

Corruption risk assessment of the prosecution system



Report

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Project against Economic Crime (PECK II)

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Project against Economic Crime in Kosovo* (PECK II)
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Corruption risk assessment of the prosecution system in Kosovo

*This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

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I. EXECUTIVE SUMMARY

1. The present report is an assessment of the risks of corruption within the prosecution system of Kosovo and makes recommendations for reform. Its aim is to make a general assessment of the capacity of the prosecutorial system in Kosovo to promote and sustain integrity and to combat and prevent corruption, to identify factors within that system that may lead to or increase the threat to this capacity, and to make recommendations for risk mitigation measures.

2. The report is based on a study of the applicable laws and regulations of Kosovo relating to the State Prosecutor and to the prosecution of crime, in particular corruption offences, and to a series of meetings held with prosecutors, prosecution officials, including members and employees of the Kosovo Prosecutorial Council, judges, police, government officials, civil servants, lawyers, civil society, diplomatic missions and international organisations which are active in Kosovo. Meetings with prosecutors included prosecutors from every level and from every part of Kosovo. Finally, a focus group took place at which both prosecutors and judges were represented.

3. The report is concerned with the risks of corruption and not with an assessment of the extent to which corruption is actually present. The general perception is that Kosovo is a very corrupt society. According to Transparency International's Corruption Perception Index for 2016 Kosovo was No. 103 in the world, in a scale where the least corrupt country is No. 1, with a score of 33 out of 100. Among European countries only Moldova, Belarus, Ukraine and Azerbaijan performed worse. Amongst those whom the expert interviewed who were not judges or prosecutors the overwhelming view was that Kosovo is indeed a very corrupt society and that there is little or no political appetite to tackle this problem - indeed that much of the political class is itself corrupt.

4. This technical paper is necessarily and primarily concerned with the organisation and functioning of the prosecution system and the extent to which it has the capacity to promote and sustain integrity and to combat and prevent corruption. It is important to note that if a political system itself is corrupt and unwilling to engage in meaningful reforms making adjustments in the organisational system of the prosecution will not in itself be adequate to eliminate and prevent corruption risks. It is necessary to have robust systems which are independent, transparent and accountable, but in the absence of honest and independent prosecutors who are given the tools to do their job corruption will not be eliminated.

5. In general the laws in force of Kosovo are of relatively recent origin and generally speaking do not present major problems. Kosovo has recently enacted both a Criminal Code and a Criminal Procedure Code. This report does not therefore attempt to evaluate these Codes in a comprehensive manner but particular aspects of the Codes as well as other laws which may tend to facilitate corruption are referred to. In particular, some of the time limits requiring investigations to be completed within a particular timeframe and which establish limitation periods for certain prosecutions are unreasonably short, tend to facilitate corruption and should be reconsidered.

6. The assessment of corruption risks is guided by international standards, including in particular the United Nations Havana Guidelines on the role of prosecutors, the standards of professional responsibility and statement of the essential duties and rights of prosecutors of the International Association of Prosecutors, Recommendation (2000)19 of the Council of Europe's Committee of Ministers on the role of public prosecution in the criminal justice system, the Venice Commission's Report on the Independence of the Judiciary (Part II; The Prosecution Service) and the Rome Charter of the Consultative Council of European Prosecutors.

7. The technical paper looks at the following aspects of the structure and organisation of the prosecution system: its independence from external control, the internal tension between hierarchical control and individual responsibility, standard setting and consistency of approach to prosecution, the transparency and accountability of the system, specialisation and the organisation of work, the relationship between prosecutors and investigators and professional support for prosecutors. It then examines the role, functions and composition of the Prosecutorial Council, and the appointment, evaluation, assessment, discipline and dismissal of prosecutors, and the respective roles of the Kosovo Prosecutorial Council and the Chief State Prosecutor. The report deals with the terms and conditions of employment, the working conditions and organisation of work of prosecutors and other employees of the State Prosecutor. It looks at methods of ensuring the integrity of prosecutors and makes thirty nine recommendations aimed at improving the capacity of the prosecutorial system to promote and sustain integrity and to combat and prevent corruption.

8. There is a widespread view that there is still a substantial political influence on the prosecutor's office which is reflected in the low level of successful prosecutions of senior political figures or their associates, despite the existence on paper of strong guarantees for the independence of prosecutors. The President of Kosovo retains a strong influence over appointments. The complete de-politicisation of appointments to the prosecution service would be welcome. If the President is to have a role in the appointment of prosecutors it would be better if it were a ceremonial one only.

9. There is a low degree of transparency and accountability concerning the work of the prosecution system. Websites are not kept up-to-date despite recent improvement.

10. The transparency of the prosecutors' work should be enhanced by placing a greater emphasis on ensuring that all transactions are recorded on the relevant file, all documentation retained and all written instructions recorded. The transparency of the work of the State Prosecutor should be improved by a series of measures to improve communication with the citizens of Kosovo and the provision of information to them. The website should be kept up-to-date by an information officer reporting to the KPC and the Chief Prosecutors. The information officer should also be responsible for relations with the media, including social media, as well as for ensuring that requests for information are appropriately replied to and for coordinating the publication of statistics, and should have the right to access any files or documents held by the State Prosecutor.

