



European Union Rule of Law Mission in Kosovo

SPECIAL REPORT ON THE IMPACT OF COVID-19 ON THE RULE OF LAW IN KOSOVO

**Assessment and recommendations for
the period March 2020 – March 2021**

May 2021



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FOREWORD

More than one year into the COVID-19 pandemic, it seemed appropriate for the European Union Rule of Law Mission in Kosovo (EULEX) to take a step back and assess the state of play in the areas of Kosovo rule of law where it is mandated to monitor and assist: the justice system and the correctional service.

Like everywhere else, Kosovo's rule-of-law institutions over the past year found themselves navigating in uncharted waters, often confronted with difficult and urgent decisions, trying to strike a balance between justice and law enforcement on the one hand and health and public safety on the other.

How do you prioritize court cases when public health reasons make it very risky to hold any hearing at all? Is there a way to ensure public and media access to a trial in the midst of a pandemic without turning it into a "superspreader"? What is the most reasonable approach to guarantee the psychological and social well-being of an inmate while maintaining in force necessary restrictions to prevent the virus from spreading?

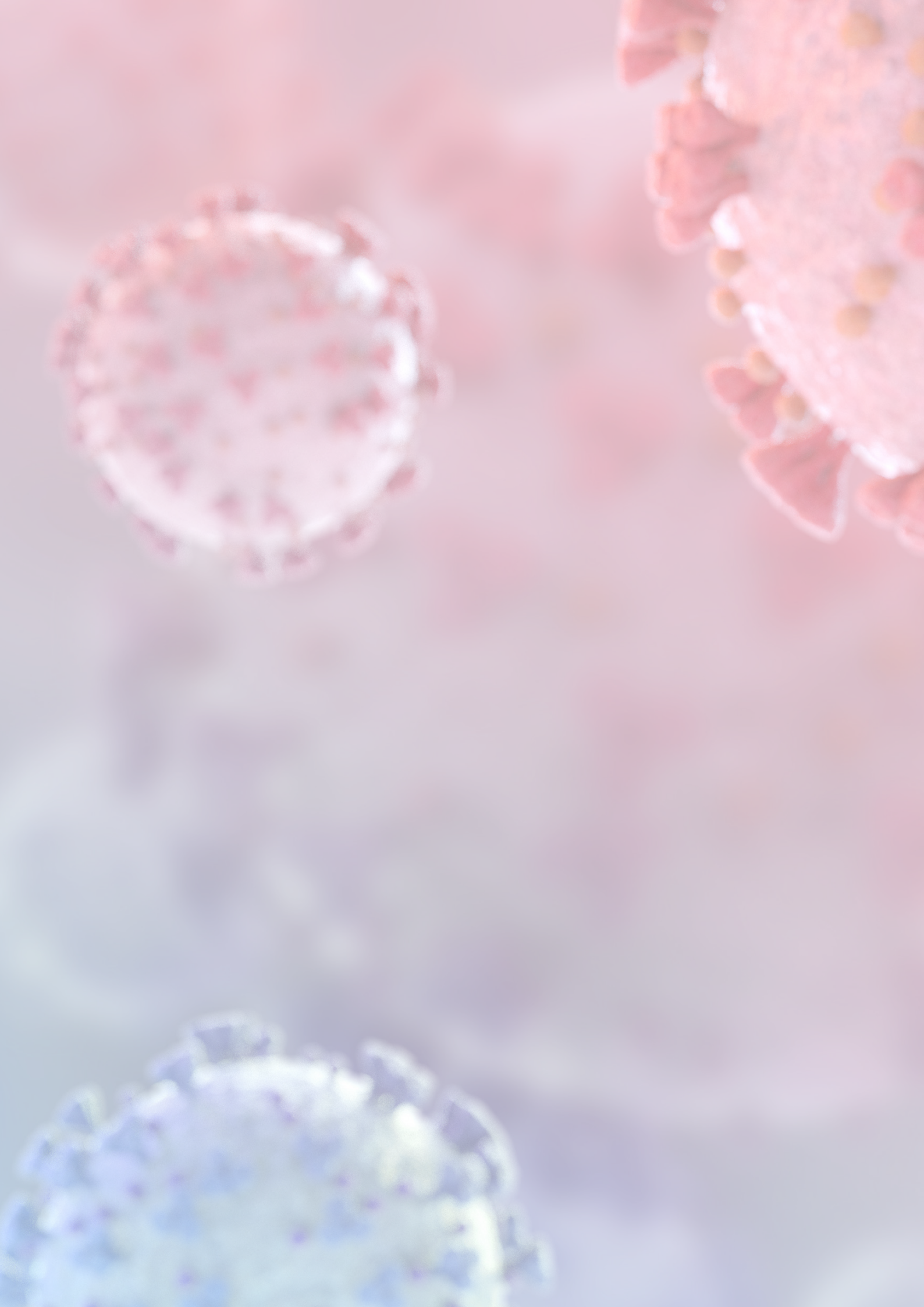
These are a few of the COVID-19 real-life scenarios that our Kosovo rule-of-law partners had to respond to over the last year. And EULEX experts have remained at their side throughout this crisis and strived to assist Kosovo authorities by monitoring the rapidly evolving and often unpredictable situation by providing advice on how to react and adapt to the challenges posed by the pandemic.

This report identifies these challenges and provides an in-depth analysis of the main issues arising and lessons learned. It also offers concrete and actionable recommendations for the Kosovo rule-of-law system to better respond to the ongoing health crisis.

While focusing on pandemic related issues, this report follows in the footsteps of the broader report EULEX launched end of last year on our systemic and thematic in-depth monitoring of Kosovo's criminal and civil justice. A preliminary draft of this report has already been shared with the institutions in Kosovo responsible for the judiciary and the correctional services. And with this publication, it is also made available for civil society actors with an active interest in rule of law, media, as well as the Kosovo citizens at large.

Finally, this report is a testament to the commitment, professionalism and resilience of many Kosovo police investigators, judges, prosecutors, correctional officers and other rule-of-law personnel who have been working relentlessly throughout the pandemic to serve justice under difficult circumstances.

Lars-Gunnar Wigemark
Head of Mission



EXECUTIVE SUMMARY

The COVID-19 pandemic presented an unprecedented set of challenges for rule-of-law institutions around the world, including in Kosovo. Many of the constraints resulting from the pandemic continue to affect the functioning of rule-of-law institutions and are part of a new reality authorities in Kosovo and elsewhere have to respond to in both the short and longterm. While institutions must always seek to guarantee the right to life and the right to health, at the same time they also need to balance the impact of restrictive measures on other human rights and the rule of law overall.

This report assesses the management of the pandemic in certain aspects of the justice and correctional systems in Kosovo. It is not a comprehensive report covering all aspects of the rule of law affected by the pandemic; instead, it focuses on the areas where the EULEX has a well-established mandate and direct experience. Nevertheless, certain general conclusions can be drawn, which may also be applicable to other rule-of-law areas.

Kosovo initially based its preventive measures on existing legislation. In August 2020, the Kosovo Assembly passed the “Law on Preventing and Combating the COVID-19 Pandemic in the Territory of the Republic of Kosovo”. However, this law mostly deals with limiting freedom of movement and does not address the particular challenges faced by the justice and correctional systems. Despite efforts of the justice and correctional authorities to address problems occurring in the absence of specific legislation, EULEX deems that the lack of a clear legal basis for some of the measures already taken needs to be addressed urgently to avoid future legal uncertainty. This is essential to ensure that Kosovo upholds fundamental principles of the rule of law, such as legality, due process and legal certainty, and for transparency and trust in the judiciary and correctional services institutions to be strengthened.

With the interruption of judicial activities due to COVID-19 lockdown measures between March and June 2020, the so-called three-month rule in the current Criminal Procedure Code stipulating that criminal trials must recommence if no hearings take place for three consecutive months, became applicable to virtually all criminal cases at trial stage in Kosovo. In most criminal cases monitored by EULEX, the courts relied on a judicial practice to ensure the expediency of the trial by reading all the previous testimonies in the records. However, the fact that this practice is not explicitly allowed by the law creates legal uncertainty and should be urgently addressed, preferably through legislative action.

