing inadmissible evidence and inconsistent reasoning of the first instance judgment.

criminal offence during the March 2004 riots,<sup>114</sup> and sentenced him to the legal minimum, a suspended sentence of three months of imprisonment. On 16 November 2006, the Mitrovicë/Mitrovica District Court considered that a suspended sentence was not “sufficient to achieve the purpose of punishment”, and therefore decided to substitute it with effective imprisonment. However, in doing so, the court also reduced the sentence to two months, which is below the legal minimum.

In another case, on 22 June 2004 the Prishtinë/Priština Municipal Court found a defendant guilty of aggravated theft and sentenced him to six months of imprisonment, the legal minimum. On 16 December 2005, the District Court reduced on appeal the first instance sentence to four months. The District Court provided no reasons for reducing the sentence below the legal minimum.

In all the cases mentioned above, appellate courts failed to address possible violations of first instance proceedings. As a result, many violations and shortcomings noted in first instance verdicts of March 2004 riots cases remained unremedied.

## **6.2. Kosovo Prosecutor’s Office withholding case files**

The OSCE also noted that some appellate proceedings of March 2004 riots cases are undergoing significant, often unjustified, delays. In some cases, these delays are due to the withholding of files by the Kosovo Prosecutor’s Office. The appellate panel does not schedule the appellate session until the prosecution’s office returns the file. Of concern, the applicable provision in the Provisional Criminal Procedure Code does not have a specific deadline for the return of the appellate file to the appellate panel.

The European Court of Human Rights held that the reasonable duration of a criminal trial must be assessed in light of the overall length of the proceedings. Thus, the “reasonable time” guarantee runs from the date of charge until its final determination, “including appeal proceedings.”<sup>115</sup> In addition, when assessing whether the length of time is reasonable, the complexity of the case, the conduct of the applicant, the conduct of the public authorities, and what is at stake for the applicant should be considered.<sup>116</sup>

According to the Provisional Criminal Procedure Code, proceedings must be held without delay.<sup>117</sup> However, without setting a specific deadline, the law foresees that the court of second instance shall send the file containing the appeal “to the competent public prosecutor, who shall examine and return them to the court without delay.”<sup>118</sup> Only once the file is returned to the court by the public prosecutor will the presiding judge of the appellate panel schedule the appellate session.<sup>119</sup>

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<sup>114</sup> Article 320(1), Provisional Criminal Code.

<sup>115</sup> See for instance European Court of Human Rights, *Eckle v. Germany*, 8130/78, Judgment, 15 July 1982, paragraph 76.

<sup>116</sup> See European Court of Human Rights, *Buchholz v. the Federal Republic of Germany*, 7759/77, Judgment, 6 May 1981, paragraph 49.

<sup>117</sup> Article 5(2), Provisional Criminal Procedure Code.

<sup>118</sup> Article 409(1), Provisional Criminal Procedure Code.

<sup>119</sup> Article 409(3), Provisional Criminal Procedure Code.

However, the OSCE monitored cases, involving appeals to the Supreme Court of Kosovo, where the Kosovo Public Prosecutor's Office retained the appeals case file for arguably an unreasonably long time.

On 11 May 2006 an international panel of the Prishtinë/Priština District Court acquitted a defendant of two counts of murder<sup>120</sup> and four counts of attempted murder,<sup>121</sup> allegedly committed against Kosovo Serbs on 17 March 2004. Following the international prosecutor's appeal, the Supreme Court of Kosovo on 18 August 2006 sent the case file to the Kosovo Public Prosecutor's Office for its opinion. However, to date (i.e. approximately 23 months later) the court has not received a response.<sup>122</sup> Consequently, the appellate proceedings have yet to begin.

In another case before an international panel of the Prishtinë/Priština District Court, a defendant filed an appeal with the Supreme Court of Kosovo against the 22 July 2005 first instance verdict, sentencing him to 18 years of imprisonment for the attempted murder of a Kosovo Serb on 17 March 2004.<sup>123</sup> The Supreme Court sent the appellate file to the Kosovo Special Prosecutor's Office on 5 April 2007. To date, (i.e. approximately 15 months later) the prosecutor has not returned the case file and the appellate proceedings are stalled.

In the above cases, the Kosovo Prosecutor's Office withheld the case files for, arguably, an unreasonably long time. Such delays do not appear to result from the complexity of the cases<sup>124</sup> or the defendant's conduct.<sup>125</sup> Rather, the primary justification for the delay appears to be the large workload of the Kosovo Prosecutor's Office.<sup>126</sup> However, under case-law of the European Court of Human Rights, such a delay is unjustified and can lead to a violation of the right to a trial within a reasonable time.<sup>127</sup>

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<sup>120</sup> Article 146, Provisional Criminal Code.

<sup>121</sup> Article 146, in conjunction with Article 20, Provisional Criminal Code.

<sup>122</sup> Of note, the defendant was suspended from his job since the lower court decision.

<sup>123</sup> The District Court found that the accused was part of a group who struck the victim with a metal bar, while he was attempting to escape. The victim did not die from the blow, but was set on fire after the assault.