11. The procedures which are meant to be followed by prosecutors are not well documented. There is a lack of clarity concerning the extent to which prosecutors have individual responsibility for their files or are subject to direction. This lack of clarity is compounded by an overlap between the managerial functions of the Chief State Prosecutor and the Kosovo Prosecutorial Council.

12. There is an almost complete absence of written rules, guidelines, and instructions as to how prosecutors should deal with legal issues or concerning practice matters. This is so despite the fact that the Chief State Prosecutor has extensive powers to issue rules, guidelines and overall binding decisions in order to implement the legislation, improve efficiency and ensure unique implementation of practices and legislation. Chief Prosecutors have important managerial functions but the actual practice seems to vary from office to office. There appears to be little real line management in many offices. This reluctance to manage is justified by the need to refrain from interference with the individual independence of line prosecutors. In reality, however, this ostensible reluctance to manage could also serve to avoid the existence of a paper trail and thereby to conceal the source of a decision. The practice about such important matters as plea agreements also varies widely with some offices making much less use of these procedures than do others. There appears to be little real effort to ensure a unified approach.

13. Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe recommends that where a prosecutor believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement. This requirement should be implemented in the law and practice of Kosovo.

14. The provisions of paragraphs 31 and 34 of Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe which provide for judicial control over the activities of prosecutors which interfere with fundamental rights and freedoms, and which provide for the rights of interested parties, in particular victims, to challenge decisions of public prosecutors not to prosecute, should be given effect in Kosovo.

15. Concerning the relationship between prosecutors and police, investigators reported a lack of communication of the outcome of cases to them by prosecutors and claimed they were not told why no prosecutions ensued. Such a failure to report outcomes is bad practice and means that where a failure to prosecute results from an inadequate investigation no lessons are learnt. It also ensures that prosecutors' reasoning remains unknown and cannot be queried by the investigator. The requirement for prosecutors to report to the investigators the outcome of the cases submitted to them with a view to prosecution is a valuable means of accountability both for investigators and for prosecutors.

16. The Constitution of Kosovo establishes the Kosovo Prosecutorial Council as a very powerful institution. It is described as fully independent, and its primary functions are to ensure that all persons have equal access to justice and that the State Prosecutor is independent, professional and impartial and reflects the multi-ethnic nature of Kosovo and the principles of gender equality. The Constitution further provides that the KPC "shall recruit, promote, transfer, reappoint and discipline prosecutors in a manner provided by law".

17. The original composition of the KPC consisted of five prosecutors and four non-prosecutors. The amendments in 2015 radically altered this structure. The total number of prosecutors was increased from 5 to 10 by providing that each of the seven Basic Prosecution Offices should elect one member. At the same time the Minister of Justice ceased to be a member. The three non-prosecutor members are no longer appointed by the Council but are supposed to be elected by the Assembly of Kosovo. The Chief State Prosecutor is no longer the chair of the KPC. The chair must be elected from amongst the prosecutor members but the chair then suspends his or her service as a prosecutor in order to serve as full-time chair.

18. It is difficult to see what the thinking was behind these changes. What was formerly a bare prosecutors' majority on the council has been transformed into an overwhelming majority. In fact, the change to date has been even more dramatic than the text of the law provides because the Assembly has failed to elect the three non-prosecutor members of the Council. The legislator should have anticipated this entirely foreseeable risk and provided for an anti-deadlock mechanism in such an eventuality. A logical provision would have required the Assembly to fill the vacancy within a certain period in default of which the Council would make the appointments itself. The result is now that the body which is supposed to be responsible for independent oversight of the prosecution service consists entirely of serving prosecutors accountable only to their fellow prosecutors, thereby rendering it incapable of carrying out an independent oversight. Its members include both very experienced prosecutors, including the Chief State Prosecutor and the representative of the Appellate Prosecutors, but also including some very junior and relatively inexperienced prosecutors, some of them elected before they had even achieved permanent status as prosecutors.

19. The recruitment, promotion, transfer, reappointment and disciplining of prosecutors are important executive functions which are not appropriate to be carried out by newly-appointed prosecutors but rather require persons of experience and wisdom who have the capacity to act in an independent manner. The eligibility criteria for prosecutor members of the Council should be amended to provide that only prosecutors elected to permanent function with a minimum experience to be specified are eligible for election.

20. A large number of functions which are not specified in the Constitution have been conferred on the KPC. Some of these are functions which would normally be the responsibility of line management rather than an elected supervisory body. They include a mixture of managerial, administrative and high level policy functions and include the development of prosecutorial policies and strategies, proposing to the Government and Parliament measures related to the prosecutorial system, overseeing the administration of the prosecution offices and its personnel, issuing rules and regulations concerning performance evaluation, preparing, submitting and overseeing the budget, promulgating codes of ethics, determining training policies, standards and instructions, and promulgating rules and regulations relating to public information. These are not matters suitable to be decided by junior prosecutors not yet appointed to permanent function.

