



ASSESSMENT OF THE HANDLING OF RAPE CASES BY THE JUSTICE SYSTEM IN KOSOVO

MONITORING REPORT



July 2022



European Union Rule of Law Mission in Kosovo

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LIST OF ABBREVIATIONS

CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CMU	Case Monitoring Unit
CPCRK	Criminal Procedure Code of Kosovo
ECHR or the Convention	European Convention on Human Rights
ECtHR	European Court of Human Rights
EULEX	European Union Rule of Law Mission in Kosovo
GBV	Gender-based violence
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
IFM	Institute of Forensic Medicine
KJC	Kosovo Judicial Council
KP	Kosovo Police
KPC	Kosovo Prosecutorial Council
WHO	World Health Organization



FOREWORD

Since handing over its executive mandate to the Kosovo judiciary in June 2018, the EU Rule of Law Mission to Kosovo (EULEX Kosovo) is engaged in monitoring, mentoring and advising the Kosovo judiciary. Based on its robust monitoring of the whole chain of the justice, the Mission has so far issued five thematic reports. This special report is dedicated to the victims of sexual violence, in particular rape, whose quest for justice is still too often unanswered, unreasonably delayed or even denied. It is based on the Mission's monitoring of how sexual violence cases are dealt with by the justice system in Kosovo.

The report is part of a wider effort by EULEX Kosovo to support Kosovo institutions in addressing violence against women in general and rape as one of its most serious manifestations. Although a comprehensive assessment of the handling of all rape cases is not possible at this time due to difficulties encountered in the collection of data, the findings in the report are still symptomatic of systematic deficiencies, requiring urgent attention by relevant Kosovo authorities and institutions.

In a landmark decision, on 25 September 2020 the Kosovo Assembly voted unanimously in favour of amending the Constitution to enable the direct application in Kosovo of the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence. Also known as the Istanbul Convention, this international legal instrument is the most comprehensive human rights convention on gender-based violence, including sexual violence offences such as rape.

The Kosovo Assembly's decision followed an intensive advocacy campaign by civil society organizations and women's rights groups, as well as an increased awareness among policy-makers of the need to tackle violence against women and domestic violence, more vigorously.

EULEX Kosovo is mandated to support Kosovo institutions in advancing the implementation of the Istanbul Convention's requirements. Moreover, while still Speaker of the Assembly in September 2020, President Vjosa Osmani-Sadriu steered the successful vote on the Convention. And in her letter to the High Representative and Vice President of the European Commission, Josep Borrell Fontelles, on June 14 2021 the recently appointed President of Kosovo invited EULEX Kosovo to support the implementation of the Istanbul Convention.

Over the past year we have done so through a large number of activities, ranging from conducting awareness-raising campaigns on gaslighting and the link between property rights and domestic violence to contributing to the drafting of programmatic documents, such as the new National Strategy and Action Plan on Protection from Domestic Violence and Violence against Women, and guidelines on establishing referral systems for dealing with sexual crimes. In this regard, the Mission drafted a roadmap to establish specialised support services for victims of sexual violence offences.¹ The Mission is also supporting a working group established in March 2022 by the Ministry of Justice to draft the National Protocol for Sexual Violence Offences.²

In fact, the work of the Mission in the area of gender-violence pre-dates the constitutional amendments of 2020. In 2018, the Mission facilitated the creation of a working group tasked to draft relevant domestic guidelines and a protocol on referral of sexual violence cases. However, at that time this working group could not produce a final report.

Since the end of 2018, the EULEX Case Monitoring Unit (CMU) is monitoring sexual violence offences, as a form of gender-based violence, from the moment they are reported to the police until their final adjudication. CMU is conducting regular statistical analyses of sexual violence cases and is monitoring

¹ The Roadmap is a non-public document that was shared with the Government of Kosovo and other relevant institutions.

² Ministry of Justice of Kosovo, Decision No. 36/2022, 2022.

related trends. In December 2021, EULEX published its fifth Systemic and Thematic Justice Report, where some preliminary findings on cases of sexual violence offences were presented.³

Furthermore, in September 2019, in cooperation with the Kosovo Institute of Forensic Medicine (IFM) the Mission launched, the 'Speak Up on Time' campaign, aimed at raising awareness on the importance of ensuring the preservation of biological evidence following sexual violence offences. Following the launch of this campaign, several lectures were held in elementary and high schools across Kosovo between September 2019 and February 2020 to inform children about this topic.

The importance of setting up specialised services for survivors of sexual violence in Kosovo was also the focus of a high-level conference organised by EULEX and the NGO Forum for Leadership and Diplomacy on 2 December 2021 in Pristina. On 3 December 2021, the IFM, with the support of EULEX, organised a workshop on "*Sexual Violence: Biological Evidence and its Importance in Criminal Proceedings*", bringing together representatives of the Kosovo Police, the Kosovo Forensic Agency, prosecution offices and courts to discuss the importance of timely reporting of sexual violence cases by the victims as well as the need for inter-institutional cooperation so that perpetrators are swiftly brought to justice.

As a Rule of Law Mission dedicated to supporting Kosovo in meeting its international obligations, EULEX is ready to continue assisting Kosovo institutions in further complying with the obligations deriving from the Istanbul Convention, for instance by creating the conditions for victims to receive the redress they are entitled to, as well as in fostering a culture that will not tolerate discrimination against women.

The recommendations at the end of this report are addressed to the different institutional actors in the chain of justice from the police to the prosecution and the courts. While improvements have been made in recent years in dealing with domestic violence cases, it is clear that sexual violence and rape cases are lagging behind, for instance in terms of standardized procedures and reporting.

Among the measures that should be undertaken as soon as possible is the establishment of a uniform protocol for reporting of sexual violence cases. Such a protocol already exists for domestic violence cases and should be urgently developed for rape cases and other serious sexual violence case. Adopting such a protocol could also improve the timing and accuracy of the initial police and forensic reporting, which has been found wanting. Due account also needs to be taken of the different procedures currently used by the police and prosecutorial services, further complicating the handling of rape cases by the justice system.

This report will hopefully inform and contribute to the ongoing process of implementing the Istanbul Convention not just in Kosovo but also by European Union Member States and other signatories of the Convention, since many of the issues addressed in the report are universal in nature. While the criminalisation of sexual violence and rape achieved remarkable progress in Kosovo law, the implementation of the legal provisions in terms of both domestic law and international law, such as the Istanbul Convention, is still lacking

Dealing with gender based violence is a fundamental principle for approximation with European Union standards and values. And EULEX is ready to continue to work closely with all relevant counterparts in Kosovo to improve the handling of rape cases. A more victim-based approach, where access to justice for both women and men, girls and boys, exposed to sexual violence and rape, is a shared priority by all actors in the chain of justice should be our common objective.

Lars-Gunnar Wigemark
Head of Mission

³ European Union Rule of Law Mission in Kosovo, Justice Monitoring Report, 2021, available at: <https://www.eu-lex-kosovo.eu/eul/repository/docs/RaportiEN162021.PDF> [accessed 22 May 2022].

1. INTRODUCTION

As a worldwide phenomenon, sexual violence is still dramatically and universally underreported due to fear of retaliation, mistrust in law enforcement agencies, cultural and social stigmatisation, and the psychological traumas endured by the victims. In 2002, the World Health Organization defined sexual violence as “any sexual act or attempt to obtain a sexual act, or unwanted sexual comments or acts to traffic, that are directed against a person’s sexuality using coercion by anyone, regardless of their relationship to the victim, in any setting, including at home and at work”.⁴

Encompassing a range of criminal offences, including sexual harassment, sexual assault and rape, the term ‘sexual violence’ is used to describe gender-based violence. As such, it is a human rights violation and a form of discrimination. Specifically, sexual violence is rooted in gender inequality and unequal power relationships and consequently, although men and boys also experience it, it affects predominately women and girls.

In its 2008 Final Report Activity, the Council of Europe Task Force to Combat Violence against Women, including Domestic Violence⁵ highlighted that only a fraction of sexual violence cases that are reported to the police are prosecuted.⁶ The reasons for this are manifold and include insufficient police investigations, lack of systematic referral procedures resulting often in the impossibility of acquiring biological and other corroborative evidence, missing or inadequate support for victims in the criminal justice system, and attitudes of police and judicial officials. The Final Report Activity also pointed out that even if criminal proceedings are initiated, only a few lead to convictions and fewer still result in sentences that are proportionate to the nature of the crime.

Kosovo is no exception to these trends, and data gathered by EULEX reveals that while a substantial number of sexual violence cases, particularly affecting minors, were reported to relevant institutions in the last three years, victims were provided with effective redress in very few cases. Moreover, given the lack of guidelines and standardised protocols in Kosovo, victims cannot access the complete chain of assistance needed, particularly as there is no complete clinical management procedure and no follow-up care is provided.

Through a constitutional amendment adopted by the Kosovo Assembly on 25 September 2020, Kosovo institutions undertook a formal commitment to implement the Council of Europe Convention on combating violence against women and domestic violence (Istanbul Convention).⁷ The Convention includes specific obligations on tackling cases of sexual violence including rape, ranging from the aspect of criminalisation to the one of protection of victims.

4 UN World Health Organization, World report on violence and health, 2002, page 149, available at: http://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf?sequence=1 [accessed 24 May 2022].

5 The Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV), was set up following a decision of Heads of State and Government of the Council of Europe taken in 2005. The Task Force, which was composed of eight international experts, was mandated among other things to: evaluate the effectiveness of measures adopted at national and international level to prevent and combat violence against women; make proposals for revising these measures or adopting new measures and; develop a method to help member states to adopt practical policies for combating violence against women.

6 Council of Europe, Final Activity Report, Council of Europe Task Force to Combat Violence against Women, including Domestic Violence, 2008, available at: https://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final_Activity_Report.pdf [accessed 22 May 2022].