<sup>124</sup> The UNMIK Department of Justice argues that in these two cases the length of the lower court decisions, appeals submitted, and evidence presented during the main trial should be examined to determine whether the cases were complex. However, in the opinion of the OSCE, these factors do not necessarily make a case complex. In addition, they do not justify withholding the case files for over 15 months before commenting on the merits of the appeal. While in the first case described above the defendant was released from custody pending appeal, that does not affect the duty to timely decide on the appeal. Moreover, what was at stake for the defendant was his employment, since he had been suspended from work as of the initiation of criminal proceedings.

<sup>125</sup> See for instance European Court of Human Rights, *Kemmache v. France*, Judgment, 27 November 1991, paragraph 60.

<sup>126</sup> The European Court for Human Rights has ruled that where the stated justification for a case delay was the long-term backlog of work in the court system, there was a violation of the reasonable time guarantee, since the state had not taken adequate measures to cope with the backlog. European Court of Human Rights, *Zimmerman and Steiner v. Switzerland*, 8737/79, Judgment 13 July 1983, paragraph 29.

<sup>127</sup> The Human Rights Committee ruled that a delay of 31 months between conviction and appeal violated the defendant's right to a trial without undue delay, adding that "in the absence of any State party justification, this finding would be made in similar circumstances in other cases" (see Human Rights Committee, Communication No. 702/1996, *McLawrence v. Jamaica*, 18 July 1997, paragraph 5.11). See Article 14(3)(c), International Covenant on Civil and Political Rights.

## **7. CONCLUSION**

The Kosovo justice system could have made more progress in the prosecution of those responsible for the March 2004 riots. All the actors involved in criminal proceedings - police, prosecutors, courts, and witnesses - contributed to the shortcomings.

In some cases, police officers failed to timely transmit police reports, and to appear at trial when summoned as witnesses. Prosecutors often failed to charge alleged perpetrators with the appropriate crimes, and submit timely and well-reasoned appeals to redress possible shortcomings of first instance verdicts.

In several cases witnesses (including police officers) failed to co-operate fully with the judicial authorities, thus impeding successful prosecutions. Courts and prosecutors often did not use all available means to secure witness statements.

Appellate proceedings did not always remedy procedural or substantive errors in first instance verdicts. In addition, undue delays in cases prevented the justice system from sending a swift and clear message that ethnic violence will not be tolerated in Kosovo.

In many monitored cases courts failed to account for aggravating circumstances (such as the ethnic motive) and imposed too lenient sentences. While the majority of the sentences were within the parameters allowed by the law, judges should have punished criminals more harshly, especially where the offences appeared ethnically motivated. Moreover, by widely using suspended sentences, the Kosovo justice system in most cases did not ensure that those who committed crimes during the March 2004 riots were punished accordingly.

## **8. RECOMMENDATIONS AND LEGAL OBLIGATIONS**

### **Kosovo Police Service must:**

- Swiftly complete investigations into alleged criminal conduct that occurred during the March 2004 riots, and transfer case files to the prosecutor without delay.
- Ensure that officers promptly appear before the court when summoned as witnesses.
- Take disciplinary action, in compliance with the Kosovo Police Service Policy and Procedure Manual, against police officers who fail to appear or change their testimony before court.

### **Kosovo prosecutors must:**

- Charge persons with the crime of participation in a group committing a criminal offence only as a residual option. Must consider carefully whether elements of more serious crimes (such as causing general danger or inciting national hatred) exist.
- Consider alternative and/or cumulative charging.
- Submit timely and well-reasoned appeals against unsatisfactory first instance verdicts.
- Prosecute witnesses who do not testify truthfully for perjury.

### **Kosovo courts must:**

- Carefully assess whether the factual situation described in indictments matches the legal qualification by the prosecutor. When confirming an indictment, if necessary must re-qualify the charges so to reflect the gravity of the defendant's conduct.
- Treat the ethnic motive of a crime as an aggravating circumstance.
- Impose sentences that match the gravity of the defendant's conduct. Must impose suspended sentences only for less serious offences. Must avoid imposing sentences below the legal minimum.
- Take appropriate measures to ensure the presence of witnesses at trial. Report police officers who fail to appear before court to their respective commands.
- Overturn first instance verdicts lacking proper reasoning related to the verdict or punishment.

### **Legislator:**

- It is recommended that Article 409(1) of the Criminal Procedural Code of Kosovo be amended to establish a specific deadline by which the public prosecutor must return the appellate file to the appellate trial panel. Alternatively, it is recommended that a copy of the appellate file be sent to the public prosecutor and a specific deadline for scheduling the appellate session should be established by law.

### **Kosovo Judicial Institute:**

- It is recommended that training be provided to judges and prosecutors on indictment-drafting, criminal appeals, aggravating/mitigating circumstances, and calculation of punishment.