21. There is a further problem caused by another aspect of the composition of the KPC which arises in relation to the functions of recruiting, appointing, evaluating, promoting and disciplining their fellow prosecutors. Kosovo is a very small jurisdiction. It is inevitable that a very large proportion of these active prosecutors will be known to most if not all of the members of the KPC on a personal basis. One of the key attributes of a body making appointments, reappointments, promotions and evaluations, and dealing with disciplinary complaints is that it must act impartially. There is a serious risk that in future such decisions could be made on the basis of favouritism, nepotism or cronyism. The conferring of such important powers which have huge consequences for the lives of individuals on an elected council has created opportunities for corruption in other states.

22. This problem could be avoided to a considerable extent if the KPC confined itself to the high-level tasks of setting the rules and procedures for recruitment, evaluation, promotion, and discipline and acting as overall guarantor of the fairness of the procedures rather than attempting to carry out the actual selections and decisions itself.

23. In carrying out its constitutional mandate to recruit, promote, transfer, reappoint and discipline prosecutors, as well as in carrying out its statutory mandate to assess them, the KPC's primary function should be to ensure that the regulations and procedures enabling this to be done are appropriate and fit for purpose and to act as guarantor for the integrity of the system by ensuring that the rules and procedures are observed in practice. It should, however, rely as appropriate on independent professional and technical expertise to carry out assessments and evaluations and should not substitute its own judgement for theirs other than for reasons which are stated in writing and subject to review by a court of law.

24. The Assembly should as a matter of urgency fill the vacant positions for non-prosecutors on the Kosovo Prosecutorial Council. These vacancies represent a serious threat to the proper functioning of the Council. The law should be amended to provide that in future if the Assembly fails to fill the non-prosecutor vacancies within one month that the nominating bodies themselves, or, failing that, the Council, will fill the vacancies.

25. The total number of prosecutor members - at present 10 - should be reconsidered with a view to reducing it.

26. The Chief State Prosecutor should remain as an *ex-officio* member of the KPC. The other members should be elected but the system of election should be more proportionate than at present and constituencies should not ever represent only a tiny number of prosecutors as is the case at present.
27. The respective roles and functions of the KPC and the Chief State Prosecutor need to be clarified and contradictions and inconsistencies eliminated. At present there is a considerable overlap. An elected body consisting mainly or even entirely of working prosecutors is not the best body to engage in day-to-day management and the Chief State Prosecutor should have the primary responsibility for the management of the professional work of the State Prosecutor. The KPC should be responsible for much of the policy-making and standard-setting and ensuring that proper procedures are followed in important areas such as recruitment and appointments, promotions, evaluations and disciplinary proceedings although it should not become involved in making actual decisions about prosecutors at a personal level which should be left to independent people selected through a process overseen by the KPC.
28. Regarding the appointment to the office of Chief State Prosecutor, Regulation No. 08/2016 on Chief Prosecutor's Appointment, which provides for the establishment of an Evaluation Committee to evaluate the candidates, should establish criteria for membership of that body. Consideration should be given to providing for some representation for suitably qualified independent persons from outside the ranks of the State Prosecutor or the KPC on this body.
29. The existing provision which allows the KPC to hold a secret ballot on the recommendation of the Evaluation Committee for the appointment of the Chief State Prosecutor and to substitute its own view for theirs without giving any reason should be scrapped.
30. Provision should be made for a competitive procedure to fill the positions of Deputy Chief Prosecutors and managers of departments within prosecution offices.
31. Where the early termination of the mandate of a Chief Prosecutor is proposed the regulations should provide a mechanism to determine any question which may be in dispute and to allow the Chief Prosecutor to be heard in his or her defence. No decision should be taken other than on foot of a report into the matter by a person or persons of undoubted independence and integrity.
32. There should be changes in the existing evaluation system for prosecutors, which at present exists mainly on paper. It should be less formalistic and paper-based, should examine the reality of what happens, in particular in court, rather than being based on statistics, should involve interviews by the evaluators, and should aim primarily at finding solutions aimed at improving the performance of the individual prosecutor as well as the State Prosecutor as a whole. The KPC should not be the ultimate decision-maker on appeals against evaluations. The system should have its primary focus on ensuring effective day-to-day management in which evaluation aiming at improving performance would play a central part and in which self-evaluation should also form an essential part.
33. The Office of Disciplinary Prosecutor should remain an independent office and should not report to the KPC but rather should have its own independent disciplinary committee which would make decisions on complaints. If an appeal to the KPC has to be retained for constitutional reasons this should be limited to setting aside the decision of the independent disciplinary committee for reasons which would have to be stated in writing. The 2015 amendments to the law on the KPC should be revisited and amended further to ensure that disciplinary complaints which were still alive on the date of its passing can still be dealt with.
34. A number of prosecutors expressed concerns about aspects of their working conditions. In particular, there are concerns about security in and travelling to certain courthouses. Given the attacks which have taken place on judges and prosecutors in other jurisdictions these concerns are

not fanciful. So far as prosecutors are concerned the KPC would be the appropriate body to examine these concerns which the expert believes they should do as a matter of urgency. They should also examine the working conditions in a number of prosecutors' offices. Apart from concerns about the safety and health of prosecutors there is also a serious concern about the condition in which certain files are being kept.