7 Council of Europe, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2014, [hereinafter Istanbul Convention], available at: <https://www.coe.int/en/web/istanbul-convention/text-of-the-convention> [accessed 24 May 2022].

This report aims at providing a preliminary assessment of the state of play with regard to the handling of cases qualified as rape in Kosovo, in light of the international standards set by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), as well as by other relevant international instruments directly applicable in Kosovo, including the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the European Convention on Human Rights (ECHR).

After describing the methodology used (chapter 2), the report provides an overview of the relevant human rights standards applicable in Kosovo (chapter 3). The report subsequently assesses the legal framework as well as the Mission's findings with regard to investigation, prosecution and adjudication of rape cases (chapter 4) and ends with concluding remarks (chapter 5) and a set of specific recommendations to the relevant and competent Kosovo authorities (chapter 6).

2. METHODOLOGY

The Mission examined cases classified as rape according to Article 227 of the current Criminal Code of Kosovo,⁸ by using two levels of assessment: the first related to statistical data collection and the second based on analysis of selected individual cases.⁹ The selected cases for the second level of assessment encompassed three phases of the justice system: (1) police, (2) prosecution and (3) court.

For the first-level assessment, statistical data refers to the period between 2019 and 2021, and is based on figures received from the Kosovo Police (KP), the Kosovo Prosecutorial Council (KPC), regional prosecution offices, the Kosovo Judicial Council (KJC) and basic courts. The statistics include the number of cases reported to KP, number of cases referred to the prosecution offices, number of closed cases, number of indictments filed and number of cases finalised with a verdict at the first instance. Additionally, the Mission also received data on cases of rape sent for forensic examination from the IFM.

The Mission encountered several difficulties in accessing consolidated statistical data. Thus, to guarantee a more comprehensive analysis of the available data, for the second-level assessment, the Mission requested information about specific cases from all three phases of the justice system.

For the police, the Mission received information about 153 cases qualified as rape for the period from August 2019 until December 2021. These cases were summarised, sorted geographically by regions and analysed.

For the prosecution, data was requested from the basic prosecution offices and KPC about the same 153 cases identified by the KP.¹⁰ Information was provided only for 129 cases. Building on this information, the Mission assessed how many of the cases made it onward to the respective basic courts.

For the third phase, information was requested from selected courts and the KJC about specific judgements issued in cases of rape to analyse the detailed reasoning of the sentences. The Mission received a total of 36 Judgments. In 21 of these judgements, the criminal offences had occurred before 2019, whereas in the remaining 15, the criminal offences occurred in the period from 2019 to 2021.

The obtained data was complemented by information obtained through meetings with prosecutors and judges, monitoring of court sessions in selected cases, and analysis of indictments and publicly available verdicts. Additional information was collected from press releases, meetings with civil society representatives, cooperation with gender advisors from other local and international organisations and the participation in workshops dealing with cases of sexual violence.

Unlike the collection of data on the criminal offence of domestic violence, acquiring consistent and consolidated data on the criminal offence of rape proved to be problematic. In some regions, institutions provided information without hesitation, while institutions in other regions needed several requests and reminders. Furthermore, some requests were not answered at all. From the replies that included only partially formulated answers, it was deducted that there is no integrated digital system for rape cases from which such information could be generated, due to the lack of standard operating procedures regulating the collection and storage of information on these criminal offences.

8 Criminal Code of Kosovo, Code No. 06/L-074, 2019, pages 89-91, available at: <https://md.rks-gov.net/desk/inc/me-dia/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf> [accessed 22 May 2022].

9 The Mission decided to focus on the specific criminal offence of rape and not on other forms of sexual violence, in order to better scope the handling of this crime.

10 The Mission's focus was to examine cases classified as rape according to Article 227, however as subsequently explained in Chapter 4.2.1.1, the KPC shared overall statistics about Chapter XX of the current CCK, Chapter XX of the (previous) CCK and Chapter XIX of the PCCK. Lack of access to disaggregated data on the criminal offence of rape was identified as a shortcoming of the KPC collection of data and the subject of recommendations by the Mission in the chapter titled 'Recommendations'.

3. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OBLIGATIONS RELATED TO RAPE CASES

Article 22 of the Constitution of Kosovo is stipulating that human rights and fundamental freedoms are guaranteed by nine international instruments directly applicable and, in case of conflict of domestic and international law, have precedence over any other domestic law or act of public institutions.¹¹ Several instruments listed under Article 22 tackle sexual violence against women and girls including: the Istanbul Convention, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹² Moreover, in line with Article 53 of the Constitution, human rights and fundamental freedoms guaranteed within it have to be interpreted consistently with the decisions of the European Court of Human Rights (ECtHR). Finally, the decisions of the CEDAW Committee,¹³ as well as the Baseline Reports of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) serve as crucial tools for local institutions to transpose international standards into their practice.¹⁴

3.1 The Council of Europe Convention on Combating and Preventing Violence against Women and Domestic Violence (the Istanbul Convention)

The Istanbul Convention includes two provisions relating to sexual violence, including rape, which are contained in Article 25 and Article 36.

Article 36 establishes the criminal offence of sexual violence¹⁵ while Article 25 deals with support for victims of sexual violence¹⁶ and requires authorities to take necessary measures to provide specialised support by setting up easily accessible rape crisis or sexual violence referral centres.

Furthermore, there is a number of additional related provisions in the Convention which should be mentioned in this context, namely: Article 5 on state obligations and due diligence to prevent, investigate, punish and provide reparation for acts of violence perpetrated by non-state actors,¹⁷ Article 11 requiring the collection of disaggregated relevant statistical data,¹⁸ Article 49 which outlines the general obligations regarding investigation, prosecution, procedural law and protective measures¹⁹ and Article 55 regulating *ex-parte* and *ex-officio* proceedings.²⁰

11 Constitution of Kosovo, September 2020, page 6.

12 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14, 15, 1950, available at: https://www.echr.coe.int/documents/convention_eng.pdf [accessed 22 May 2022].

13 The Committee on the Elimination of Discrimination against Women is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women.

14 The Group of Experts on Action against Violence against Women and Domestic Violence is one of two pillars (the other being the Committee of the Parties) monitoring parties' implementation of the Istanbul Convention.

15 Istanbul Convention, Article 36 – Sexual violence, including rape.

16 Istanbul Convention, Article 25 – Support for victims of sexual violence.

17 Istanbul Convention, Article 5 – State obligations and due diligence.

18 Istanbul Convention, Article 11 – Data collection and research.

19 Istanbul Convention, Article 49 – General obligations.

20 Istanbul Convention, Article 55 – Ex parte and ex officio proceedings.

3.2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Although CEDAW does not specifically address the issue of sexual violence, in its General Recommendation 19 on Violence Against Women adopted in 1992, the CEDAW Committee stated that to eliminate all forms of violence against women, including domestic violence, sexual violence and rape, states must take ‘positive measures’.²¹ It recommended that authorities “*should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity*”.²² It further emphasised that appropriate protective and support services should be provided for victims, highlighting the importance of gender-sensitive training of judicial and law enforcement officers and other public officials. It also underlined that services for victims (including refugees) of family violence, rape, sexual assault and other forms of gender-based violence, such as rehabilitation and counselling, should be made accessible.

CEDAW’s General Recommendation 33 on Women’s Access to Justice²³ and General Recommendation 35 on Gender-Based Violence²⁴ are also relevant for the purpose of this report since the former refers to the nature of evidentiary rules and the latter concerns state obligations in prosecution and reparations in sexual violence cases.

3.3 The European Convention on Human Rights (ECHR)

The ECHR is a gender-neutral instrument and does not tackle the issue of sexual violence explicitly. However, the ECtHR has produced jurisprudence on women’s rights, including on violence against women, and also set several important standards on women’s equal access to justice.

For example, in the landmark case of *M.C. v Bulgaria*,²⁵ the complainant (who was 14 years old at the time of the alleged rape) claimed that Bulgarian law did not provide effective protection against rape and sexual abuse, since only cases where the victim had actively resisted were prosecuted, and that the authorities had not properly investigated her allegations.

In its judgment, the Court found a breach of Article 3 (prohibition of torture) and Article 8 (right to respect for private and family life) of the Convention by recognizing as defective not only the investigation in the case, but also the law. The Court emphasised the lack of consent as the essential element in determining rape and sexual abuse, and how victims of sexual abuse, especially young girls, often fail to resist for a psychological reason or for fear of further violence. The prohibition of torture was described as entailing: “*a positive obligation to enact criminal-law provisions effectively punishing [serious crime] and to apply them in practice through effective investigation and prosecution.*”²⁶ The same judgment added that “[...] the court considers that states have a positive

21 UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf [accessed 23 May 2022].

22 Ibid, paragraph 24.b.

23 UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 33: Women’s access to justice, 2015, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf [accessed 23 May 2022].

24 UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 35: On gender-based violence against women, updating general recommendation No. 19, 2017, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf [accessed 23 May 2022].

25 European Court of Human Rights, *M.C. v Bulgaria*, no. 39272/98, 2003, available at: <https://hudoc.echr.coe.int/eng?i=001-61521> [accessed 23 May 2022].

26 Ibid, paragraphs 148-153.

*obligation inherent in articles 3 and 8 of the Convention to enact criminal-law provisions, effectively punishing rape and to apply them in practice through effective investigation and prosecution.*²⁷

Furthermore, the ECtHR has been increasingly referencing the Istanbul Convention and the baseline reports of the GREVIO commission in its jurisprudence, thus underlying the Convention's importance in shaping legal standards in cases of violence against women.