Furthermore, practical issues such as the use of video-teleconferencing (VTC) during trials, should be properly regulated by law. To ensure compliance with human-rights standards, restrictions on access to correctional facilities, in particular family visits, should be clearly stipulated in relevant legislation, meet the requirements of necessity and proportionality and be gender-sensitive. The authorities should also consider adopting legislation allowing, when it is safe to do so, for the postponement, suspension, or termination of sentences due to pandemic-related reasons, in particular for vulnerable groups, such as juveniles, and individuals at risk of developing severe COVID-19 symptoms.

Moreover, as the pandemic continues to unfold, it is also essential that all relevant justice and correctional authorities set an example and ensure compliance with the COVID-19 preventive measures, especially in court premises and in the correctional facilities.

One year into the pandemic, Kosovo's justice and correctional services, as well as the recently elected government and the Kosovo Assembly, should take the opportunity to review how the crisis has been managed so far and examine the lessons learned. The authorities should assess the negative impact of the preventive measures, in particular in relation to vulnerable groups, such as for example, victims of gender-based violence, children, the elderly, people with disabilities and poor households.

ASSESSMENT OF SELECTED ASPECTS IN THE JUSTICE SYSTEM

The outbreak of the COVID-19 pandemic compelled many EU Member States to adjust the functioning of their judicial systems to the new circumstances to ensure the fulfilment of the right to health and the protection of the right to life. Depending on their legal system, this was done in a variety of ways: by adopting new laws or amending existing ones; by declaring a state of emergency or issuing related decrees; or by assigning the competence to undertake measures in response to the pandemic to the judicial authorities or the ministries of justice.

In Kosovo, the authorities initially introduced COVID-19 preventive measures applicable to all public institutions, including the courts, by applying existing legislation, and in particular “Law No. 02/L-109 on Combating and Preventing Contagious Diseases and Law No. 04/L-125 on Health”.¹ Later, in August 2020, the Kosovo Assembly adopted a specific law, namely, the “Law on Preventing and Combating the COVID-19 Pandemic in the Territory of the Republic of Kosovo”.² However, while a commendable, necessary and timely initiative, this law only provides a legal basis for the proportionate, necessary and legitimate limitation of freedom of movement and does not address many of the legal issues arising from the pandemic.

While some of the measures pertaining to the functioning of the court and prosecutorial systems were introduced based on the abovementioned laws, the most relevant ones were introduced outside the scope of these laws through separate decisions of the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC).

On 12 March 2020, the KJC issued Decision 52/2020.³ In accordance with this decision and based on the assessment of the presidents of the court and case judges, most judicial activities involving the presence of the public were temporarily restricted, and the public’s access to the court premises was also limited. On 15 March 2020, the KJC issued Decision 53/2020⁴, by which it ordered a substantial reduction of the activities of the KJC and the courts, and limited the work of the court exclusively to *activities of an urgent nature*.

On 14 March 2020, the KPC adopted a decision⁵ to substantially reduce the activities of this body and those of the State Prosecutor’s Office. In accordance with this decision, the Chief State

1 On 11 March 2020, following the confirmation of the first COVID-19 cases in Kosovo, authorities suspended public and private schooling, as well as travel lines to and from high-risk countries and limited public activities and gastronomy activities. On 12 March 2020, the government established a special committee, tasked to manage the prevention of infections and on 13 March 2020 it prohibited travelling to and out of some municipalities. It closed the borders and gastronomy activities and reduced all public and private events to essential participants only. On 15 March 2020, the government declared a public health emergency. On 23 March 2020, with decision 01/15, the government limited the freedom of movement of all people and allowed outdoors activities for only eight hours per day. Exemptions were granted for medical needs, production, supply and sale of essential goods, and for services related to the management of the pandemic.

2 Law No. 07/L-006 on Preventing and Combating the COVID-19 Pandemic in the Territory of the Republic of Kosovo (25.08.2020), <https://gzk.rks-gov.net/ActDetail.aspx?ActID=30819>.

3 KJC Decision No. 52/2020, 12 March 2020, https://www.gjyqesori-rks.org/wp-content/uploads/decisions/13755_Vendimi_Nr_52_2020_Kufizohen_perkohesisht_veprimtarit_gjyqesore.pdf.

4 KJC Decision No. 53/2020, 15 March 2020, https://www.gjyqesori-rks.org/wp-content/uploads/decisions/63168_Vendimi_KGJK-se_Nr.53_2020_per_Masat_parandalimit_infeksionit_nga_Corona_Virusi_SHQ.pdf.

5 KPC Decision Nr. ___/2020 [The decision contains no number], 14 March 2020, <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Vendime/Vendim%20-%20Reduktohen%20esencialisht%20aktivitetet%20n%C3%AB%20kuad%C3%ABr%20t%C3%AB%20K%C3%ABshillit%20Prokurorial%20t%C3%AB%20Kosov%C3%ABs%20dhe%20Prokurorit%20t%C3%AB%20Shtetit.pdf>.

Prosecutor and the Chief Prosecutors were instructed to assign sufficient on-call prosecutors and administrative staff to carry out only activities of an urgent nature and certain other activities in accordance with legal deadlines. For instance, in the first months of the pandemic (March through May 2020), the Kosovo Special Prosecution (SPRK) dealt mainly with requests to initiate or extend investigations of serious suspected crimes, requests to extend or replace detentions on remand, requests to extend less intrusive precautionary measures (e.g. house arrest, reporting to the police), and requests for international legal assistance in urgent cases.

Nearly two months later, following the temporary improvement of the epidemiological situation, the KJC on 8 May 2020 by Decision 83/2020⁶ decided to increase the level of KJC and court activities by authorising them to continue carrying out *activities of urgent nature*, and to resume other activities in which “the presence of the parties and the public is not required in the procedure” (point 3 of Decision 83/2020).

On 29 May 2020, the KJC adopted Decision 85/2020⁷, leading to the immediate resumption of the activities of the KJC and the courts in compliance with COVID-19 prevention measures. Through this decision, judges were required to start handling cases according to the legal priorities and modalities determined by the KJC. The Decision stipulated, for example, that court sessions were to be held without the presence of the public. Decision 85/2020 is still in force.

On the same day, the KPC adopted Decision 244/2020⁸, laying the ground for an increase of the KPC’s and State Prosecutor’s activities as well. By this decision, the KPC stipulated: 1) to increase the work activities of the KPC and State Prosecutor; 2) that the Chief Prosecutors of Prosecution Offices are authorised to coordinate activities for an increased return of the prosecutors in the office premises and the administrative staff to carry out prosecutorial activities; 3) that the General Director of the KPC secretariat and the Director of the Prosecutorial Performance Assessment Unit are authorised to coordinate activities that increase the return of the officers in the office premises within the Secretariat, Units and State Prosecution; and 4) that the full return to work of all employees would be done in coordination with public health institutions in Kosovo.

Furthermore, on 29 May 2020, both the KJC and the KPC adopted their respective Crisis Management Action Plans (hereinafter: KJC and KPC Crisis Plans).⁹

6 KJC Decision No. 83/2020, 8 May 2020, https://www.gjyqesori-rks.org/wp-content/uploads/decisions/57454_Vendimi_KGJK_Nr_83_2020_Shtohet_aktiviteti_punes_se_Keshillit_Gjyqesor_te_Kosoves_dhe_te_gjitha_Gjykatat_vendit..pdf.

7 KJC Decision No. 85/2020, 29 May 2020, https://www.gjyqesori-rks.org/wp-content/uploads/decisions/90277_KGJK_Vendimi_Nr_85_2020_Rifillon_puna_ne_KGJK_dhe_ne_gjykatat_RKS-se.pdf.

8 KPC Decision No. 244/2020, 29 May 2020, <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Vendime/Vendim%20Nr.462.2020%20-%20Shtohen%20aktivitetet%20e%20pun%C3%ABs%20n%C3%AB%20sistemine%20prokurorial.pdf> [Albanian]; <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Vendime/Odluka%20Br.462.2020%20-%20Povecavaju%20se%20aktivnosti.pdf> [Serbian].

9 KJC Decision No. 86/2020, 29 May 2020, Crisis Management Action Plan, https://www.gjyqesori-rks.org/wp-content/uploads/reports/69352_KGJK_Plani_veprimit_per_menaxhimin_krizes.pdf [Albanian]; https://www.gjyqesori-rks.org/wp-content/uploads/reports/48851_KGJK_Plani_veprimit_per_menaxhimin_krizes_SRB.pdf [Serbian]; Kosovo Prosecutorial Council, Crisis Management Action Plan, 29 May 2020, <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Plane%20te%20Punes/Plani%20i%20Veprimit%20p%C3%ABr%20Menaxhimin%20e%20Kriz%C3%ABs.pdf> [Albanian]; <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Plane%20te%20Punes/Akcioni%20Plan%20o%20Upravljanju%20Krize.pdf> [Serbian].