35. There are also a number of problems about some of the working systems in place in the State Prosecutor. The practice of allowing prosecutors to take files from the office without any procedure being in place as to when this is appropriate, or as to the safeguards which should be in place needs to be reviewed as a matter of urgency. There is a need for a protocol to deal with these questions. This should also be a task for the KPC.

36. A system should be introduced to flag all cases where the prosecutor directs an investigation to ensure that the prosecutor is kept informed of progress at regular intervals and to ensure that deadlines for the completion of the investigation are not missed.

37. There should be a review of the time limits after which cases become statute barred to examine whether they are all appropriate. Particular attention should be given to cases whose existence may only come to light years after an offence is committed, in particular offences involving secret corruptive acts.

38. Training in relation to issues concerning ethics, conflicts of interest and corruption should be carried out on a regular basis. Such training should cover all staff and not only prosecutors. In general there is a need for training for the general staff working in prosecutors' offices. Such training is largely absent at present. Training should cover both the specific jobs staff work on as well as general issues pertaining to the prosecutor's office and the system of criminal prosecution.

39. There are a number of major problems which relate to resources. The capacity of the Special Prosecutor's Office needs to be increased substantially. At present it has neither the numbers of prosecutors nor the expertise to handle the demands which are likely to be made on it in the immediate future. At the time of the expert's visit in November 2016 the SPRK was seriously understaffed with still only 10 prosecutors employed. The complement should be 18 prosecutors rising to 25 when EULEX completes its task. There are only two prosecutors assigned to deal with terrorist crimes. At present EULEX is still transferring cases to the Special Prosecutor but it is impossible for two prosecutors to deal with all the caseload. There are still more than 100 war crimes cases to be transferred. If steps are not taken to substantially increase the capacity of the office to deal with terrorism and war crimes this will lead to serious failures and serious reputational damage for Kosovo. There is a need for greater technical expertise in the area of money laundering. There is also a need for technical staff with expertise in IT, financial affairs, business and economics to be attached to the office. The investigative resources available to the office need to be strengthened further.

40. The capacity of the Basic Prosecution Offices to deal with cases involving children needs to be strengthened considerably, in particular by the provision of training for staff and facilities for children to give evidence in a manner which is less stressful for them than that provided in the normal courtroom environment.

41. In Kosovo there is a system whereby legally qualified staff and paralegals work in the prosecutor's office to provide auxiliary services to the prosecutors. These consist of Professional Associates, who are legally qualified staff who do work which would otherwise be performed by prosecutors, such as preparing indictments or submissions under the supervision of the prosecutor. In addition, there are legal officers who are also legally qualified and who do both professional and administrative work. There are also legal secretaries. These staff perform invaluable work. However,

outside Pristina there are virtually none of these auxiliary staff employed. Clearly not enough persons apply for these positions and of those who do most of them apparently choose to work in Pristina. It may be that the salaries or other terms and conditions of work of these auxiliary staff need to be examined with a view to improving them and attracting more applicants. Employing more people in these capacities is a less costly option than employing more prosecutors.

42. Finally, the single biggest obstacle to the proper organisation of work in the State Prosecutor is the absence of an electronic case management system. As a result the office is entirely dependent on paper files and on its staff to keep the files properly and to ensure that all relevant transactions are recorded on them. The system of registration of files is also a manual one. There is a project financed by the Norwegian government to provide an electronic case management system which is generally expected to commence within the next year, initially being rolled out in the courts and subsequently extended to the prosecution service. However, the expert found it difficult to get any hard information about the current state of play in relation to this project which is one of vital importance for the future of the judicial system. It was a little surprising that so few of the working prosecutors the expert met had any hard information about the project. One would have expected that a project that was well-advanced would have engaged in widespread consultation with prosecutors generally and that preparations to roll the system out would be well advanced. The expert did not see an evidence of such activity. If a case management system is to be introduced to the State Prosecutor in the near future there should be planning at all levels for how this will impact on work at every level. The KPC should address this as a matter of urgency.

II. INTRODUCTION

1. The PECK II Project

43. The joint European Union/Council of Europe Project against Economic Crime (PECK I) implemented during 2012-2015 for the first time in Kosovo introduced and structured assessments of the Anti-corruption and Anti-Money Laundering/Combating the Financing of Terrorism frameworks and measures vis-à-vis relevant international and European standards.