3.4 Overview of the obligations

In light of the human rights standards and jurisprudence recalled above, the obligations of Kosovo institutions when handling rape cases can be grouped into four main areas:

- a) Criminalisation;
 - b) Data collection and research;
 - c) Due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors;
 - d) Provision of specialised services.
- a) Under Article 36 of the Istanbul Convention, Kosovo is required to criminalise all forms of non-consensual sexual acts including rape; and more specifically to criminalise three types of intentional conduct: “a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person...” This provision specifies that ‘consent’ must be given voluntarily based on free will and that the acts committed against former or current spouses or partners should also be criminalised.²⁸ The central element of the Convention's definition of sexual violence as a criminal offence is the absence of consent given voluntarily by the victim, without requiring the use of force or threat by the perpetrator and proof of resistance by the victim.
- b) In order to implement the Istanbul Convention, Kosovo institutions are expected to collect disaggregated statistical data at regular intervals and support research on all forms of violence against women and domestic violence, including sexual violence (Article 11). As highlighted in the Explanatory Report to the Istanbul Convention, systematic and adequate data collection is an essential component of effective policy-making and can encourage reporting by victims and witnesses. Relevant statistical data should include information provided by the police, prosecution and judicial institutions and extends also to information provided by health care and social welfare institutions and NGOs.²⁹
- c) The Istanbul Convention (in particular Article 11) and the CEDAW Committee General Recommendation No. 19 enshrine a principle of due diligence for relevant institutions which are mandated to organize their response against acts of sexual violence to allow for their investigation

²⁷ Ibid.

²⁸ Istanbul Convention, Article 36 – Sexual violence, including rape.

²⁹ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, p. 14, [hereinafter Explanatory Report to the Istanbul Convention], available at: <https://rm.coe.int/ic-and-explanatory-report/16808d24c6> [accessed 24 May 2022].

and punishment. Further, investigations and judicial proceedings need to be carried out '*without undue delay*' (Article 49 of the Istanbul Convention). Investigation and prosecutions also need to be carried out in an effective manner; this means for example that relevant facts have to be established, available witnesses interviewed and forensic examinations conducted.³⁰ Under the Convention, Kosovo is also required to ensure that investigations or prosecution of sexual violence offences "*shall not be wholly dependent upon a report or complaint filed by the victim...and that proceedings may continue even if the victim withdraws her or his statement or complaint*".³¹

- d) Recognising the severe trauma associated to sexual violence, including rape, the Istanbul Convention stipulates that support to victims, including immediate medical care, trauma support, counselling and forensic examination, shall be provided by trained and specialised staff.

³⁰ Explanatory Report to the Istanbul Convention, Article 49 – General Obligations, p. 43.

³¹ Istanbul Convention, Article 55 – *Ex parte* and *ex officio* proceedings.

4. ANALYSIS AND FINDINGS

4.1 Criminalisation: compliance of the legal framework with the requirements set by the Istanbul Convention

In Kosovo, the overall legislative framework regulating rape and sexual intercourse with minors has undergone significant changes in the last decades. Penalties have been increased, the scope of the offence has been defined in a clearer manner and significantly expanded. This section provides an overview of how the criminalisation of the offence of rape has changed in Kosovo based on different criminal codes.

4.1.1 The Criminal Law of the Socialist Autonomous Province of Kosovo in force between 1977-2004

Under this law, rape was incriminated in Article 74, which set a punishment of one to 10 years of imprisonment for whoever compelled “...to sexual intercourse a female person with whom the perpetrator does not live in a marriage community”³²

Article 77 incriminated as a separate offence “Sexual intercourse or unnatural lechery with a person less than 14 years of age” and stipulated that whoever committed sexual intercourse or ‘unnatural lechery’ against a person less than 14 years of age, should be punished with six months to five years of imprisonment. In case the crime was committed by use of force, against a ‘helpless person’ or by direct threat, the perpetrator could be punished with at least three years of imprisonment. In case of serious bodily injuries, death of the juvenile, or if the act was committed by several persons, or in a particular cruel or humiliating manner or in any other particularly grave case, the foreseen punishment was of at least five years of imprisonment.

4.1.2 The Provisional Criminal Code of Kosovo (PCKK) in force between 2004 and 2012

Through Article 193 of this code, the criminal offence of rape was expanded by replacing the expression ‘female person’ with ‘another person’ and the condition that the perpetrator ‘does not live in a marriage community’ was removed.³³ As a result, any person regardless of their gender could be a victim of rape and rape within a marriage union was also penalised. Concerning punishment, Article 193, paragraph 1 of the PCKK provided for imprisonment terms of two to 10 years.³⁴ Article 198 specifically disciplined sexual abuse of persons under the age of 16 years; it stipulated that, when a sexual act took place between two persons who had reached the age of 14 years and where the age difference was more than two years, but where there was no clear difference in maturity level, such act did not constitute a criminal offence. The PCKK also explicitly introduced, under Article 192, the notion of ‘consent’, while noting that the voluntary agreement of a person under the age of 16 years to a sexual act was not considered as valid.

32 Assembly of the Socialist Autonomous Province of Kosovo, Criminal Law of the Socialist Autonomous Province Of Kosovo, No. 011-25/77, 1977.

33 United Nations Mission in Kosovo, Provisional Criminal Code of Kosovo, UNMIK/REG/2003/25, 2003, [hereinafter PCKK], available at: http://www.icls.de/dokumente/criminal_code_of_kosovo.pdf [accessed 23 May 2022].

34 When the crime is committed by use of force, ‘threat of imminent danger, by exploiting a situation’, the punishment increases to ‘three to 10 years imprisonment’ according to paragraph 2. The perpetrator is punished with ‘five to 15 years imprisonment’ when the crime is preceded, accompanied or followed by torture or inhuman treatment, seriously bodily injuries, use of weapon, intoxication, committed by more than one person, against an exceptionally vulnerable victim, ‘by a family member/domestics relationship and the victim is between 16 and 18 years. If the crime results in ‘death of the victim’ the foreseen punishment was with at ‘least 10 years to lifelong imprisonment.’

4.1.3 The Criminal Code (CCK) in force between 2013 and 2019

Under this code, the act of rape was incriminated in Article 230 while the “*sexual abuse of persons under the age of 16*” was incriminated under a different article (Article 235), as it had been done in the PCCK.³⁵

Article 230 presented the same provisions as listed in the PCCK, however it also expanded on the definition of the act of rape by noting that it included the threat “*to reveal a fact that would seriously harm the honour or reputation of such person or of a person closely connected to such person*”. In regard to the notion of consent, the CCK contained the same provisions as in the previous code.³⁶

Compared to the PCCK, Article 235 also included several criminal offences against sexual integrity of persons under the age of 16 (i.e. rape, sexual assault and degradation of sexual integrity) and imposed harsher punishments for relevant perpetrators.

4.1.4 The Criminal Code (current CCK) in force since 2019

The current Criminal Code entered into force in April 2019.³⁷ According to its Article 227, the criminal offence of rape is defined in a similar manner and foresees similar punishments as in the previous PCCK and CCK. However, compared to the previous Codes, the current CCK no longer contains a separate article regulating the criminal offence of sexual abuse of persons under the age of 16 years, but it makes it fall under Article 227 as rape.

Paragraph 6 stipulates five to 20 years imprisonment when rape is committed against a person under 16 years, while paragraph 7 stipulates punishment with at least 10 years imprisonment when the crime is committed against a person under 14 years.

According to Article 225, subparagraph 1.1 of the current CCK, the term consent is defined as a voluntary agreement of a person who has reached the age of 16 years to engage in a sexual act. Subparagraph 1.2 of the same Article adds that the voluntary agreement to engage in a sexual act of two persons who have reached the age of 14 years, and where the difference in their ages does not exceed two years, is also considered as consensual.

4.1.5 Conclusions

The criminalisation of the offence of rape in Kosovo has made remarkable progress in aligning with international standards mentioned in chapter three, thus creating a stronger legal framework for the prosecution of this type of sexual violence. The victim’s lack of consent is the constituent element of the offence, in line with Article 36 of the Istanbul Convention and with CEDAW General Recommendation 35³⁸ and Article 227 of the current CCK. The current CCK now recognises as bearing higher punishment all types of rape committed within a domestic relationship, while the CCK only recognised as aggravating circumstance occasions where the perpetrator shared a domestic relationship with a person between the age of 16 and 18.³⁹ For this purpose, the current

35 Criminal Code of Kosovo, 04/L-082, 2012, [hereinafter CCK], available at: <http://old.kuvendikosoves.org/common/docs/ligjet/Criminal%20Code.pdf> [accessed 23 May 2022].

36 Ibid, Article 228.

37 Criminal Code of Kosovo, 06/L-074, 2018, [hereinafter current CCK], available at: <https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf> [accessed 23 May 2022].

38 UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 35: On gender-based violence against women, updating general recommendation No. 19, 2017, paragraph 33, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf [accessed 23 May 2022].

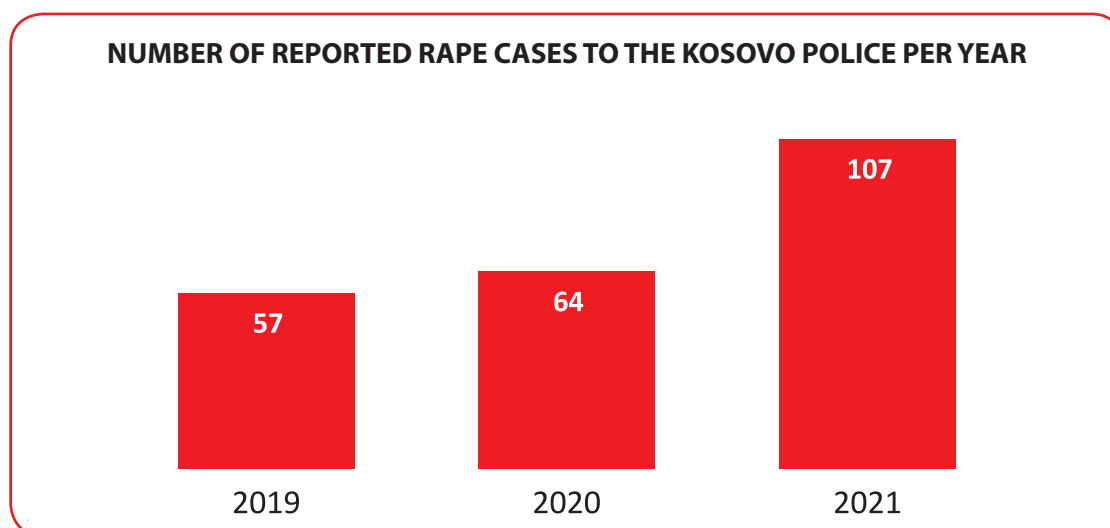
39 CCK, Article 230, subparagraph 4.9.