The KPC Crisis Plan outlines principles for dealing with the crisis and steps to be taken in order to protect the prosecutorial system. It has three core elements: a) creating Central and Regional Crisis Management Teams; b) protecting critical services and work processes; and c) strengthening communication and coordination. The KPC Crisis Plan itself does not provide any legal instructions on: prioritisation of the cases/urgent cases, dealing with investigations, possible suspension of investigations and other related legal issues created by the pandemic. The authority to deal with the crises and to issue legal decisions rests with the Central and Regional Crisis Management Teams.

In May 2020, the KPC published the *Provisional Guide for Protection from COVID-19 in the Kosovo Prosecutorial System*,¹⁰ providing instructions on safety and health protocols.

The KJC Crisis Plan establishes bodies at central (KJC) and local (court) levels which are in charge of managing the crisis, in three stages of operations.

Stage 1 (complete lockdown): Only urgent cases are held, including cases that may reach statutory limitations, as well as other activities that are identified as essential; courts are closed for work with parties, except for urgent cases as listed above; where technical conditions are met, hearings can be held through video or teleconferencing (VTC); court presidents, with the consent of the KJC, may decide to hold hearings in other facilities if the court is not accessible, safe or sufficiently spacious; all urgent cases must be treated within a reasonable time; depending on circumstances, the possibility of holding hearings through VTC or phone calls, without the presence of the parties and other members of the public, should be considered. If all the above options are not possible, then hearings will be held in the courtroom, while respecting the COVID-19 preventive measures. The court ensures that VTC hearings are recorded.

Stage 2 (moderate measures): During this stage restriction measures are reviewed and the work involving parties is gradually resumed. In coordination with the KJC, the presidents of the courts decide individually whether to increase the number of services for any person. Courts continue to have VTC hearings when possible. When not possible, the hearings are held in the courtrooms. In such cases, all protocols must be respected, including limiting public access to the court. The presence of citizens is limited and must be based on court summons, or the existence of a prior agreement. Citizens are required to sign a statement by which they declare that they have had no contact with infected persons; physical distance must be ensured; parties are prevented from entering the court without masks; courtrooms must be reorganised and marked to maintain physical distance; the number of parties that can enter the court should be limited.

Stage 3 (functioning of the judiciary with increased caution): This refers to the stage where the freedom of movement of the citizens is not restricted, but the risk of infection cannot be ruled out completely and increased caution is still required. During this stage all staff return to work. The judiciary returns to its full capacity, drafting strategies to treat the cases that have not been dealt with during the two initial stages. Hearings through VTC continue when possible, whereas hearings in courtrooms are held with increased caution

¹⁰ Kosovo Prosecutorial Council, *Provisional Guide for Protection by COVID-19 in the Kosovo Prosecutorial System*, May 2020, <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Provisional%20guide%20for%20protection%20by%20Covid19%20in%20the%20Kosovo%20prosecutorial%20system.pdf>.

as in the previous two stages. Based on the recommendations of the relevant institutions, the space available and other relevant conditions, The courts themselves decide on the number of persons allowed to be present in the hearings/courtrooms. The courts are also to ensure that the safety protocols are implemented, including (among others): by limiting the presence of citizens in the courts based on the court summons or the existence of a prior agreement; by requesting that citizens sign a statement attesting that they had no contact with infected persons; by ensuring physical distance; by preventing parties from entering the court without masks; by reorganising and marking the courtroom to maintain social physical distance; by limiting the number of parties that can enter in court, and by other sanitary and hygienic means.

The KJC was acting in accordance with the decisions and recommendations issued by the government and the National Institute of Public Health of Kosovo (NIPHK). These recommendations were valid for a period of two weeks and periodically reviewed. The Government of Kosovo categorised all municipalities into three groups according to the degree of risk of COVID-19 infections (i.e. low risk, medium risk, and high risk). Depending on this categorisation, it was recommended that concrete actions be taken by public institutions.

To that end, considering that the situation with the pandemic differed across Kosovo over time (with different numbers of infections in each municipality and thus a different level of risk), the KJC decided that the court workload should be organised in cooperation with the respective court presidents. In line with the periodic risk categorisation of each region of Kosovo (low, medium or high), the functioning of the respective courts was organised in accordance with the recommendations provided by the NIPHK for each risk group of municipalities. The KJC instructed court presidents to implement the Crisis Management Action Plan in line with the recommendations provided by the NIPHK. Each court would implement the activities and measures foreseen in each stage of operations (complete lockdown, moderate measures, and increased caution) as per the KJC Plan, which corresponds to the risk level of the area where each court is located.

The sections below provide an assessment of some of the most important measures described above in light of applicable human-rights standards, as well as some recommendations to the relevant institutions.

The identification of urgent cases

Like in all countries resorting to significant reductions in the work of public institutions to limit the spread of the virus, in mid-March 2020 the imposition of the lockdown in Kosovo raised the question of which court activities could be suspended and which should continue in order to avoid irreparable harm.

On 15 March 2020, by Decision 53/2020, the KJC defined activities/cases of urgent nature as: *'Measures to ensure the presence of defendants in criminal proceedings - detention or other measures, cases of domestic violence, other measures, as well as other urgent cases which may eventually arise'* (point II of the decision).

In June 2020, following the adoption by the KJC of the 'Crisis Plan' mentioned above, cases at imminent risk of expiry of statute of limitations were also included among activities deemed as "urgent".

Overall, the identification of urgent activities by the KJC followed the best practices adopted in many European countries.¹¹ Some of these countries included among activities they deemed “urgent” the proceedings instigated to challenge sanctions for violations of the lockdown rules. This category of proceedings is not explicitly listed among the “urgent activities” in Kosovo. However, the formulation of point II of Decision 53/2020 entrusts courts in Kosovo with a margin of discretion in the identification of “urgent activities”, in addition to those explicitly listed.

Recommendation:

- The approach adopted by the KJC identifying a number of specific activities deemed as “urgent” but, at the same time, leaving a margin of discretion to judges in determining other urgent activities is to be commended. EULEX encourages courts to use this discretion wisely and in line with human rights standards, so as to prioritize activities which would, if neglected, cause irreparable harm, in particular to vulnerable individuals or groups.

The publicity of hearings

Worldwide, the pandemic created serious challenges in terms of upholding the right to a fair trial, and in particular the public nature of the hearings.

The publicity of hearings is an essential component of the right to a fair trial, a right which is solidly recognised in the Kosovo legal system by virtue of specific provisions in the Kosovo Constitution, particularly: Article 31 (Right to Fair and Impartial Trial) and Article 22 (Direct Applicability of International Agreements and Instruments). The latter article gives direct applicability to the rights stipulated, among others, in the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR), which include provisions on the right to a fair trial, respectively under Article 6 and Article 14.¹² In line with above mentioned provisions, the requirement to hold a public hearing is subject to limited exceptions, namely: *public order, national security, the interests of minors or the privacy of parties in the process and morals*.

11 See for some examples: ‘OSCE Primer Functioning of Courts in the COVID-19 pandemic’, <https://www.osce.org/odihr/469170>.

12 Article 6 of the European Convention on Human Rights reads under paragraph one: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

Similarly, Article 14 of the ICCPR reads under paragraph one: “[...] The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

General Comment no. 32 on Article 14 of the ICCPR of the UN Human Rights Committee clarifies the importance of the publicity of hearings with the following observation: “All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large [...]”.

The European Court of Human Rights in its jurisprudence has stated that “[...] the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby

In Kosovo, the publicity of hearings is further upheld by Article 293¹³ of the Criminal Procedure Code (CPC).¹⁴ Article 294 of the CPC, on the other hand, specifies the circumstances which may prompt the court to exclude the public, if deemed necessary, on the motion of the parties or *ex officio*.¹⁵

Under international and domestic law applicable in Kosovo, there is no specific provision that would authorise the court to exclude the public from hearings in case of a public health emergency such as a pandemic. Therefore, a complete ban on public access to the courtroom due to COVID-19 could be deemed as a substantial violation of procedural law and could ultimately lead to the annulment of the judgement (Article 384 CPC).