44. In view of the need to continue to support Kosovo institutions in carrying out comprehensive assessments and moreover to provide assistance in implementing specific recommendations from the previous assessment cycles conducted within PECK I the aim of PECK II is to:

- build on the results and lessons learned from PECK I and support reforms tailored to prevent and combat economic crime;
- assist the Kosovo authorities with the implementation of specific recommendations issued within PECK I;
- carry out a second phased assessment of the Anti-corruption and Anti-Money Laundering/Combating the Financing of Terrorism frameworks vis-à-vis evolving international and European standards.

45. The present report is an assessment of the risks of corruption within the prosecution system of Kosovo. Its aim is to make a general assessment of the capacity of the prosecution in Kosovo to promote and sustain integrity and to combat and prevent corruption, to identify factors may lead to or increase the threat to this capacity, and to make recommendations for risk mitigation measures.

2. Corruption risks

46. The study within this technical paper is concerned with the risks of corruption and not with an assessment of the extent to which corruption is actually present. The extent of corruption is notoriously difficult to measure. One reason for this is that in its most severe form, bribery, the corrupt transaction is essentially between two persons, both of whom commit a criminal offence, in one case the giving of a bribe and in the other case its receipt. Both parties have an obvious interest in concealing not only their guilt but even the very existence of the criminal transaction. In many cases there may be a strong suspicion that a corrupt transaction has taken place but the evidence may not reach the high standard required to secure a criminal conviction. However, the absence of such evidence does not mean that corruption is not present. Absence of evidence is not evidence of absence. The low incidence of successful prosecutions of judges or prosecutors in Kosovo does not prove that corruption does not exist in those institutions.

47. Fortunately it is not necessary for this study to assess the extent to which corruption is actually present. The general perception according to various reports and studies is that Kosovo is a very corrupt society. According to Transparency International's Corruption Perceptions Index for 2016 Kosovo was No 103 with a score of 33 out of 100¹. Among member states of the Council of

¹ Transparency International (2016), [Transparency International Corruption Perceptions Index 2016](#). The Index lists the countries of the world from No. 1 (the least corrupt, Denmark, with a score of 91) down to No. 167, (Somalia, with a score of 8), available at www.transparency.org

Europe² only Moldova, Belarus, Ukraine and Azerbaijan performed worse. The judgments arrived at by TI and other bodies which have arrived at similar conclusions are based on measuring public perception. However, such surveys should not be regarded as necessarily providing an accurate measure of actual levels of corruption. Surveys of citizens' actual experience of corruption may yield more reliable results or even different ones. Many of those interviewed during expert's on-site missions argued that corruption among judges and prosecutors in Kosovo is not necessarily as widespread as public perception might suggest. However, given that many of contacted interlocutors were themselves judges or prosecutors this can hardly be regarded as either surprising or conclusive. Amongst those of contacted interlocutors who were not judges or prosecutors the overwhelming view was that Kosovo is indeed a very corrupt society and that there is little or no political appetite to tackle this problem - indeed that much of the political class is itself corrupted.

48. What can be said with confidence is that if a system is vulnerable to corruption human nature is such that there will be people to exploit that vulnerability. Judges and prosecutors make decisions which may be of fundamental importance to the lives and fortunes of individuals, commercial enterprises and even nations. If the assessment of a judicial and prosecutorial system demonstrates that there are opportunities for corruption and the measures taken to minimise these opportunities are inadequate then it is highly likely that there will be those who will exploit those opportunities and inadequacies for a corrupt purpose. Inefficient and inadequate systems and procedures, even if not in themselves corrupt, tend to provide fertile ground in which corruption can thrive. Conduct, procedures and systems that undermine the proper performance by the judiciary or the prosecution of either's function tend to facilitate corruption and are properly part of the concern of a corruption risk assessment.

49. Finally, it is necessary to say a little about what is meant by corruption. The most serious forms of corruption are covered in the United Nations Convention against Corruption (UNCAC). While the Convention does not attempt a comprehensive definition of corruption it provides a list of offences which it either requires or encourages state parties to the Convention to criminalise. The offences in question are bribery of public officials, both active and passive, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, the abuse of their functions by public officials, illicit enrichment (meaning a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income), bribery and embezzlement committed in the private sector in the course of economic, financial or commercial activities, and money-laundering, as well as concealment or obstruction of justice in relation to those crimes.³ This list of crimes essentially forms a good working definition of the most serious forms of corruption.

50. It is clear that the UNCAC list goes well beyond the giving and taking of bribes. For example, nepotism and cronyism clearly amount to abuse of functions even though money may not change hands. Nevertheless, in such cases one citizen is preferred over another for unjustifiable reasons.

51. It is worth noting that the Convention, in considering the measures which should be taken to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption refers to the need to enhance the transparency of and promote the contribution of the public to decision-making processes, to ensure that the public has effective access to information, and to undertake public information activities and public education programmes.⁴ A failure to take such measures is properly the concern of a corruption risk assessment.

² Belarus is at present suspended from membership of the Council of Europe.

³ [United Nations Convention against Corruption \(UNCAC\)](#), Articles 15-25.

⁴ *Ibid*, Article 13.