CCK definition of domestic relationship is also in line with Article 36 paragraph 3 of the Istanbul Convention, as it includes current and former spouses.⁴⁰

It is also worth mentioning that the current CCK contains in its Article 225 subparagraph 1.2 a provision for sexual activity between peers, whereby it recognises that sexual intercourse between “two persons who have reached the age of fourteen (14) years and where difference in their ages does not exceed two (2) years” shall not be criminalised as statutory rape. As a result a possible matter of concern is that, a consensual sexual activity between, for example, a 14-year-old and a 17-year-old, automatically qualifies as a rape case whereas Article 198 of the PCCK stipulated that when a sexual act took place between two persons who had reached the age of 14 years and the age difference was more than two years, but there was no clear difference in maturity level, such an act did not *per se* constitute a criminal offence.

4.2 Investigation, Prosecution and Adjudication of cases

Based on the statistical data obtained by EULEX, 228 cases classified as rape were reported to the KP from 2019 until 2021, specifically 57 in 2019, 64 in 2020 and 107 in 2021. This represents an upward trend, with the following annual percentage increase in the reporting of cases: 12% from 2019 to 2020, 67% from 2020 to 2021 and an overall 87% increase from 2019 to 2021.



However, the available data does not allow for an assessment of the possible impact that the COVID-19 pandemic (and the lockdown regulations that enforced people’s cohabitation) might have had on such a sharp increase in the number of reported rape cases in 2021. Further, it is unclear whether the above-mentioned legal provisions related to sexual activities between people under 18 years of age (namely Article 225, subparagraph 1.2 of the current CCK) could have caused the spike in reported cases. Similarly, it cannot be clearly deduced whether a change in awareness and reporting behaviour may have caused this increase.

With regard to the regional distribution of cases, the data shows that from 2019 until 2021, an average of 35 % of all cases were reported in Pristina.

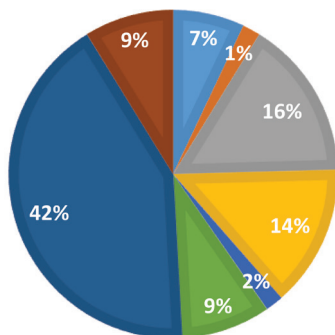
For the full regional distribution of the cases related to each of the analysed years and for the cities for which relevant information was available, please see the graphs below:⁴¹

⁴⁰ Current CCK, Article 113, paragraph 25.

⁴¹ Distribution of the 57 cases per region in 2019: Ferizaj/Uroševac four cases (7%), General Directory one case (2%),

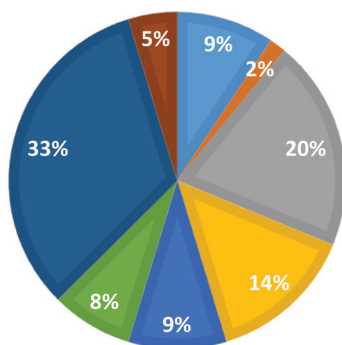
REGIONAL DISTRIBUTION OF CASES IN 2019

- Ferizaj/Uroševac
- General Directory
- Gjakovë/Đakovica
- Gjilan/Gnjilane
- Mitrovica North
- Pejë/Peć
- Pristina
- Prizren



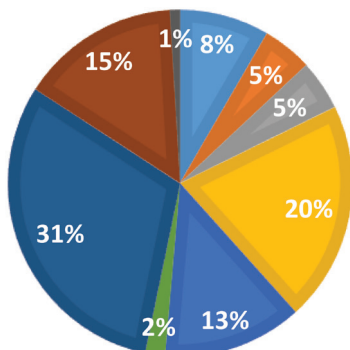
REGIONAL DISTRIBUTION OF CASES IN 2020

- Ferizaj/Uroševac
- General Directory
- Gjakovë/Đakovica
- Gjilan/Gnjilane
- Mitrovica North
- Pejë/Peć
- Pristina
- Prizren



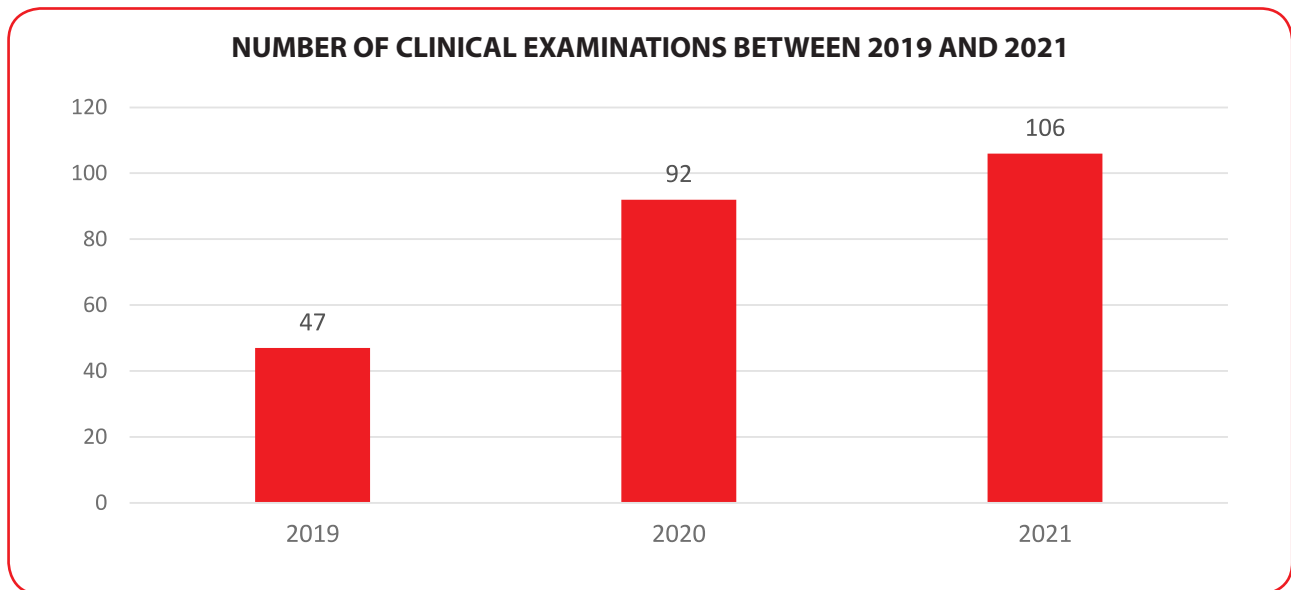
REGIONAL DISTRIBUTION OF CASES IN 2021

- Ferizaj/Uroševac
- General Directory
- Gjakovë/Đakovica
- Gjilan/Gnjilane
- Mitrovica South
- Pejë/Peć
- Pristina
- Prizren
- Mitrovica North



Gjakovë/Đakovica nine cases (16%), Gjilan/Gnjilane eight cases (14%), Mitrovica North one case (2%), Pejë/Peć five cases (9%), Pristina 24 cases (42%), Prizren five cases (9%); Distribution of the 64 cases per region in 2020: Ferizaj/Uroševac six cases (9%), General Directory one case (1,5%), Gjakovë/Đakovica 13 cases (20%), Gjilan/Gnjilane nine cases (14%), Mitrovica South six cases (9%), Pejë/Peć five cases (8%), Pristina 21 cases (33%), Prizren three cases (5%); Distribution of the 107 cases per region in 2021: Ferizaj/Uroševac nine cases (8%), General Directory five cases (5%), Gjakovë/Đakovica five cases (5%), Gjilan/Gnjilane 22 cases (21%), Mitrovica North one case (1%), Mitrovica South 14 cases (13%), Pejë/Peć two cases (2%), Pristina 33 cases (31%), Prizren 16 cases (15%).

Another observed trend is that the majority of victims are minor girls (in 85% of the cases), as evidenced also from the data received from the IFM, with all perpetrators being male. Namely, according to this data, a total of 245 clinical examinations on potential victims (217 female and 28 male) were conducted between 2019 and 2021; 47 in 2019, 92 in 2020 and 106 in 2021 respectively.



4.2.1 Length of Proceedings

4.2.1.1 Statistical Data

As highlighted above, a total of 228 cases classified as rape were reported to the KP in the years 2019, 2020 and 2021, respectively 57 in 2019, 64 in 2020 and 107 in 2021.

The KPC shared overall statistics about Chapter XX of the current CCK on '*criminal offences against sexual integrity*', namely Articles 227-236⁴² of the current CCK, Chapter XX of the (previous) CCK namely Articles 230-243,⁴³ and Chapter XIX of the PCCK with regard to Articles 193-204,⁴⁴ without providing separate statistics on rape cases.