While KJC Decision 85/2020, dated 29 May 2020, essentially states that public hearings without the presence of the public are allowed, the KJC Crisis Plan clarified that, in all stages, courts will continue to have VTC hearings, where possible, and when not possible the hearings will be held in the courtroom in compliance with COVID-19 protocols and limiting public access to the court. According to the Crisis Plan, the presence of citizens in the court premises is limited, based on court summons or the existence of a prior agreement.

Based on Article 293 of the CPC, the main trial shall be held in open court. In the introductory part of the records of the main trial, among others, the court is obliged to indicate whether the main trial was public or the public was excluded (Article 318 CPC). The public may be excluded for reasons provided by Article 294 of the CPC. The exclusion of the public does not apply to the parties, defense, injured parties and their representatives, except under conditions of protection of the injured parties/witnesses. The judge may grant permission for certain categories: officials, academics, public figures and, on the request of the accused, also the spouse/partner and her/his close relative to attend the trial which is not open to the public (Article 295 CPC). The judge (or the trial panel) is obliged to render a reasoned ruling for the exclusion of the public. Such a ruling can be challenged only with appeal against the judgement. If the judge (or the trial panel) does not issue a ruling on exclusion, this constitutes a substantial violation of the CPC, which is a lawful ground to challenge a judgement.

Throughout the period covered by this report, EULEX and other court monitors were regularly allowed to attend hearings, even if they were closed to the public, either due to the pandemic or other reasons stipulated by the CPC. On certain occasions, presiding judges asked NGOs monitoring hearings to reduce the number of their representatives in courtrooms (e.g. the number of interns

confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society’.

13 Article 293 CPC: Publicity of the main trial 1. The main trial shall be held in open court. 2. The main trial may be attended by the adults. 3. No arms or dangerous instruments are allowed inside the courtroom except for police officers guarding the accused who are authorized by the single trial judge, presiding trial judge or president of the court.

14 Criminal No. 04/L-123 Procedure Code, 13 December 2012, <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2861>.

15 Article 294 CPC: Public May be Excluded 1. At any time from the beginning until the end of the main trial, the single trial judge or trial panel may exclude on the motion of the parties or *ex officio*, but always after it has heard the parties, the public from the whole or part of the main trial if this is necessary for: 1.1. Protecting official secrets; 1.2. Maintaining the confidentiality of information which would be jeopardized by a public hearing; 1.3. Maintaining law and order; 1.4. Protecting the personal or family life of the accused, the injured party or of other participants in the proceedings; 1.5. Protecting the interests of children; or 1.6. Protecting injured parties, cooperative witnesses and witnesses as provided for in Chapter XIII of the present Code.

attending) in order to comply with the social distancing regulations during the pandemic. Also, in certain instances, especially during the lockdown period from March to June 2020, members of the public (including family members) were not allowed to be present at hearings due to COVID-19 restrictions. However, since the implementation of the KJC Crisis Plan and the reopening of the courts in early June 2020, EULEX has not received any complaints by members of the public with respect to being refused entry in the courtrooms during sessions. Neither did EULEX observe any major issues or patterns regarding constant exclusion of members of the public from trials. EULEX also observed wide and unhindered presence of media inside courtrooms in hearings of high-profile and other cases attracting public interest.

However, on several occasions, the increased presence of the public resulted in overcrowded courtrooms where it was impossible to implement any protocols or measures to contain the spread of COVID-19.

Recommendations:

- In order to ensure respect for the principle of ‘publicity’, courts must continue to provide adequate facilities for the attendance of interested members of the public. While measures to limit the numbers of people physically present in the courtroom may be deemed necessary and proportionate to prevent the spreading of the virus, it is important that these provisions are not interpreted in a way that for all practical purposes prevents the publicity of trials;
- Court presidents and judges should make arrangements and plan better in advance for the best use of court premises and courtrooms in particular to avoid small court rooms being used for trials involving large numbers of participants and large premises being used for trials with fewer participants;
- Presiding judges should proactively ensure that members of the public are allowed to attend hearings while also ensuring that social distancing and other protective measures are respected;
- Should the need to limit public presence in courtrooms arise, in light of COVID-19 restrictions, presiding judges should ensure nonetheless that members of the public, who wish to attend hearings in their private capacity, are not automatically precluded from doing so.

Compliance with COVID-19 protocols: ensuring publicity and safety of trials

In accordance with the KJC Crisis Plan of June 2020, the spreading of the COVID-19 virus in the court premises, including in the courtrooms, has to be prevented by limiting public access as described above, and also through the implementation of additional measures. Citizens are required to sign a statement confirming that they had no contact with infected persons; physical distance must be respected; entry in the court premises without a mask is forbidden; courtrooms must be reorganised including in terms of seating arrangements, and social physical distance must be maintained.

In-person monitoring in courtrooms throughout Kosovo of cases by EULEX in the period from 3 June to 13 July 2020 and from 12 October 2020 to 10 January 2021, and from 25 January 2021 onwards revealed a concerning pattern of disregard of the COVID-19 prevention protocols.

Overall information on the rules that the public must comply with while in the court premises appeared insufficient, and the number of disinfectant dispensers made available throughout the premises of the courts was also inadequate. EULEX did not observe the distribution by court personnel of any masks or leaflets for the public and observed that a significant proportion of the public was not wearing a mask or was wearing it incorrectly. Furthermore, EULEX did not observe any members of the public being asked to sign a statement confirming that they had not been in contact with infected persons.

During the sessions, EULEX observed that some trial panels or single judges tried to disperse the public within the courtroom to facilitate safe distancing. However, once outside the premises of the courts, people tended to crowd together and lower or remove their masks. There were also no breaks in the proceedings to allow the courtrooms to be ventilated or proper ventilation during the sessions.

The failure to implement protocols becomes particularly problematic in cases with high numbers of defendants. EULEX noticed that when sessions were hosted in larger courtrooms the distancing between the parties was relatively easy to maintain, although there were many instances in which the panels failed to make any such announcement to the parties. The situation was complicated by scheduling sessions in smaller courtrooms despite the large number of defendants, rendering physical distancing impossible. EULEX also noticed that in case of high-profile defendants the presiding judges appeared reluctant to request that the attendants wear masks or did not do so at all. It should be noted, however, that all defendants in detention were provided with masks during the hearings.

Court sessions often began later than scheduled, which increased the time parties and the public had to spend in the premises of the courts. Planning of use of the courtrooms was also not adequate in many courts. EULEX observed proceedings with one defendant scheduled in large courtrooms, while cases with as many as 15 defendants were scheduled in smaller courtrooms.

Regrettably, even members of the trial panels were inconsistent or less strict in the way they were wearing masks in court.

Recommendations:

- Judges and court staff should request and ensure the use of masks and social distancing, especially in the courtrooms;
- Courtrooms should be frequently ventilated;
- Signs displaying protection measures should be visible and hand disinfectant available at all times in the premises of courts;
- Allocation of courtrooms should take into consideration the anticipated number of persons to be present at the trials (defendants, lawyers, witnesses, injured parties, members of the public, etc.);
- Court staff should proactively inform the parties and the public about a realistic time of the start of the hearings and prevent access to the waiting areas until the hearings are initiated and/or unnecessary presence at the court premises.

Use of video-teleconferencing (VTC)

Across Europe, authorities in many countries use video-teleconferencing (VTC) to conduct hearings remotely. Resorting to this type of hearings is dependent on the one hand on the existence of a legal basis allowing it, and on the other on the availability of the necessary technological means.

Currently, the CPC specifically permits the holding of VTC during hearings, in cases of Special Investigative Opportunities (Article 149 CPC) and in cases where protective measures are ordered (Article 222, para. 1.3 CPC). Additionally, the CPC allows the submission of documents to the court registries through electronic means (Article 442 CPC). However, the CPC does not authorise the holding of a VTC for detention hearings, although the KJC Crisis Plan for the pandemic allows the holding of a VTC in *urgent cases*. Based on EULEX monitoring, and also conversations with several court presidents, courts have mostly limited the use of online hearings to civil cases, while they have been reluctant to use VTC means in criminal cases due to the lack of technological means and also because of concerns in relation to privacy or integrity of online sessions (e.g. possibility of intrusions) as well as the administration of evidence in online hearings.