52. Finally, the objective of the technical paper is not primarily to assess the effectiveness of prosecution in dealing with cases of corruption which are referred to them in connection with their respective professional responsibilities, although a failure to deal effectively with such cases may itself prove to be an indicator of corruption. Rather is it the primary objective of this study to assess the effectiveness of the prosecution in promoting integrity and in preventing and tackling corrupt conduct within their own ranks.

III. METHODOLOGY

53. In this corruption risk assessment the ability of the Kosovo prosecution system to promote and sustain integrity and to combat and prevent corruption has been assessed against a body of international standards on prosecutorial standards, integrity and independence that has been developed by groups of judges and experts under the auspices of international organisations such as the United Nations, the Council of Europe, the International Association of Prosecutors, the Consultative Council of European Prosecutors (CCPE), the Venice Commission, and the American Bar Association. In addition, there are standards relating to corruption more generally which are useful. Below are listed the principal standards of relevance, not all of which are referenced in the body of the report.

- 1) Guidelines on the Role of Prosecutors, 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990;
- 2) Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors 23 April 1999;
- 3) Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, 6 October 2000;
- 4) Venice Commission 2010 report on the 'Independence of the Judicial System Part II: The Prosecution Service' (CDL-AD(2010)040) adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010);
- 5) Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Prosecutors (CDL-PI(2015)009). This compilation gathers together the key points from numerous reports concerning individual prosecution services;
- 6) Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their Families, International Association of Prosecutors, Helsinki, 1 March 2008;
- 7) European Guidelines on Ethics and Conduct for Public Prosecutors, Conference of Prosecutors General of Europe, Budapest, 31 May 2005;
- 8) Rome Charter for Prosecutors, Consultative Council of European Prosecutors, 16-17 December 2014. (Opinion No. 9 of the CCPE on European norms and principles concerning prosecutors);
- 9) Council of Europe Committee of Ministers Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption, 6 November 1997;
- 10) United Nations Convention against Corruption (2004).

54. The information for the present corruption risk assessment has been collected to a large extent by interviewing and collecting the informed opinions of prosecutors, members of the staff of the State Prosecutor, other legal actors and civil society actors focusing on the prosecutorial system in Kosovo as well as international donors and observers based in Kosovo, who have first-hand experience of the extent to which laws, regulations, systems, procedures and official practices are enforced and operational. Data has also been collected from existing sources such as laws and regulations in Kosovo and reports by international organisations and NGOs on the judicial system in Kosovo. A full list of prosecution offices and institutions with which the CoE expert met or visited is provided in Annex 1.

55. The joint European Union/Council of Europe Project against Economic Crime (PECK II) commissioned a local legal expert, Ms Ariana Qosaj-Mustafa, to prepare a Technical Paper on Preliminary assessment in identifying potential corruption risks and vulnerabilities in the Kosovo prosecutorial system.

56. Further, PECK II Project engaged two international experts to carry out a corruption risk assessment of the prosecutorial and judicial system simultaneously. The Council of Europe experts (CoE expert) conducted two on-site assessment missions in October and November 2016.

57. From 31 October to 4 November 2016 the CoE expert on the prosecution system conducted interviews with prosecutors and other prosecution staff in all 7 Basic Prosecution Offices in Kosovo. Some interviews were carried out together with the CoE expert on the judiciary: interviews with an international EULEX judge and international EULEX prosecutor, officials working in the judicial strengthening unit of EULEX, and Kosovo Police Investigators at the Directorate of Economic Crime and Corruption Investigation (DIECCI).

58. From 21 November to 25 November 2016 the CoE expert conducted interviews with Chief State Prosecutor, Special Prosecution Office, Appellate Prosecution, civil society representatives, Office of Disciplinary Prosecutor, Kosovo Prosecutorial Council and its Chair, Agency for Management of Sequestered and Confiscated Assets, Chamber of Advocates, OSCE Monitoring Unit, local experts as well as international organisations and projects supporting judiciary and prosecution. The Council of Europe expert posed closed as well as open-ended questions to interlocutors concerning the areas of corruption risk set out in the present report that included the issues highlighted in the local expert's background paper. During the course of interviews additional information became available that was cross-checked with the various officials interviewed in judicial offices, state agencies and international offices.

59. In some interviews the CoE experts were concerned that the presence of more senior judges, prosecutors or officials could inhibit the information given by more junior judges, prosecutors or officials.

60. Apart from interviews and meetings with prosecutors, judges and support staff the CoE experts on the judicial system and the prosecution service together prepared a follow-up questionnaire for local judges and prosecutors that sought to afford them an opportunity to anonymously share information on concerns and opinions they hold about corruption in the judicial system and prosecution service. The questionnaire was uploaded on an online survey platform, Google Forms, and sent to judges, prosecutors and administrators via email. The response to the questionnaire was very poor. The questionnaire is provided in Annex 2 and a table setting out numbers of recipients and respondents is provided in Annex 3. Despite the fact that the questionnaire would have had an added value while preparing this report, it must be stressed out that findings of the report are not a consequence of information collected through them.