⁴² The Chapter XX of the current CCK includes the following crimes: Article 227 on Rape, Article 228 on sexual services of a victim of trafficking, Article 229 on sexual assault; Article 230 on degradation of sexual integrity, Article 231 on offering pornographic material to persons under the age of 16 years, Article 232 on abuse of children in pornography, Article 233 on inducing sexual acts by false promise of marriage, Article 234 on facilitating or compelling prostitution, Article 235 on providing premises for prostitution and Article 236 on sexual relations within the family.

⁴³ Chapter XX of the (previous) CCK includes the following crimes: Article 230 on rape, Article 231 on sexual services of a victim of trafficking, Article 232 on sexual assault, Article 233 on degradation of sexual integrity, Article 234 on sexual abuse of persons with mental or emotional disorders or disabilities, Article 235 on sexual abuse of persons under the age of 16 years, Article 236 on inducing sexual acts, touching or activity by persons under the age of 16 years, Article 237 on offering pornographic material to persons under the age of 16 years, Article 238 on abuse of children in pornography, Article 239 on sexual abuse by abusing position, authority or profession, Article 240 on inducing sexual acts by false promise of marriage, Article 241 on facilitating or compelling prostitution, Article 242 on providing premises for prostitution, Article 243 on sexual relations within the family.

⁴⁴ Chapter XIX of the PCCK includes the following crimes: Article 193 on rape, Article 194 on commission of sexual acts by threat to honour or reputation, Article 195 on sexual assault, Article 196 on degradation of sexual integrity, Article 197 on sexual abuse of persons with mental or emotional disorders or disabilities, Article 198 on sexual abuse of persons under the age of 16 years, Article 199 on promoting sexual acts or sexual touching by persons under the age of 16, Article 200 on sexual abuse by abusing position, authority or profession, Article 201 on facilitating prostitution, Article 202 on abuse of children in pornography, Article 203 on showing pornographic material to persons under the age of 16, Article 204 on sexual relations with family units.

Based on these statistics, in 2019, 36% of cases were recorded as “*incomplete investigations at the end of the reporting period*” while in 2020 and 2021 44% and 38%, of all cases were categorised in the same manner. Unfortunately, due to the lack of access to disaggregated data on the criminal offence of rape, the Mission could not provide an accurate analysis concerning the length of the investigation timeframes focusing on rape cases only.

The KJC reported that 173 cases were recorded as rape cases through the filing of indictments between 2019 and 2021. Ninety-six of these cases were already pending at the beginning of 2019, which signifies that 77 new indictments were filed between 2019 and 2021 (namely 23 in 2019, 36 in 2020 and 18 in 2021). Of all these cases, 76 were finalised at first instance with a verdict between 2019 and 2021 (specifically 48 in 2019, 26 in 2020 and 2 in 2021), leaving 97 cases still pending at the end of 2021. However, just from the statistical data and without an insight into the actual case files, it was not possible to establish whether the indictments filed between 2019 and 2021 pertained to crimes which had allegedly occurred in the same timeframe or earlier.

By combining all the above-mentioned data, it can be concluded that although 228 cases were reported to the KP from 2019 until 2021, only 77 new indictments were filed and only 76 were finalised.

At the same time, due to the lack of a comprehensive and integrated reporting system among the KP, prosecution offices and courts, it proved difficult to obtain consolidated statistical data to identify the current challenges related to the duration of proceedings. Specifically, it was not possible to determine whether the low number of filed indictments was due to delays in investigations or the high number of cases closed without the filing of an indictment.

4.2.1.2 Assessment of Selected Cases

Due to the abovementioned challenges related to the lack of integrated data collection, in February 2022, EULEX filed a formal request to KP for additional information concerning the investigative steps undertaken in the identified 228 cases, and it received an answer with regard to 153 cases for the period from August 2019 until December 2021. These cases were summarised, sorted geographically by regions and analysed. Subsequently, the Mission reached out to prosecution offices for further information on the length of proceedings for these 153 cases and it obtained information on 129 cases.

The Mission found that in the majority of the cases, criminal reports were filed by the KP to the prosecution offices within one or few days after the incident had occurred or after it had been reported to the KP.

In those cases where criminal reports were filed months later, KP reported the following reasons for such delays:

- Lack of identification of suspects;
- Lack of evidence or results of evaluation of evidence still missing;
- The need to carry out several pre-investigative steps due to the complexity of the investigation.

The Mission also found that the average rate of pending cases which are still under investigation within prosecution offices is considerably higher in specific municipalities. Namely, this rate is around 79% in Prizren, 50% in Mitrovica North, 20% in Gjilan/Gnjilane and 9% in Mitrovica South.⁴⁵

⁴⁵ Gjilan/Gnjilane: four out of 20 cases (20%); Gjakovë/Đakovica: two out of eight (25%); Mitrovica South: one out of 17 (9%); Mitrovica North: one out of four (25%); Pejë/Peć: two out of six (33%); Pristina: nine out of 43 (21%);

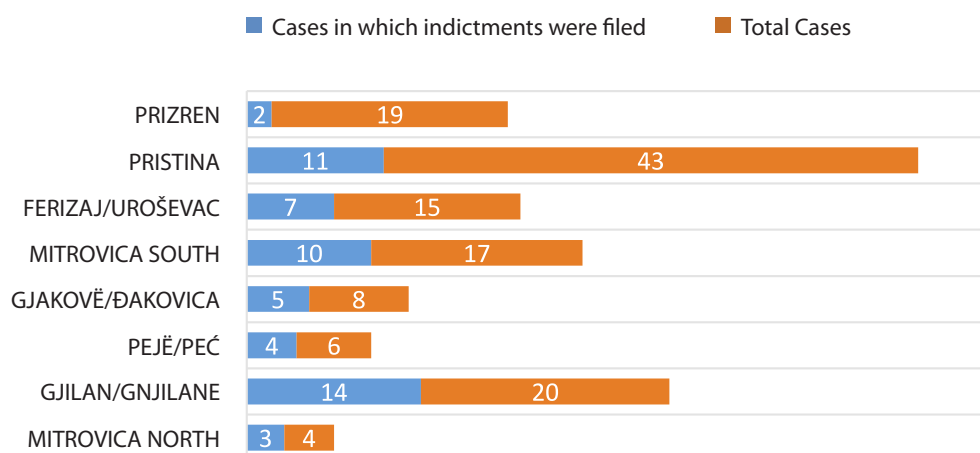
Inquiring further into the underlying reasons for these observed delays in the investigative stage, the Mission received various replies from the prosecution offices, mainly related to the suspects being out of Kosovo and/or the case being recent and, subsequently, investigative steps still ongoing. However, in some cases no specific justification was provided.

The Mission found that the average time between the receipt of the criminal report from the police and the filing of an indictment by the prosecution clearly differs in various municipalities. The average time is about six and a half months in Mitrovica South, three and a half months in Gjakovë/Đakovica and Pejë/Peć respectively, two months in Ferizaj/Uroševac, maximum three months, but in majority of cases one month, in Gjilan/Gnjilane and in the two cases in Mitrovica North, an indictment was filed within one month and the other within three months. For both Prizren and Pristina, the Mission did not receive sufficient data and therefore was not able to perform the analysis.

The number of cases in which indictments were filed is also subject to significant regional differences. Specifically, the rates of filed indictments were as follows: 75 % in Mitrovica North, 70% in Gjilan/Gnjilane, 67 % in Pejë/Peć, 62,5% in Gjakovë/Đakovica, 59% in Mitrovica South, 47 % in Ferizaj/Uroševac, 25,5 % Pristina and 10% in Prizren.⁴⁶ The Mission also received information about cases where educational-correctional measures for minors were imposed prior to filing of any indictment.

For the ratio of total cases/filed indictments distributed geographically, please see the graph below:

RATIO BETWEEN TOTAL CASES AND FILED INDICTMENTS



Based on the data received from the KJC and the registries of the basic courts, court proceedings also appear to have been affected by delays, with only limited cases finishing at the first instance level. In 2019, 40% of all the outstanding cases in the reporting period were finalised, in 2020 and 2021 just 24,5% and 7% respectively.⁴⁷

Prizren: 15 out of 19 (79%); Ferizaj/Uroševac five out of 15 (33%).

46 For Gjilan/Gnjilane: 14 out of 20 (70%); Gjakovë/Đakovica: five out of eight (62,5%); Mitrovica South: 10 out of 17 (59%); Mitrovica North: three out of four (75%); Pejë/Peć: four out of six (67%); Pristina: 11 out of 43 (25,5%); Prizren: two out of 19 (10,5%); Ferizaj/Uroševac: seven out of 15 (47%).

47 Based on data received from KJC and registries of basic courts, 48 of all outstanding cases were solved in 2019, 26 cases in 2020 and two cases in 2021.

For specific cases, between the filing of the indictment, and the first hearing/main trial/judgement took place/was announced, the Mission recorded particularly long delays. In Gjilan/Gnjilane, for example, EULEX identified three cases from 2019 with 11, 15 and 20 months between the filing of the indictment and the first hearing, respectively. In Ferizaj/Uroševac, the Mission identified another case in which a trial that started in February 2020 is still ongoing.

With regard to the judgments analysed by the Mission in about 50% of cases the judgement was pronounced within 24 months after the crime took place. In other cases, the delay was disproportionately long, with judgements pronounced more than 14 years after the criminal offence had occurred. In two cases, the re-trial judgements were announced seven and a half years and nine and a half years after the first judgements, respectively.