Recommendations:

- The use of VTC should be properly regulated by law;
- Although not specifically provided for by the CPC, the presence of the public could also be ensured through technological means. This could be implemented by providing a video link to the public and media, or by providing TV monitors in separate spaces in the courtroom. In the absence of a concrete regulation for this matter, it is advisable to regulate this matter by law.

The application of the “three-month rule”

Human rights standards applicable to the criminal justice system require authorities, among other things, to ensure the right to a fair trial, the right to judicial control over any deprivation of liberty, and the right to an effective remedy.

In order to continue fulfilling the key functions deriving from these obligations during periods of total or partial lockdowns of the institutions, many states in Europe and elsewhere suspended or extended procedural deadlines and instructed courts to prioritise certain cases. The Kosovo authorities did identify *urgent activities* as illustrated above, but did not immediately address a number of issues arising from the ongoing procedural deadlines.

During the institutional COVID-19 lockdown period from 14 March until 1 June 2020, EULEX noticed that issues arising from the application of the so-called “three-month rule” remained unaddressed, although the issue was raised repeatedly in meetings with the Kosovo Judicial Council as well as senior government officials starting end of April 2020,

According to Article 311, para. 3 and Article 312, para. 3 CPC: “[...], *the main trial shall recommence from the beginning and all the evidence shall be examined again [if the main trial has been adjourned for more than three (3) months].*”

Nevertheless, EULEX monitoring revealed that in most cases this provision did not have an impact on the course of the proceedings because of a common judicial practice: in the first trial session after three months of inactivity, the parties can agree to have all evidence presented in previous hearings considered as “read” while also inserting a relevant entry into the trial minutes. However, the Criminal Procedure Code (CPC) does not allow this practice explicitly. Thus, there is always a possibility that judgements will be challenged at a later stage of the proceedings on procedural grounds. In short, there is a lack of legal certainty as to the consequences of the three-month rule, which should be urgently addressed, preferably through legislative action.

Recommendation:

- The matter of the “three-month rule” should be urgently regulated by law in order to ensure legal certainty. It is to be noted that the current draft CPC stipulates that instead of three months, six months would have to pass between two hearings before the trial would have to recommence. Importantly, it also specifically allows considering testimonies as read after the passing of these six months, which would contribute to increased legal certainty.

ASSESSMENT OF SELECTED ISSUES IN THE CORRECTIONAL SYSTEM

In the context of the COVID-19 pandemic, the specific vulnerability of people confined in correctional institutions was identified at an early stage as a matter to be urgently addressed by the relevant Kosovo authorities. As pointed out in March 2020 by the World Health Organization (WHO): “People deprived of their liberty, such as people in prisons and other places of detention, are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time”.¹⁶ Another factor to be taken into consideration is that prisoners are generally less healthy than the overall population, which might result in more severe complications should they contract the virus.

Under international and Kosovo law, the authorities have a duty to take steps to protect the life and health of individuals deprived of liberty. The European Court of Human Rights has ruled specifically that authorities have a positive obligation to prevent the spreading of contagious diseases for people deprived of liberty. The European Prison Rules of the Council of Europe, which contain essential legal standards and principles on the management of prisons, state that “prison authorities shall safeguard the health of all prisoners in their care” (Rule 39). These obligations on the part of the authorities derive from the fact that prisoners can only rely on such authorities to promote and protect their health and therefore this duty of care is of critical importance.¹⁷

At the early stages of the outbreak of the pandemic, the Council of Europe Committee for the Prevention of Torture (CPT) on 20 March 2020 issued the *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic* (hereinafter: CPT Principles).¹⁸ The principles acknowledge the imperative of combating COVID-19 in places of deprivation of liberty, while at the same time reminding the authorities that preventive measures should never result in inhuman or degrading treatment or punishment.

The essence of the difficult balancing exercise that the authorities are called to implement is best illustrated by the combined reading of CPT Principle 1 and Principle 4, which state that: “The basic principle must be to take all possible action to protect the health and safety of all persons deprived of their liberty. Taking such action also contributes to preserving the health and safety of staff.” (CPT Principle 1) and also that: “Any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time. Persons deprived of their liberty should receive comprehensive information, in a language they understand, about any such measures.” (CPT Principle 4)

16 WHO, Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim Guidance 15 March 2020, p. 2.

17 European Prison Rules, Rule 39: Prison authorities shall safeguard the health of all prisoners in their care. Rule 40.2 Health policy in prisons shall be integrated into, and compatible with, national health policy. Rule 40.3 Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation. Rule 40.4 Medical services in prison shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer.

18 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf (2020)13, 20 March 2020, <https://rm.coe.int/16809cfa4b>.

The CPT Principles provide a useful framework for assessing the effectiveness of the Kosovo Correctional Service (KCS) and other relevant authorities' responses to the pandemic as well as its adherence to human rights standards.

As pointed out by the CPT, the imposition of preventive measures should always be balanced against other rights and should never result in an unlawful or disproportionate compression of these rights. The paragraphs below provide some considerations with regard to the limitations imposed on the rights of prisoners and detainees.

The following sections will assess the effectiveness of the KCS preventive measures and the impact of the pandemic on issues such as family visits, access of the Ombudsperson and access to lawyers, as well as other issues.

The application of the COVID-19 preventive measures in the Kosovo correctional facilities

Kosovo authorities recognised early on the need to make preparations to prevent an outbreak of the pandemic in the correctional facilities. Consultations on the measures to be taken between the Ministry of Justice (MoJ), KCS and the Ministry of Health (MoH) were already ongoing in January and February 2020, prompted by the rising number of COVID-19 cases worldwide. On 11 March 2020, the same day as the first measures adopted by the Kosovo Government entered into force, the KCS, in cooperation with the MoH Prison Health Care Department and the MoJ, adopted an Operational Plan (OP) titled '*Operation Plan - Increase of security measures due to Corona virus spreading or in events of any reported cases of infections*'.¹⁹

The OP entrusts the responsibility for implementing the measures to the management of the different correctional institutions. The measures adopted were diverse in nature and ranged from increasing standards of hygiene in the premises and the frequency of health check-ups for prisoners and staff, to suspending visits of family members and creating spaces for quarantine for prisoners returning from court premises or hospital visits.²⁰ By the decision of 13 March 2020, the work of prisoners outside the correctional institutions was also suspended.

The OP was complemented by additional measures adopted on 16 March 2020, adding among other matters, the obligation for all prisoners re-entering or being admitted to the facilities,

¹⁹ On 11 March 2020, the prison population amounted to 1755 persons (1282 convicted and 473 detained), of which 42 were in the Lipjan/Lipljan Female Correctional Center and 44 + 16 (44 juveniles sentenced, detained or under educational measure and 16 adult prisoners) were in the Lipjan/Lipljan Correctional Center. As of 31 December 2020, the prison population amounted to 1398 persons (1014 convicted and 384 detained), of which 35 were in the Lipjan/Lipljan Female Correctional Center and 39 + 9 (39 juveniles sentenced, detained or under educational measure and 15 adult prisoners) were in the Lipjan/Lipljan Correctional Center (source: OP).

²⁰ Measures contemplated in the OP were: Banning of family visits to prisoner from 12 March until 27 March 2020; possibility for more phone calls for prisoners; installation of Skype communication in correctional facilities; Temporary suspension of weekend leaves (home leaves); Banning of internal (between facilities) transfers of prisoners; Banning of movements outside institutions such as humanitarian visits, medical check-ups, except in emergency situations; Reducing or temporarily banning court sessions for detainees (in coordination with relevant courts); Directors of institutions shall increase security measures in terms of additional personnel, manning watchtowers 24 /7; Intervention Units in Dubrava CC, HSP and other centres to be on standby; Escort Unit to be on standby 24 hours a day; Initiation of the procedure for suspension of execution of sentence for prisoners with serious illness; Disinfection, pest control and disinfection of all residential areas and prison facilities. Providing staff in admission with sterile masks and gloves; Continuous examination of staff by doctors in Correctional/Detention Centers (with the consent of the prison health department); Continuous examination of prisoners/detainees with infectious symptoms; Supply of prisoners inside prisons with hygiene material such as: shampoo, soap and hand sanitiser; Assessment of risk within prisons/detention centres, identifying persons who are prone to riots or organising riots and dispersing panic; Strict control of food preparation by kitchen staff; Daily check of food by medical staff.

to be placed in quarantine for either seven or 14 days. On 6 April 2020 and 10 October 2020 respectively, Operational Orders were adopted to ease restrictions, while on 4 November 2020 an Operational Order was adopted aimed at again increasing security measures. On 21 December 2020 the KCS issued an Operational Order for easing the ban for family visits and reinstating weekend leave privileges starting from 28 December 2020. However, on 8 January 2021 the KCS issued again a temporary halt on weekend leave (home leave) privileges due to the increasing number of COVID-19 cases in Kosovo. Family visits were allowed to continue, however only one adult visitor was permitted at a time with safeguards in place.