61. In February 2017, the CoE experts met officials from the British Embassy and the Dutch Embassy as well as court experts.

62. A final focus group was held between 23 and 24 February 2017 in Tirana, Albania with selected prosecutors and staff from prosecution offices of Kosovo as well as the Chief Prosecutor of the Basic Public Prosecution in Gostivar – "the former Yugoslav Republic of Macedonia", a first instance prosecutor from Montenegro and a prosecutor from General Prosecutor's Office of Albania. The focus groups enabled the CoE expert to present initial findings and cross-check information as well as get feedback, corrections and further information.

IV. CORRUPTION RISKS IN THE PROSECUTION SERVICE

1. Introduction

63. The purpose of this technical paper is to assess corruption risks in the prosecution service. The meaning of corruption has already been addressed in the introduction to this report. By corruption risks are meant factors which may lead to or increase the risk of corruption within the prosecution service, or which may hinder or even prevent the adoption of measures to promote integrity. A crucial factor is the extent to which the prosecution service is able to promote integrity within its own ranks and minimise the risks of corruption. It is not the intention of this part of the report to attempt a comprehensive history or description of the prosecution service or any of its components, or of the criminal justice system, except to the extent that a brief description may be necessary in order to understand the nature of the corruption risks. It should also be understood that corruption risk is intended to include any factor which may increase the risks of corruption whether it does so directly or indirectly.

2. The structure and organisation of the prosecution system

2.1 The structure of the prosecutors' offices

64. The structure of the State Prosecutor of Kosovo, generally speaking, reflects Kosovo's court structure. There are seven Basic Prosecution Offices corresponding to each of the seven Basic Courts in Kosovo, at Pristina, Peja, Gjakova, Prizren, Ferizaj, Gjilan and Mitrovica, each office headed by a Chief Prosecutor and dealing with the criminal work coming before the corresponding Basic Court. All criminal cases are now dealt with at first instance in the Basic Courts, replacing an earlier system in which serious crime was dealt with in district courts whereas general crime was dealt with in separate municipal courts. The present system is somewhat asymmetrical since 60% of all the court cases in Kosovo are heard in Pristina, reflecting its demographic and economic dominance. About 95% of all cases dealing with economic crime are dealt with in Pristina.

65. In addition to the seven Basic Prosecution Offices there is an Appellate Prosecution Office headed by a Chief Prosecutor which handles the criminal work before the Court of Appeals, which is based in Pristina and hears appeals from all the Basic Courts.

66. There is also a Special Prosecution Office headed by a Chief Prosecutor.⁵ This represents a departure from the system of organisation based on the courts structure since this Office is specialised to deal with certain serious offences including terrorism, genocide and war crimes, money-laundering, serious crimes of corruption (meaning corruption offences committed by senior officials and crimes with a high monetary value), commercial crime and organised crime, although there is no specialised court to deal with these offences which are dealt with at first instance in the Basic Courts. The Special Prosecution Office has jurisdiction in the whole territory of Kosovo⁶ and has powers of investigation.

67. Finally, there is the Office of the Chief State Prosecutor which deals with cases heard in the Supreme Court, which is the final appellate court, or the Constitutional Court. In addition, the Chief State Prosecutor has certain powers to take over cases from junior prosecutors and can exercise

⁵ Official Gazette of Kosovo (2008) [Law No. 03/L-052 on the Special Prosecution Office](https://gzk.rks-gov.net/), available at <https://gzk.rks-gov.net/>

⁶ Official Gazette of Kosovo (2010) [Law on State Prosecutor](https://gzk.rks-gov.net/), Law No. 03/L-225 of 30 September 2010, as amended by Law No. 05/L-034 of 28 May 2015, Article 14, available at <https://gzk.rks-gov.net>

functions relating to the overall coordination of the system. These powers and functions are discussed in greater detail below.

68. Within each Basic Prosecution Office the prosecutors are divided into three Departments, a General Department, a Department for Minors and a Serious Crimes Prosecution Department.⁷

69. Prosecutors are appointed initially for a three-year period. Newly-appointed prosecutors undergo a 12-month initial training during which they are not assigned to cases. Following this period they are to be evaluated.⁸ They are evaluated again at the end of the three-year period⁹ at which point they become eligible for permanent appointment.

70. The Chief State Prosecutor is appointed for a term of seven years, without the possibility of reappointment.¹⁰ Chief Prosecutors are appointed for a term of four years with the possibility of one additional term.¹¹

2.2 Independence from external control

71. The law provides a very clear guarantee for the independence of the institution of State Prosecutor. Article 109 of the Constitution of Kosovo provides that “the State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law”. The Kosovo Prosecutorial Council has the duty, pursuant to Article 110 of the Constitution of ensuring the independence of the State Prosecutor. This duty is restated and elaborated in the Law on the Kosovo Prosecutorial Council.¹² Article 47 of the Criminal Procedure Code prohibits public entities, the definition of which includes an entity of the government of Kosovo, from formally or informally influencing or directing the actions of the State Prosecutor when dealing with individual criminal cases or investigations.