## ANNEX I

The Kosovo Police Service received approximately 1,400 complaints for offences related to the riots.<sup>128</sup>

According to UNMIK Department of Justice statistics, as of April 2008 a total of 36 defendants had been prosecuted by international prosecutors. Crimes charged include aggravated murder, inciting ethnic hatred, and causing general danger. Of these 36 defendants, 14 received prison sentences and 21 received suspended sentences, and one was acquitted. International prosecutors are continuing investigations against several other suspects.<sup>129</sup>

As of April 2008, according to UNMIK Department of Justice<sup>130</sup> and Kosovo Judicial Council statistics,<sup>131</sup> local prosecutors had brought criminal charges against 206 defendants, resulting in convictions of 150 defendants in municipal and district courts. In the minor offences courts, 116 individuals were found liable in cases involving 157 persons.<sup>132</sup>

During the period monitored by the OSCE (December 2005 until March 2008) international judges and prosecutors handled seven cases (where an indictment was filed), involving 18 defendants. Courts convicted 17 and acquitted one defendant. Sentences ranged from a minimum of 21 months to a maximum of 16 years. International judges and prosecutors generally prosecuted more serious alleged crimes, including murder, attempted murder, inciting national hatred, and causing general danger.

Local judges and prosecutors during the monitoring period handled 61 cases (where an indictment was filed), involving 105 accused.<sup>133</sup> 72 defendants were convicted, 13 were acquitted, while proceedings against 24 accused are still ongoing. Sentences ranged from two months to 18 months. The most common alleged crimes were participating in a crowd committing a criminal offence (51 charges) and aggravated theft (21 charges). Other alleged crimes included attacking (or participating in a group obstructing) official persons performing official duties, inciting national hatred, and causing general danger. During the reporting period the OSCE also monitored five minor offences proceedings.

Of note, prosecutors only filed an indictment after December 2005 in 21 of the cases during the reporting period (involving 42 defendants). Thus, in the last two and a half

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<sup>128</sup> Offences included 19 murders, 14 attempted murders, 36 aggravated assaults, 83 assaults, 629 arsons, 121 burglaries, 247 criminal damages, 33 lootings, 12 grenade attacks, 20 robberies, and 153 thefts (source: UNMIK, Note to the media - Update on prosecutions and convictions related to the March 2004 riots, 14 March 2008).

<sup>129</sup> *UNMIK Department of Justice Input (April 2008 Update) to Technical Assessment of Progress in the Implementation of the Standards for Kosovo*, prepared by the Special Representative of the Secretary-General for Kosovo, 29 February 2008, paragraph 25.

<sup>130</sup> Information provided to the OSCE by an UNMIK Department of Justice official on 30 April 2008.

<sup>131</sup> Kosovo Judicial Council, *Updated information on the March 2004 riots cases* (April 2008), provided to the OSCE by a Kosovo Judicial Council official on 25 April 2008.

<sup>132</sup> There are allegedly no more unsolved March 2004 riots cases in the minor offences courts (see UNMIK Department of Justice Input (April 2008 Update) to Technical assessment of progress in the implementation of the standards for Kosovo, prepared by the Special Representative of the Secretary-General for Kosovo, 29 February 2008, paragraph 25.

<sup>133</sup> These figures include municipal and district courts.

years there have been only 21 “new” March 2004 riots cases in Kosovo before local or international judges. The balance of the cases involved either continuation or appeal of cases monitored during the first March riots report.

<b>MARCH RIOTS CASES* MONITORED BY THE OSCE BETWEEN DECEMBER 2005 AND MARCH 2008</b>		
<b>Number of cases*</b>	Before international judges	7
	Before local judges	61
	In the minor offences courts	5
	<b>Total</b>	<b>73</b>
<b>Number of defendants</b>	Before international judges	18
	Before local judges	105
	In the minor offences courts	5
	<b>Total</b>	<b>128</b>
<b>Defendants convicted or found liable</b>	Before international judges	17
	Before local judges	73
	In the minor offences courts	1
	<b>Total</b>	<b>91</b>

<b>OVERALL NUMBER OF MARCH RIOTS CASES* (MARCH 2004 TO MARCH 2008)</b>		
<b>Number of defendants</b>	Before international judges	36
	Before local judges	206
	In the minor offences courts	157
	<b>Total</b>	<b>399</b>
<b>Defendants convicted or found liable</b>	Before international judges	35
	Before local judges	150
	In the minor offences courts	116
	<b>Total</b>	<b>301</b>

\* For criminal proceedings in the municipal or district courts, “case” is defined as where an indictment has been filed.

**ANNEX II**  
**Punishments of the Kosovo Courts in March 2004 Riots Cases**  
**Monitored by the OSCE<sup>134</sup>**

	<b>No. of cases</b>	<b>Minimum/ Maximum Punishment</b>	<b>Average punishment in March 2004 riots cases</b>
<b>Aggravated Theft</b>	7	6 months to 5 years	4.3 months
<b>Participating in a crowd committing a criminal offence</b>	26	3 months to 3 years	6.2 months
<b>Participating in a group obstructing official persons</b>	8	fine or up to 3 years	5.6 months

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<sup>134</sup> The OSCE monitored cases related to the March 2004 riots that were pending before the Kosovo courts between December 2005 and March 2008.