On 22 February 2021 the KCS issued another Operational Order easing the restriction in reference to family visits starting from 23 February 2021, allowing two adults and two children at a time to visit prisoners while maintaining safeguards during this visit.

Although initially the KCS experienced difficulties in supplying all facilities with a sufficient number of masks due to complicated procurement procedures, and had to rely on donations, it succeeded in becoming self-sufficient rather rapidly by producing its own masks for all KCS facilities at the Lipjan/Lipljan Correctional Center for Women, where sewing machines were already available.

Overall, EULEX's direct observation of the implementation of the preventive measures in the correctional facilities revealed a generally high level of compliance, such as temperature measurements upon entry to the facilities, improved hygiene, general respect of social distancing instructions (when possible in detention surroundings), adequate quarantine spaces and strict implementation of them, availability of disinfectants, wearing of masks by most staff members, release of risk category staff members from duty and release of infected staff members from duty until obtaining negative COVID-19 tests.

However, on some occasions, EULEX monitors observed that, due mainly to poor material conditions, especially in older facilities, the KCS experienced difficulties in enhancing the hygienic conditions, despite additional efforts and social distancing. The Mission also observed that some staff members working with prisoners were not wearing masks. Moreover, on certain occasions, inmates complained about the loose implementation of protective measures with respect to COVID-19.

By the end of March 2021, the number of KCS staff infected with COVID-19 since the outbreak of the pandemic in March 2020 was 223, while the number of prisoners infected was 46, out of which four died. Overall, preventive measures put in place by the Kosovo authorities appear to have led to a relatively low number of infections registered among KCS staff and prisoners.

Recommendation:

- The KCS middle and senior management should rigorously enforce COVID-19 preventive measures in all of the KCS facilities, including the correct usage of face coverings.

Interruption of family visits

The importance of respecting human dignity, as well as the principles of legality, necessity and proportionality of any restrictions to the rights of inmates are clearly reflected in relevant Kosovo legislation.²¹

²¹ The Criminal Code (CC) requires that during the execution of a punishment, the convicted person shall not be subjected to inhuman or degrading treatment or punishment (Article 88). The rights of a convicted person shall always be respected and may only be limited to the extent necessary and in compliance with the law and international human rights standards (Article 89). The same standards are required by Article 5 of the Law on Execution of Penal Sanctions (LEPS), which stipulates that penal sanctions shall be executed in such a way as to assure humanity of

The OP from 11 March 2020 foresaw the banning of all family visits to all facilities, including those for women and juveniles, without exception from 12 to 27 March 2020. The measure was announced to the public on 12 March 2020, through posts on the KCS website in Albanian, through Facebook (also only in Albanian) and through interviews to the media given by the senior management of the KCS.²² Information in Serbian was not provided to the public which is contrary to Kosovo law. As a compensation for the banning of in-person family contacts, Skype communication was introduced progressively in all correctional facilities, in line with the CPT Statement of Principles, Principle 7.²³

Family visits and spending time in the special premises²⁴, resumed from 1 June 2020 until 11 July 2020 (with one close family member per time), then were suspended from 11 July until 24 August 2020, resumed from 24 August and later were interrupted again as of 21 October 2020. They later resumed on 28 December 2020 with one family member per prisoner and were further eased from 23 February 2021, allowing visits by two adults and two children. On 3 April 2021, however, the number of visitors was again limited to one close family member on the basis of the increasing number of COVID-19 cases in Kosovo and for the purpose of preventing the spread of the pandemic and protecting the health of prisoners and staff in correctional institutions.

The right of prisoners, both convicted and detained, to maintain meaningful contact with their close family is clearly recognised by the jurisprudence of the European Court of Human Rights as being part of every individual's right to privacy and family life under Article 8 of the European Convention on Human Rights.²⁵ It is also solidly codified in Kosovo legislation. According to Article 62, para. 1 of the Law on Execution of Penal Sanctions (LEPS), "*a convicted person shall*

treatment and respect for the dignity of each individual. The convicted person shall not be subject to torture or to inhuman or degrading treatment or punishment (para.1). During the execution of a penal sanction, the rights of the convicted person shall always be respected and may be restricted only to the extent necessary for the execution of the penal sanction, in compliance with the applicable law and international human rights standards (para. 4).

Juvenile Justice Code (JCC), in Article 4 para. 6 requires that, every juvenile deprived of liberty shall be treated with humanity for the inherent dignity of the human person, and in a manner which takes into consideration the personal needs of his age. Similar standards are required for detainees. According to Article 194 of the Criminal Procedure Code, the detainee must be treated in a humane manner and her or his physical and mental health must be protected.

- 22 Kosovo Correctional Service, Notification, 12 March 2020, https://shkk.rks-gov.net/al/lajmi_single/2810; Kosova Press, Bie numri I të burgosurve dhe paraburgosurve, shkak pandemia, August 2020, <https://kosovapress.com/bie-numri-i-te-burgosurve-dhe-paraburgosurve-shkak-pandemia/>; Office of the President, The President talks with the heads of the justice institutions to prevent the spread of the pandemic in prisons, 15 April 2020, <https://president-ksgov.net/en/news/the-president-talks-with-the-heads-of-the-justice-institutions-to-prevent-the-spread-of-the-pandemic-in-prisons>; Front Online, ShKK: Asnjë i burgosur nuk është prekur me Covid-19, 9 June 2020, <https://frontonline.net/shkk-asnje-i-burgosur-nuk-eshte-prekur-me-covid-19/>; Ekonomia Online, 11 April 2020, [Bie për 100 numri i të burgosurve, të arrestuarit s'janë testuar për Coronavirus | Ekonomia Online](https://ekonomia.com/gjate-pandemise-ka-rene-numri-i-te-burgosurve-te-arrestuarit-nuk-jane-testuar-per-covid-19/); Telegrafi, Gjatë pandemisë ka rënë numri i të burgosurve, të arrestuarit nuk janë testuar për COVID-19, April 2020, <https://telegrafi.com/gjate-pandemise-ka-rene-numri-te-burgosurve-te-arrestuarit-nuk-jane-testuar-per-covid-19/amp/>.
- 23 Principle 7: While it is legitimate and reasonable to suspend nonessential activities, the fundamental rights of detained persons during the pandemic must be fully respected. This includes in particular the right to maintain adequate personal hygiene (including access to hot water and soap) and the right of daily access to the open air (of at least one hour). Further, any restrictions on contact with the outside world, including visits, should be compensated for by increased access to alternative means of communication (such as telephone or Voice-over Internet-Protocol communication).
- 24 Law on Execution of Penal Sanctions, Article 65: "Spending time in special premises": Par.1: A convicted person has the right to spend time with his or her spouse and children at least once every three (3) months for minimum of three (3) hours. Par. 2: Time, duration, the manner of visits, nature of visits and spending time in special bars shall be regulated with a secondary legislation on domestic order.
- 25 For a comprehensive overview of international law and practice on this matter see: KHOROSHENKO v. RUSSIA [GC] no. [41418/04](https://www.echr.coe.int/ViewDoc.aspx?id=41418/04), § 58-84.

have the right to receive a visit at least once each month for a minimum of one (1) hour by his or her spouse, child, adopted child, parent, adoptive parent and other relatives by blood in a direct line or in a collateral line to the fourth degree".²⁶ According to Article 62, para. 6 of LEPS, issues related to the procedures, security and the conditions under which visits may be refused or suspended shall be regulated with secondary legislation. In addition, a convicted person has the right to spend time in special premises²⁷ with his or her spouse at least once every three months for a minimum of three hours.²⁸

Detained persons also have a right to family visits. According to Article 200 of the Criminal Procedure Code, with the permission of the judge, a detainee may receive visits from close relatives. However, visits can be prohibited if they might be harmful to the conduct of the proceedings.²⁹ In case of refusal by the judge, the detainee has the right to appeal to the Review Panel.