After inquiring with the relevant institutions (prosecution offices and basic courts) about the reasons for such delays, the Mission received the following justifications:

- Lack of prosecutors. Insufficient number of prosecutors in the Juvenile Department and the high number of cases involving minors which led to serious delays;
- A general lack of specialised psychologists which caused delays in the interviewing of victims. According to Article 112 of the Juvenile Justice Code, the first and second examination shall be conducted with the assistance of a psychologist. Further, it was indicated that there is no system in place in which a psychologist is appointed or competent for a particular district;⁴⁸
- It was indicated that the competent institutions needed additional time to collect evidence, without further detailing what kind of evidence or the motives making the acquisition of evidence lengthy;
- Institutions also lamented a lack of a unified protocol and clearly defined responsibilities among the different institutions involved, particularly in the phase of acquisition of evidence, principally forensic evidence. They stated that although there are specific procedures with regard to cases involving juveniles as per the Juvenile Justice Code, as well as cases of domestic violence, there are no specific unified guidelines in the area of sexual offences, even for cases involving minors;
- Delays in examination of surveillance evidence, i.e. phone records;
- Delays in getting the results from the biological evidence examinations. It was indicated that the clinical examination report is usually issued immediately after the relevant examination, however the report does not include the DNA results or other forensic evidence examination results, besides rapid urine test for narcotics.

4.2.1.3 Conclusions

Article 49 of the Istanbul Convention requires that there are no delays in the investigation and evidence collection stages (especially concerning the collection and testing of forensic evidence) that would jeopardize the prosecution and adjudication of cases of violence against women and “...[would contribute] significantly to a sense of impunity among perpetrators ..[thus helping perpetuating] high levels of acceptance of such violence”.⁴⁹ Expedited proceedings should, therefore, be used for all cases

⁴⁸ Juvenile Justice Code, 06/L-006, 2018, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18019> [accessed 23 May 2022].

⁴⁹ Explanatory Report to the Istanbul Convention, page 43, paragraph 255.

of violence against women and not only in specific contexts, (e.g. domestic violence cases). Article 50 of the same Convention further refers to the need to interview victims without delays.

The jurisprudence of the ECtHR stemming from Article 3 of the ECHR is equally paramount. In *P.M. v. Bulgaria*, the ECtHR addressed the issue of lengths of investigations in a sexual assault case and found a breach of Article 3 in light of the long-time taken to complete the investigation. The Court found that “*the promptness of the authorities’ reaction to the complaints is an important factor ... [as well as]... matters such as the opening of investigations, delays in identifying witnesses or taking statements the length of time taken for the initial investigation and unjustified protraction of the criminal proceedings resulting in the expiry of the statute of limitations*”⁵⁰

Unlike for domestic violence cases which are regulated by Standard Operating Procedures and instructions,⁵¹ Kosovo still lacks specific guidelines which would mandate that rape cases be dealt with utmost diligence and urgency. The existence of such unified guidelines would not only set clear obligations, but it would also help to define specific responsibilities of each service provider involved, thus avoiding unnecessary delays.

Furthermore, as evidenced above, the lack of resources has an impact on delays in proceedings. The obligation of due diligence stemming from both the Istanbul Convention and the ECHR requires institutions to allocate appropriate human and financial resources that allow for effective implementation of the required standards.

Additionally, as detailed above, the lack of systemised data collection on rape offences among the different institutions in Kosovo has prevented the effective collection of data on the length of proceedings. Specifically, Article 11 of the Istanbul Convention sets an obligation for institutions to collect representative and comparable data, in order to shape policies for effective prevention and combating of all forms of violence against women. As detailed in the Explanatory Report to the Istanbul Convention, “*Preventing and combating violence against women and domestic violence requires evidence-based policy-making. This implies effectively documenting the magnitude of violence by producing robust, comparative data in order to guide policy and to monitor the implementation of measures to address the problem. [Article 11 refers to] the obligation to address the importance of regularly collecting representative and comparable data to the devising and implementation of policies to prevent and combat all forms of violence covered by the scope of this Convention.*”⁵²

It is therefore of major importance that Kosovo puts in place a system allowing for effective documentation of rape cases in order to, *inter alia*, understand better the scope of delays in proceedings and put in place measures to address and prevent them.

50 European Court of Human Rights, *P.M. v. Bulgaria*, no. 49669/07, 2012, available at: <https://hudoc.echr.coe.int/eng?i=001-108781> [accessed 23 May 2022].

51 Kosovo Agency for Gender Equality, Standard Operation Procedures for Protection from Domestic Violence in Kosovo, 2013, available at: <https://abgj.rks-gov.net/assets/cms/uploads/files/Publikimet%20ABGJ/Procedurat%20Standarte%20t%C3%AB%20Veprimit%20p%C3%ABr%20Mbrojtje%20nga%20Dhuna%20n%C3%AB%20Familje.pdf> [accessed 23 May 2022]; Kosovo Prosecutorial Council, Standard Operating Procedures for Increasing Efficiency in Handling Cases of Domestic Violence, 2017, available at: <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Plane%20te%20Punes/Procedurat%20Standarde%20te%CC%88%20Veprimit%20pe%CC%88r%20Ngritjen%20e%20Efikasitetit%20ne%CC%88%20Trajtimin%20e%20Rasteve%20te%CC%88%20Dhune%CC%88s%20ne%CC%88%20Familje.pdf> [accessed 23 May 2022].

52 Explanatory Report to the Istanbul Convention, page 14, paragraph 74.

4.2.2 Effective investigation and termination of cases

The rate of investigations closed by the prosecution offices⁵³ without any indictment being filed indicates visible regional differences. Specifically, in Ferizaj/Uroševac 20% of cases were closed without any indictment, in Pristina this rate amounted to 16%, in Gjilan/Gnjilane and Prizren, respective rates amounted to 10% and 5%.⁵⁴

The Mission enquired into the motives for the termination. Based on the Mission's monitoring activities and on replies from prosecution offices, the main reasons for such termination related to:

- Elapsed time between the victim reporting the case and the possibility of carrying out a medical examination, i.e. the lack of a medical report as deemed impairing the successful adjudication of the case;
- Lack of physical injuries and/or the biological evidence report was not decisive to prove any acts of force. In some of the analysed cases, it was observed that the cases were closed after the gynaecological examination report, performed by the IFM, stated that no bodily injuries were found;
- Lack of sufficient evidence, even after evaluating electronic devices and other types of corroborative evidence;
- The victim's statement did not suffice to make the case move forward;
- The victim retracted the statement, or in some cases the victim's statement was considered by the Prosecutor to be a false accusation.

The Explanatory Report to the Istanbul Convention when elaborating on Article 36⁵⁵ refers to the case-law of the ECtHR, namely the judgment in *M.C. v. Bulgaria* where the ECtHR was "*persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member states' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim*".⁵⁶ Additionally, the ECtHR also noted that: "*Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence*".⁵⁷

Article 36, paragraph 2 of the Istanbul Convention specifically requires that the prosecution of sexual offences shall be based on a context-sensitive assessment of the evidence in order to establish, on a case-by-case basis, whether or not the victim has freely consented to the sexual act. The needed assessment should, therefore, be driven by a consent-based approach (as also envisaged by the legal framework in Kosovo), and not require evidence of use of violence. Furthermore, "*such an assessment must recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is*

⁵³ The Mission only received this information for the specified prosecution offices.

⁵⁴ In Gjilan/Gnjilane, two cases closed out of 20 (10%); in Pristina, seven out of 43 (five cases closed with proposals for increased supervision or to send to educational-correctional institution, two cases dismissed) (16%); in Prizren, one out of 19 (5%); in Ferizaj/Uroševac, three out of 15 (20%).

⁵⁵ Explanatory Report to the Istanbul Convention, paragraph 191.

⁵⁶ European Court of Human Rights, *M.C. v. Bulgaria*, no. 39272/98, 2003, paragraph 166, [hereinafter *M.C. v. Bulgaria*], available at: <https://hudoc.echr.coe.int/eng/?i=001-61521> [accessed 23 May 2022].

⁵⁷ *M.C. v. Bulgaria*, paragraph 161.

equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality".⁵⁸

On the same line, CEDAW's General Recommendation 33 on Women's Access to Justice refers to the need for state parties to ensure that evidentiary rules are not restrictive, or influenced by stereotypes. State parties shall "(a)...abolish discriminatory barriers to access to justice, including: ...*(iii) Corroboration rules that discriminate against women as witnesses...by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy; (iv) Procedures that exclude or accord inferior status to the testimony of women; (v) Lack of measures to ensure equal conditions between women and men during the preparation, conduct and aftermath of cases; (vi) Inadequate case management and evidence collection in cases brought by women resulting in systematic failures in investigation*".⁵⁹

Additionally, Article 49, paragraph 2 of the Istanbul Convention requires effective investigation and prosecution of offences. It entails "*establishing the relevant facts, interviewing all available witnesses, and conducting forensic examinations, based on a multi-disciplinary approach and using state-of-the-art criminal investigative methodology to ensure a comprehensive analysis of the case in respect of Article 6 of the ECHR*".⁶⁰ Authorities shall make use of a wide range of non-victim/corroborating evidence used in cases of violence against women, and therefore also applicable for rape cases. Namely, "*statements of police officers; statements of neighbours or other witness accounts; recordings of emergency calls/ police dispatch calls; CCTV recordings; photographs of the injury and scene; medical history/reports; history of previous incidents (e.g. criminal record of the perpetrator; past exclusion/protective orders; administrative penalties); communication from the perpetrator to the victim; bad character evidence about the perpetrator and expert testimony, especially to explain the impact of violence on the victim, common behaviours and reactions of victims*".⁶¹

The Mission has also observed how victim's interviews at police stage are often not digitally recorded and also not taken verbatim, but instead in a summarized form. This might run the risk of having a selective form of the victim's statement with possible omissions, thus calling for the use of digital recording of the interviews and effective victims-sensitive interviewing techniques and procedures in line with international standards.