As far as juveniles are concerned, based on Article 4, para. 6 of the Juvenile Justice Code (JJC), every juvenile has the right to maintain contact with their family.³⁰ Based on Article 88 of the JJC, a juvenile shall have the right to receive a visit at least once a week for a minimum of one hour by their family. They also have the right to receive a visit at least once per month by other persons, who will not have a negative influence on execution of the measure. The director of the educational-correctional institution has the authority to prohibit visits for justified reasons in accordance with a sub-legal act issued by the Ministry of Justice.³¹ According to Article 39, para. 9 of the Administrative Instruction 07/2015 on House Rules in Correctional Institutions (House Rules),³² if the convict or visitor disrupts discipline, safety and security, the supervising officer may interrupt such visits.

From 01 December 2020 MoJ Administrative Instruction No.09/2020 on prohibition of visits for justifiable causes entered into force, According to this Instruction, the Director of the Correctional Institution, in case of epidemics in Kosovo, and in order to prevent the spread of diseases may temporarily prohibit all visits for juveniles in open and semi-open correctional educational centres.

26 Article 62 LEPS, para 6: Issues regarding the screening of visitors of convicted persons, security during visits, the procedures for specific categories of visitors and the conditions under which visits may be refused or suspended by the director of the correctional facility for security and safety reasons shall be regulated with a secondary legislation on domestic order. <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=8867>.

27 Article 65 LEPS, para 1: A convicted person has the right to spend time with her or his spouse and children at least once every three (3) months for minimum of three (3) hours. <https://gzk.rksgov.net/ActDocumentDetail.aspx?ActID=8867>.

28 Time, duration, the manner of visits, nature of visits and spending time in special bars shall be regulated with a secondary legislation on domestic order.

29 Article 200 CPC, para 1: With the permission of the pre-trial judge, single trial judge or presiding trial judge and under her or his supervision or the supervision of someone appointed by such judge, the detainee on remand may receive visits from close relatives and, upon her or his request, from a doctor or other persons, within the limits of the rules of the detention facility. Certain visits may be prohibited if they might be harmful to the conduct of the proceedings.

30 Article 4 JJC: Every juvenile deprived of liberty shall be treated with humanity for the inherent dignity of the human person, and in a manner which takes into consideration the personal needs of his age. In particular, every juvenile deprived of liberty shall be separated from adults unless it is considered in the best interest of the child not to do so and shall have the right to maintain contact with his family through the correspondence and visits, save in exceptional circumstances as defined by Law.

31 Article 88 JJC para 1. A juvenile shall have the right to receive a visit at least once a week for a minimum of one (1) hour by his parent, adoptive parent, guardian, spouse, child, adopted child, and other relatives by blood in a direct line or in a collateral line to the fourth degree.

Para 2. A juvenile shall have the right to receive a visit at least once per month by other persons who will not have a negative influence on execution of the measure.

Para 3. The director of the educational-correctional institution has the authority to prohibit visits for justified reasons in accordance with a sub-legal act issued by the Ministry of Justice.

32 Ministry of Justice, Administrative Instruction MoJ-No.07/2015 on house rules in correctional institutions, signed by the Minister of Justice, date 14.07.2015, <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=10993>.

In its March 2020 Statement of Principles, the CPT stressed that “[a]ny restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time. Persons deprived of their liberty should receive comprehensive information, in a language they understand, about any such measures”. (Principle 4)

Principle 4 of the CPT statement cites four cardinal principles that restrictive measures such as those for family visits must meet: legality, necessity, proportionality and limited duration.

EULEX observed that none of the adopted Operational Plans or Orders mention the legal basis upon which they are adopted and do not make reference to Article 39 of the AI/House Rules³³ which stipulates that: “In case of epidemic illness the Director of correctional institution may temporarily prohibit all visits until a final decision is taken by the General Director of Correctional Service. Convicted persons will be able to inform their families about the prohibition of visits with expenses of the correctional institution (para.6)”. “In case of possible epidemics, the measures against the epidemic shall apply, and the processing of contacts according to the recommendations of the professional medical group established by the Ministry of Health (para. 7)”. The Mission further notes that the right to family visits is stipulated by law and that to meet the principle of legality, their restriction should be clearly based on Kosovo legislation. This would also be important to ensure transparency and legal certainty.

As far as the aspects of necessity and proportionality are concerned, while EULEX recognize that the authorities continuously assessed the situation with a view to lifting the measures as soon as feasible, the Mission notes that, in order to comply with the principle of necessity and proportionality, a case-by-case approach taking into account the specific situation in each facility would have been more appropriate, especially after the initial period of lockdown. Indeed, the principle of necessity and proportionality requires the authorities to continuously assess the situation as the circumstances evolve over time and to adopt the least restrictive measures.

The principles of necessity and proportionality should have been applied even more stringently in the case of juvenile inmates, while the authorities opted for applying the same measures also for facilities hosting them, despite the fact that juveniles are accorded more frequent visits in accordance with the law.³⁴ However, EULEX considers that the article should be interpreted in its entirety, respectively the right to prohibit certain visits for certain juvenile for justifiable reasons, but not as an authorisation to prohibit all visits for all juveniles. Finally, no special arrangements were provided for female prisoners with children.³⁵

Recommendations:

- Provide a sound legal basis for the restrictions to prisoners’ rights;
- Ensure dissemination of information in all Kosovo official languages;
- Introduce a case-by-case approach that takes into account the specific conditions of each facility;

³³ [As above.](#)

³⁴ Based on Article 4 para. 6 and Article 88 JJC, juveniles are entitled to visits for at least one hour per week as opposed to the regular regime of one hour per month for adults.

³⁵ Article 62 para. 4 LEPS: Special rules shall apply to visits to convicted mothers by their children which shall take place on a more regular basis.

- Allow for exceptions and special arrangements for specific categories of inmates such as juveniles and female prisoners with children, as well as for vulnerable individuals (older persons and persons with pre-existing medical conditions);
- Ensure that restrictions, measures, and operational orders/plans are gender-sensitive and gender-mainstreamed.

Temporary suspension of work outside of the facilities

While bearing in mind the importance of work activities outside of the correctional facilities for the rehabilitation of prisoners, these have to be assessed against the risk of propagating the virus. On 13 March 2020, the KCS decided to suspend the privilege for prisoners to work outside of the KCS facilities. The practice had started as a new privilege for the prisoners for the KCS in 2019 in the Smrekonica/Smrekonicë Correctional Centre (SMRE CC). The suspension of this privilege was the appropriate measure to be taken by the KCS, since the general protection of health and life of all prisoners and the staff in the SMRE CC had to be taken into account. The few prisoners granted this privilege would have posed a high risk to others because they were working within the community and the situation was worsening.

Recommendation:

- Reinstate the privilege for prisoners to work outside correctional facilities as soon as it is safe to do so.

Access of the Ombudsperson to the correctional facilities

In line with the March 2020 CPT Statement of Principles 10,³⁶ the Kosovo authorities have always guaranteed access to the KCS facilities for the Kosovo Ombudsperson, who plays the fundamental role of the National Preventive Mechanism. The National Preventive Mechanism stopped all field visits to correctional facilities (and to other facilities they inspect) in order to minimise the risk of COVID-19 infections spreading in mid-March 2020 and only resumed their ad-hoc visits to correctional facilities in September 2020.

Recommendation:

- The Ombudsperson should continue to make use of its right to visit KCS facilities whenever it is safe to do so, in order to exercise its fundamental functions for the prevention of torture and other ill-treatment in correctional institutions.

Access of lawyers to the correctional facilities

Physical access of lawyers to all Kosovo correctional facilities was banned from 12 March until 20 May 2020. It was again suspended from 21 October 2020, with the exception of defense counsels in cases where trials were ongoing.

Article 61 (2) of the CPC guarantees the right of the defendant/person deprived of liberty to communicate with his or her defense lawyer orally and in writing under conditions which guarantee confidentiality.³⁷

³⁶ CPT Statement of Principles 10: Monitoring by independent bodies, including National Preventive Mechanisms (NPMs) and the CPT, remains an essential safeguard against ill-treatment. States should continue to guarantee access for monitoring bodies to all places of detention, including places where persons are kept in quarantine. All monitoring bodies should however take every precaution to observe the 'do no harm' principle, in particular when dealing with older persons and persons with pre-existing medical conditions.

³⁷ Article 61, para 2 CPC: The defense counsel has the right to freely communicate with the defendant orally and in

In addition to the right to communicate with defense lawyers, Article 61 of the LEPS stipulates that *“the correctional facility shall facilitate the access of the convicted person to legal assistance in connection with the execution of the sentence of imprisonment or life imprisonment and undertaking necessary actions to protect rights and interests guaranteed by law. A convicted person also has the right to be visited by his or her authorised representative who represents him or her in legal proceedings”*.³⁸

Representatives of the Kosovo Bar Association also raised concerns with respect to hindered access of the defense counsels to their inmate clients, especially in urgent cases, such as detention hearings, when immediate legal action and legal consultation were needed. Legal counsels also raised concerns about the extensive body searches of lawyers in correctional facilities, even during the pandemic period, which caused delays and limited the time they could spend with their clients at the prison facilities. These issues may hinder the effectiveness of criminal defense and the prisoners’ rights of access to a lawyer.

Recommendations:

- Review how the rights of the defendant/person deprived of liberty to communicate with their defense lawyer orally and in writing under conditions which guarantee confidentiality can be respected and upheld without hindrance, in relation to the constraints added by the pandemic.
- Consult with legal experts and related official bodies prior to implementing any measures that may restrict these rights.

Release of vulnerable inmates from the correctional facilities

The CPT statement of principles reads under Principle no. 5: *“As close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation; reassess the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate, residents of social care homes; and refrain, to the maximum extent possible, from detaining migrants”*.

The United Nations Subcommittee on Prevention of Torture, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and The Alliance for Child Protection in Humanitarian Action have all called for measures for the reduction of the population in educational/correctional institutions due to the vulnerability of inmates in pandemics.³⁹

writing under conditions which guarantee confidentiality.

38 Article 63, para 1 LEPS: A convicted person may be visited by her or his authorized representative who represents him or her in legal proceedings.

39 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic, 25 March 2020, <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>; Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, CPT/Inf(2020)13, 20 March 2020, <https://rm.coe.int/16809cfa4b>; Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Follow-up statement regarding the situation of

Overcrowding is not a problem at the moment in Kosovo's prisons⁴⁰ and therefore, unlike in many European countries, there has been no critical need to lower the number of inmates in order to contain the spread of the virus.

It is also relevant to note that in Kosovo, the number of prisoners was reduced by 20.3% from 12 March, when KCS introduced restrictions, until the end of December 2020 as the total prison population went from 1,755 to 1,398 (1,014 convicted and 384 detained). Delays in court hearings and sentencing in trials may be one explanation for the marked reduction in the number of inmates. There were 42 female convicts or detainees in mid-March, while by the end of December 2020 this number had decreased to 35. In the same period the number of detained juveniles dropped from 44 to 39.

Regardless of the above, the fact that the legal framework does not allow for postponement, suspension or termination of sentences due to reasons related to the pandemic⁴¹ remains an issue worth paying attention to in light of the fact that the risks of contracting COVID-19 in correctional facilities are higher and that pre-existing health conditions or immune deficiencies in certain prisoners may lead to more severe symptoms.

Recommendation:

- The authorities should consider adopting legislation allowing, when it is safe to do so, for the postponement, suspension or termination of sentences due to pandemic-related reasons, in particular for vulnerable groups such as juveniles, and individuals at risk of developing severe COVID-19 symptoms.

persons deprived of their liberty in the context of the ongoing COVID-19 pandemic, CPT/Inf (2020)21, <https://rm.coe.int/16809ef566>; The Alliance for Children Protection in Humanitarian Action, Technical Note: COVID-19 and Children Deprived of their Liberty, 8 April 2020, <https://www.ohchr.org/Documents/Issues/Detention/ChildrenDeprivedofLibertyandCOVID.pdf>.

40 On 30 September 2020, the KCS total official capacity in facilities was reported by the KCS as 2502, while the prisoner population in total was 1522, with 991 vacant beds.

41 Postponement (Article 20 of LEPS and Article 82 of the JJC); Suspension (amended Article 94 of LEPS and Article 83 of the JJC); Conditional release (Article 90 of the CC, article 121 of the LEPS and Article 36 of JJC); Early release (amended Article 127 of LEPS).

ANNEX – RECOMMENDATIONS

THE JUSTICE SYSTEM:

1. The approach adopted by the KJC identifying a number of specific activities deemed as ‘urgent’ but, at the same time, leaving a margin of discretion to judges in determining other urgent activities is to be commended. EULEX encourages courts to use this discretion wisely and in line with human rights standards, so as to prioritize activities which would, if neglected, cause irreparable harm, in particular to vulnerable individuals or groups;
2. In order to ensure respect for the principle of ‘publicity’, courts must continue to provide adequate facilities for the attendance of interested members of the public. While measures to limit the numbers of people physically present in the courtroom may be deemed necessary and proportionate to prevent the spreading of the virus, it is important that these provisions are not interpreted in a way that for all practical purposes prevents the publicity of trials;
3. Court presidents and judges should make arrangements and plan better in advance for the best use of court premises and courtrooms in particular to avoid small court rooms being used for trials involving large numbers of participants and large premises being used for trials with fewer participants;
4. Presiding judges should proactively ensure that members of the public are allowed to attend hearings while also ensuring that social distancing and other protective measures are respected;
5. Should the need to limit public presence in courtrooms arise, in light of COVID-19 restrictions, presiding judges should ensure nonetheless that members of the public, who wish to attend hearings in their private capacity, are not automatically precluded from doing so;
6. Judges and court staff should request and ensure the use of masks and social distancing, especially in the courtrooms;
7. Courtrooms should be frequently ventilated;
8. Signs displaying protection measures should be visible and hand disinfectant available at all times in the premises of courts;
9. Allocation of courtrooms should take into consideration the anticipated number of persons to be present at the trials (defendants, lawyers, witnesses, injured parties, members of the public, etc.);
10. Court staff should proactively inform the parties and the public about a realistic time of the start of the hearings and prevent access to the waiting areas until the hearings are initiated and/or unnecessary presence at the court premises;
11. The use of VTC should be properly regulated by law;

12. Although not specifically provided for by the CPC, the presence of the public could also be ensured through technological means. This could be implemented by providing a video link to the public and media or by providing TV monitors in separate spaces in the courtroom. In the absence of a concrete regulation for this matter, it is advisable to regulate this matter by law;
13. The matter of the 'three-month rule' should be urgently regulated by law in order to ensure legal certainty. It is to be noted that the current draft CPC stipulates that instead of three months, six months would have to pass between two hearings before the trial would have to recommence. Importantly, it also specifically allows considering testimonies as read after the passing of these six months which would contribute to increased legal certainty.

THE CORRECTIONAL SYSTEM:

1. The KCS middle and senior management should rigorously enforce COVID 19 preventive measures in all of the KCS facilities, including the correct usage of face coverings;
2. Provide a sound legal basis for the restrictions to prisoners' rights;
3. Ensure dissemination of information in all Kosovo official languages;
4. Introduce a case-by-case approach that takes into account the specific conditions of each facility;
5. Allow for exceptions and special arrangements for specific categories of inmates such as juveniles and female prisoners with children, as well as for vulnerable individuals (e.g. older persons and persons with pre-existing medical conditions);
6. Ensure that restrictions, measures, and operational orders/plans are gender-sensitive and gender-mainstreamed;
7. Reinstate the privilege for prisoners to work outside correctional facilities as soon as it is safe to do so;
8. The Ombudsperson should continue to make use of its right to visit KCS facilities whenever it is safe to do so, in order to exercise its fundamental functions for the prevention of torture and other ill-treatment in correctional institutions;
9. Review how the rights of the defendant/person deprived of liberty to communicate with their defense lawyer orally and in writing under conditions which guarantee confidentiality can be respected and upheld without hindrance, in relation to the constraints added by the pandemic;
10. Consult with legal experts and related official bodies prior to implementing any measures that may restrict these rights.
11. The authorities should consider adopting legislation allowing, when it is safe to do so, for the postponement, suspension or termination of sentences due to pandemic-related reasons, in particular for vulnerable groups such as juveniles, and individuals at risk of developing severe COVID-19 symptoms.