Article 55, paragraph 1 of the Istanbul Convention further stipulates that "*Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles [...] 36 [rape], [...] of this Convention shall not be wholly dependant upon a report or complaint filed by a victim [...] that the proceedings may continue even if the victim withdraws her or his statement or complaint*".⁶²

The Convention takes into account that offences like rape are also often perpetrated by family members, intimate partners or persons in the immediate social sphere of the victim. This may further exacerbate the feelings of shame, fear and helplessness that victims suffer as well as be connected to the low numbers of reporting and, subsequently, convictions. Therefore, law enforcement and prosecution institutions should investigate such crimes in a proactive way to gather evidence, including substantial evidence, testimonies of witnesses and medical expertise to allow for proceedings to take place even if the victim withdraws her or his statement or complaint.

⁵⁸ Explanatory Report to the Istanbul Convention, paragraph 192.

⁵⁹ UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 33: Women's access to justice, 2015, paragraph 25, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf [accessed 23 May 2022].

⁶⁰ Explanatory Report to the Istanbul Convention, paragraph 256.

⁶¹ European Union and Council of Europe, Women's Access to Justice: A Guide for Legal Practitioners, October 2018, page 20, available at: <https://rm.coe.int/factsheet-womens-access-to-justice/16808ff44e> [accessed 24 May 2022].

⁶² Istanbul Convention, Article 55, paragraph 1.

In conclusion, the case analysis reveals that the main reasons for closing a case/terminating an investigation are the withdrawal of the victim's statement, the evaluation of the statement as not credible, and the absence of evidence such as physical injuries or biological evidence.

International standards require that investigations into rape cases should continue despite the withdrawal of the statement by the victim, thus placing an obligation on investigating institutions to improve the standards for the search of further evidence besides the victims' statements and notwithstanding the lack of physical injuries. The legal framework in Kosovo correctly criminalises the criminal offence of rape as a consent-based offence, and not as a force/coercion based one. This needs to be reflected also in the modalities used by relevant institutions to handle cases. When investigating a case of rape, the gendered and discriminatory nature of the crime must be displayed. Further, the actions undertaken by relevant institutional stakeholders should demonstrate an understanding of the nature of this form of violence against women, including its impact on victims and how this can affect their statements or their willingness to report and go ahead with the case. Additionally, while recalling that taking of evidence, particularly a victim's statement, should always adhere to a victim-based approach and be gender-sensitive, evaluation of a victim's statement shall never be based on assumption or beliefs (e.g. if sexual violence is truly non-consensual, the woman will fight back, therefore, if there are no signs of physical injuries, consent was given).

Finally, because the nature of the crime of rape is particularly difficult to determine due to the frequent lack of witnesses and its occurrence in very intimate contexts, based on its analysis, the Mission emphasises the need to establish specific guidelines and specialised trainings for relevant institutions, to gain the necessary understanding and skills to conduct appropriate investigations.

4.2.3 Punishment

CEDAW's General Recommendation 19 talks about an obligation to take all legal and other measures that are necessary to provide effective protection of women against gender-based violence including penal sanctions.⁶³

The Istanbul Convention refers to the obligation to "*take due diligence to [...] punish [...] acts of violence [...]*".⁶⁴ Furthermore, in its Recommendation on the protection of women against violence, the Council of Europe has underlined how there should be appropriate measures and sanctions in domestic legislation, making it possible to take swift and effective action against perpetrators of violence and redress the wrong done to women who are victims of violence.⁶⁵

In October 2021, a court judgement on a case of rape was the subject of wide public discussions across Kosovo. In this case, the court sentenced a man accused of raping a 15-year-old girl to only eight months imprisonment. Although Article 227 of the current CCK foresees a sentence from five to 20 years of imprisonment in case rape is committed against a person under the age of 16 years,⁶⁶ the judge found the mitigating circumstances, including the guilty plea and the age of the defendant, to justify the low sentence imposed. Such judgments, apart from disregarding the applicable criminal code provisions, indicate to perpetrators that they can abscond from their responsibilities with

63 UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, paragraph 24(t), available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf [accessed 23 May 2022].

64 Istanbul Convention, Article 5 – State obligations and due diligence.

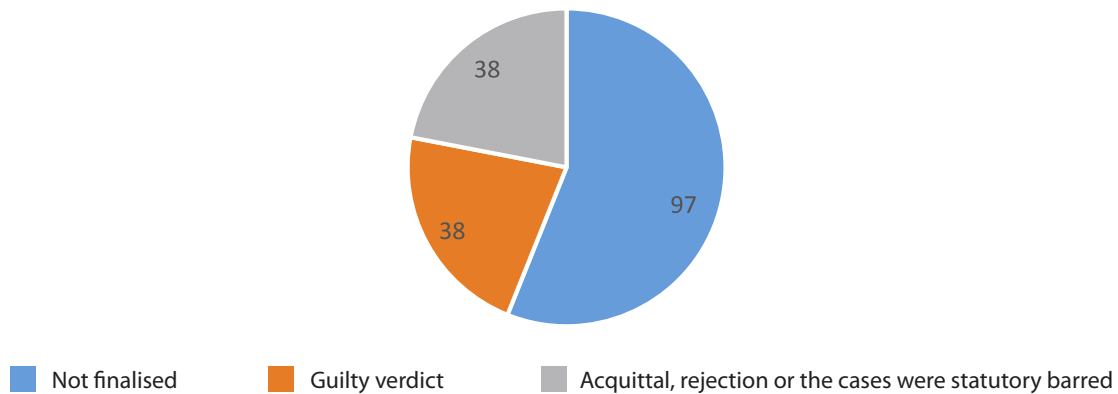
65 Council of Europe, Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30 April 2002, paragraph 35, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612 [accessed 23 May 2022].

66 Current CCK, Article 227, paragraph 6.

almost no consequences. They also negatively impact on the victims' willingness to come forward and report future similar crimes.

As already highlighted in the section on the length of proceedings, the KJC reported that 173 rape cases reached the basic courts between 2019 and 2021. Out of these 173 cases, 76 were finalised and in 38 cases guilty verdicts were announced, whereas in the other 38 cases, the courts issued judgments of acquittal, rejection or the cases were statutory barred.

STATUS OF RAPE CASES THAT REACHED THE COURTS BETWEEN 2019 AND 2021



In order to gain a broader overview over the reasoning of courts, the Mission carried out a desk analysis of 36 judgments including judgments preceding the period from 2019 until 2021. Namely, out of these 36 judgements, 21 cases occurred before 2019 while the other 15 were selected among the 76 cases finalised in the last three years. The following findings could be extracted from the analysis of the judgements.

4.2.3.1 Rate and reasons for acquittals

Out of the 36 analysed cases, there were 16 acquittal (15 acquittals, one rejection).⁶⁷ The reasons for acquittals varied. Similarly to the justifications for closing investigations highlighted above, these acquittals mainly centred on the lack of proof of violence (including no injuries in the genital areas of the victims) and the subsequent impossibility adduced by courts to prove that the defendant committed the crime. Another reason was linked to the victim's withdrawal of statement during court proceedings. In one case, the victim stated to have lied during the court proceedings. Subsequently, the court rendered an acquittal judgment despite the fact that bruises and bodily injuries were detailed in the medical report. In another case, the statement of the victim was considered not credible, because it differed during each stage of the proceedings (police, prosecution, court). In other judgements, the court's reasoning for the acquittal was based on the victim's implied consent, based on the fact that the person had previous intercourse with the perpetrator(s). Similarly, in one case, the court justified the acquittal based on the fact that the injured party went to the place of the alleged crime with unknown persons. The court deducted from these actions that the victim tacitly consented to sexual intercourse.

⁶⁷ Criminal Procedure Code of Kosovo, Law No. 04/L-123, 2012, Article 364 and Article 363 respectively.

4.2.3.2 Lenient sentences

Out of the 20 guilty verdicts, it was observed that 12 were below the minimum length of punishment according to the law. For the remaining eight judgments, the length of punishment was in accordance with the law.

In almost all cases, mitigating circumstances were taken into account, while in only few cases aggravating circumstances were considered. A few examples of circumstances that the courts evaluated as mitigating included:

- Defendant giving a promise that he will never violate the law again;
- Defendant apologising to the victim;
- Defendant's weak economic state; status as only breadwinner in the family or unemployed;
- Defendant's young age;
- Defendant's correct behaviour in the court;
- Defendant's guilty plea;
- Defendant had no previous criminal record in Kosovo;
- Small age gap between the victim and defendant;
- Defendant having a family and kids;
- Defendant's low education level;
- Defendant's bad health condition;
- Lack of physical injuries to the victim as a result of the rape;
- Prolonged length of proceedings and period of time elapsed from the occurrence of the crime (i.e. 10 years).

In the few cases where they were applied, the following aggravating circumstances were used:

- Weight of criminal offence, manner of the commission of the criminal offence;
- Minor age of the victim;
- Previous criminal record;
- Commission with intention although the age of the victim was known;
- Knowledge about the consequences and dangerousness of the crime;
- Lack of guilty plea on the part of the defendant.

4.2.3.3 Type of Evidence Used

In almost all analysed judgements the victim's statement was the main evidence. The victim was often interviewed three times: by the police, the prosecution and by the court during the trial. Doctors' statements and medical forensic reports, where available, were also used as evidence. Thus, on a positive note, the Mission found that the rate of medical examinations carried out and used in trials has progressively increased. However, very seldom a psychologist's assessment of the victim was used as evidence. Further, only in a few cases evidence such as copies of communication with technical devices and reports of the crime scene (with photos) were presented during relevant trials.

4.2.3.4 Conclusions

Article 370, paragraph 8 of the Criminal Procedure Code of Kosovo (CPCRK),⁶⁸ with regard to reasoned judgments, states that: *“If 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 an especially serious case or that it is necessary to impose a sentence which is more severe than what has been prescribed, or if it found that it was necessary to reduce the sentence or to waive the sentence, or to impose an alternative punishment or to impose a measure of mandatory rehabilitation treatment or confiscation of the material benefit acquired by the commission of a criminal offence.”* There is, therefore, a paramount obligation on courts to clearly reason in the sentencing part of the judgement the exact grounds which led to the imposed sentence.

With regard to the analysed judgements, a high number of acquittals or low sentences was observed.

Similarly as the reasoning for closing investigations, the main causes for court acquittals related to the lack of proof of violence/coercion, withdrawal of the victim’s statement, questioning the credibility of the victim and declaring her statement either as a false accusation or not sufficient to prove the case beyond reasonable doubt as well as assumptions and stereotyping on given consent.

This report reinstates how the criminal offence of rape is criminalised in Kosovo as a consent-based offence, and not a coercion one. Due to the nature of this crime and the emotional burden it brings for victims, courts should always employ a victim-centred approach in holding proceedings and interviewing victims. Further, they should also carefully scrutinize change of statements. Victims should not be expected to discharge a higher burden of proof than perpetrators. Additionally, as already referenced above, proceedings should be carried out without relying on gender stereotypes and myths about male and female sexuality.

To this regard, in the case of *Vertido v. The Philippines*⁶⁹ the CEDAW Committee referred to the problem of stereotyping and the need to address evidentiary rules and provide appropriate judicial training (particularly in the lower levels of courts) to ensure that stereotypes and rape myths are addressed.

The rape myths addressed in the *Vertido* case concerned the ability to escape, timid personality (i.e. the presumption that strong personalities cannot be raped), need for evidence of direct threat and injuries, issue of understanding rape within the context of acquaintance rape and the age of the aggressor. The Committee assessed that the court erroneously based its findings on gender-based myths and stereotypes about rape and rape victims, and stated that there should be no assumption in law or practice that a woman gives her consent just because she did not physically resist unwanted sexual conduct. These myths are often associated with other common rape myths/assumptions, such as those related to the appearance and character of the victim as affecting her credibility, and the time and place of the rape (i.e. if the victim went to a motel, he/she should have known what to expect).

When considering the high number of issued lenient judgments, the report found how in all cases analysed, the aggravating circumstances were hardly taken into account, or were completely counterbalanced by the mitigating factors. Further, courts failed to provide the detailed reasoning for such sentencing and chose to refer to the overall conclusion that the set sentence was fair.

Article 69, paragraph 2 of the current CCK specifies that: *“The punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender.”*

⁶⁸ Criminal Procedure Code of Kosovo, Law No. 04/L-123, 2012, available at: <https://gzk.rks-gov.net/ActDocument-Detail.aspx?ActID=2861> [accessed 24 May 2022].

⁶⁹ Committee on the Elimination of Discrimination against Women (CEDAW), *Vertido v. the Philippines*, Communication No. 18/2008, 2010, available at: <https://juris.ohchr.org/search/details/1700> [accessed 24 May 2022].

Article 70 of the current CCK refers to the general rules on mitigation or aggravation of punishment. The prescribed punishment for different forms of rape can be mitigated to a maximum of six months (from two years) to five years (from ten years).

Due to the nature of violence against women, Article 45 of the Istanbul Convention requires that offences be punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.⁷⁰ Furthermore, Article 46 of the Convention also sets a list of circumstances that should be taken into consideration as aggravating ones, insofar as they do not already form part of the constituent elements of the offence.⁷¹

It is also worth mentioning that the Supreme Court of Kosovo, in its *“Guidance on the legal qualification and treatment of domestic violence cases according to the Criminal Code of Kosovo”*,⁷² makes a specific reference to marital rape cases when it states that: *“It is important to emphasise in particular that under the new [criminal] Code the expression ‘family relationship’, which was not expressively mentioned before, was added in Article 227 (Rape). In the internationally recognised language, this is called ‘Marital Rape’ which automatically increases the severity of the sentence.”*⁷³

The low penalties currently imposed in Kosovo indicate that the understanding of the crime of rape, its gendered nature as well as its discriminatory and human rights violations’ aspects continue to pose a challenge, while the handling of this type of cases by institutions is still often influenced by traditional stereotypes and assumptions.

70 Istanbul Convention, Article 45 – Sanctions and measures, paragraph 1.

71 Istanbul Convention, Article 46 on aggravating circumstances stipulates the following: “...: a) the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority; b) the offence, or related offences, were committed repeatedly; c) the offence was committed against a person made vulnerable by particular circumstances; d) the offence was committed against or in the presence of a child; e) the offence was committed by two or more people acting together; f) the offence was preceded or accompanied by extreme levels of violence; g) the offence was committed with the use or threat of a weapon; h) the offence resulted in severe physical or psychological harm for the victim; i) the perpetrator had previously been convicted of offences of a similar nature”.

72 Supreme Court of Kosovo, *Guidance on the legal qualification and treatment of domestic violence cases according to the Criminal Code of Kosovo*, 2020, available at: https://supreme.gjyqesori-rks.org/wp-content/uploads/legalOpinions/75340_Supreme%20Court%20DV%20Guidance_June%202020.pdf [accessed 24 May 2022]

73 Ibid, page 7.

5. CONCLUDING REMARKS

Throughout the years, and even ahead of the inclusion of the Istanbul Convention into its Constitution, Kosovo's legal framework aligned progressively with international human rights standards on sexual violence offences. As a result, the victim's lack of consent is now the constituent element of the criminal offence and all types of rape committed within a domestic relationship bear a higher punishment.

However, adequate criminalisation of rape is just the first step; to ensure effective prosecution of perpetrators, investigation and evidence collection must be swift; the opposite does not only jeopardise efforts to ensure accountability but can also contribute to creating a culture of impunity and a feeling of helplessness among victims who may be discouraged to further pursue their path towards justice.

When confronted with a report of rape and in order to avoid further victimisation, all authorities have to act in a concerted manner; in simple terms they need to know exactly what to do, when and how. In this regard, the absence of a specific protocol like those applicable to cases of domestic violence is a gap that should be filled urgently.

An important aspect illustrated in this report, is the lack of systemised data collection on rape offences among the different institutions. This deficiency has on the one hand impeded the proper acquisition of information by the Mission, while at the same time further highlighted the importance of solid data collection for the shaping of policies.

Although the sample of judgments examined in this report is relatively small, the high number of acquittals or low sentences is of serious concern and symptomatic of lack of adequate human and financial resources, of specialised training and professionals profiles for personnel within institutions tasked to handle such crimes and of biases.

Altogether, the findings of this report have evidenced several shortcomings in the handling of rape cases in Kosovo, particularly in light of the Istanbul Convention and CEDAW requirements.

This report showcased how a gendered understanding of the nature of the criminal offence of rape by all relevant institutions, recognising rape as a form of discrimination against women and girls, one of the key requirements of the Istanbul Convention, is paramount in order to ensure prompt and effective investigation, prosecution and ultimately appropriate adjudication. Only with this approach actual protection and redress to victims can be ensured. Such understanding needs to be based on a victim-centred focus that would avoid re-traumatisation for victims and remove barriers exacerbating an already difficult event to report. This approach would also empower these victims throughout the proceedings. Adequate sanctions and punishment are a prerequisite, and acquittals and lenient sentences (based on a non-gender-sensitive case assessment) are detrimental to ensuring redress for victims, their empowerment and willingness to report, while also fostering impunity for perpetrators. In order to mitigate these deficiencies, the Mission prepared, in the following chapter, a set of precise recommendations for the KP, prosecution, courts, the Kosovo Justice Academy and the Ministry of Justice.

6. RECOMMENDATIONS

6.1 Kosovo Police

- Building on recent improvements in the investigation and reporting of domestic violence cases, organise and regularly undergo specialised trainings in response to rape cases, especially in relation, but not limited, to the victim-centred approach, interviewing rape victims' techniques and investigating rape cases techniques;
- To secure all forms of non-victim centred corroborative evidence, not limited to forensic/biological evidence;
- To this end, the use of electronic means to record the initial statement of victims and any witnesses should be considered;
- To allocate sufficient human and financial resources to ensure the effective ability to comply with the set obligations, including the means to allow for prompt examination of collected evidence (e.g. examination of mobile phone records);
- To issue internal guidelines requiring utmost diligence in dealing with this type of cases.

6.2 Prosecution

- To allocate sufficient human and financial resources to ensure prompt investigations without delays, as well as the presence of specialised profiles, i.e. forensic psychologists;
- To organise and regularly undergo specialised trainings in response to rape cases particularly regarding, but not limited to, the victim-centred approach, interviewing rape victims techniques, investigating rape cases techniques, understanding the gendered nature of the crime;
- To issue internal guidelines requiring utmost diligence in dealing with this type of cases.

6.3 Courts

- To ensure prompt and timely adjudication of cases with appropriate adjudication and effective sanctions and punishments;
- To allocate sufficient human and financial resources to ensure prompt adjudication of cases without delays;
- To issue internal guidelines requiring utmost diligence in dealing with this type of cases;
- To regularly undergo specialised trainings on adjudication of rape cases particularly in relation to, but not limited, the victim-centred approach, evaluation of evidence, interviewing of victims in court proceedings, understanding the gendered nature of the crime;
- To improve the recently developed dashboards for courts in order to provide an overview of the court processes, enabling the identification of relevant trends and patterns.

6.4 Kosovo Justice Academy

- To design and deliver specialised trainings on investigation, prosecution and adjudication of rape cases particularly regarding, but not limited to, the victim-centred approach, collection and evaluation of evidence, interviewing of victims in investigation and court proceedings, understanding the gendered nature of the crime.

6.5 Ministry of Justice

- To lead the development of national guidelines that would unify and improve the handling of rape cases by the different institutions, whereby clear obligations, responsibilities and procedure would be spelled out;
- To facilitate the creation of an integrated system of collection of data in relation to rape cases that would help better scope the trends and patterns and assist the related policy-making procedure.