72. Of course, even though the law or even the Constitution may proclaim the independence of an institution the reality may be otherwise. According to the EU “the judiciary is still vulnerable to undue political influence”¹³ and there are many who would lay the same charge at the door of the State Prosecutor. There is a widespread view that the low number of prosecutions of senior political figures for corruption is attributable in part to political influence on the prosecution. The Kosovar Institute for Policy Research and Development has commented as follows “Despite the public commitments to fight corruption, the rule of law stakeholders continued to deal mainly with petty crimes of corruption whereas the investigation of high-profile cases of corruption remained scarce. Prosecutorial services also admit that often the work of state prosecutors and judges does not go further beyond calls for fighting corruption. The lack of concrete results in the fight against high-profile corruption is also linked with political interferences and neglect of prosecutors often followed by media pressure.”¹⁴

73. Where political influence is a factor in the appointment and promotion of prosecutors this inevitably compromises their independence. There is still a strong political influence on appointments

⁷ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 14. “Serious crimes” are listed in Article 22 of the Criminal Procedure Code (Code No. 04/L-123 of 13 December 2012).

⁸ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 20, available at <https://gzk.rks-gov.net>

⁹ Kosovo Prosecutorial Council (2015) *Regulation No. 12/2015 on the Performance Evaluation of Prosecutors*, available at www.kpk-rks.org

¹⁰ *Constitution of Kosovo*, Article 109(7), available at <https://www.rks-gov.net>

¹¹ Official Gazette of Kosovo (2010) *Law on the Kosovo Prosecutorial Council*, Law No. 03/L-224 of 30 September 2010, as amended by Law No. 05/L-034 of 28 May 2015, Article 20, available at <https://gzk.rks-gov.net>

¹² Official Gazette of Kosovo (2010) *Law on the Kosovo Prosecutorial Council*, Article 4, available at <https://gzk.rks-gov.net>

¹³ European Commission (2016), *EC Kosovo 2016 Report*, p.13, available at <http://ec.europa.eu/>

¹⁴ KIPRED (2016), *Impunity in Kosovo: the fight against high profile corruption*, pp. 9-10, available at www.kipred.org/

to the State Prosecutor even though the amendments to the Law on the Kosovo Prosecutorial Council which were made in 2015¹⁵ represent a certain strengthening of the power of the KPC over the appointments of prosecutors and a loosening of political control and hence a strengthening of the independence of the State Prosecutor. The amended law now provides that persons who are to be appointed as prosecutors must have passed a written exam for prosecutors, have three years legal experience, possess a university degree in law and have passed the bar examination. This provides a greater degree of objective qualification for office. Politically-appointed members of the KPC have been reduced in number. However, the President continues to make the actual appointment of all prosecutors (as is mandated by Article 84(18) of the Constitution) and it would seem that he may have discretion to decline to make an appointment in accordance with the KPC's recommendation.

74. The Constitution is silent on whether the President should have such discretion and on the circumstances in which he may exercise it. According to Article 19 of the Law on the KPC if the President refuses to appoint or reappoint any candidate he must provide written reasons within 60 days, whereupon the KPC may present the refused candidate one additional time together with its written justification or alternatively may propose another candidate. There is a precedent for a President declining to make an appointment of a prosecutor proposed by the KPC. It does not appear that there is anything further that the KPC can do where the appointment is refused a second time. The President also has the power to appoint the Chief State Prosecutor but only upon the nomination of the KPC.¹⁶

2.3 Hierarchical control and individual responsibility

75. There is a growing recognition among democratic states that the prosecution as an institution should not be subject to political direction with regard to prosecutorial decisions made in individual cases. As the Venice Commission has stated, "It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. The crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature."¹⁷ Even in states which maintain a degree of political control over the prosecution service it is generally claimed that the political masters do not intervene to influence individual decisions.¹⁸

76. There is, however, no generally recognised international standard which requires that an absolute independence in decision-making of the individual prosecutor should be recognised. There are some states in which prosecutors are afforded a similar degree of complete individual independence to that enjoyed by judges and in which the individual prosecutor is subject only to judicial control. However, as pointed out by the Venice Commission "the 'independence' of prosecutors other than the prosecutor general, unlike that of individual judges, is not an absolute value. There is a tension between the need to decide on the approach to the individual case on the basis of the prosecutor's conscience and the need to ensure consistency of approach and the application of the principles and guidelines which have been established. It is legitimate to have a system of prosecution which is organised on a hierarchical way, and in which a decision of a prosecutor may be overruled by a senior prosecutor when it runs counter to general instructions."¹⁹

¹⁵ See footnote 6 above.

¹⁶ *Constitution of Kosovo*, Article 109(7), available at <https://gzk.rks-gov.net>

¹⁷ Venice Commission (2010) *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution Service*, CDL-AD (2010)040-e, para. 43, available at www.venice.coe.int/

¹⁸ For example, this is the case both in Germany and in Austria.

¹⁹ Venice Commission (2010) *Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution Service*, CDL-AD (2010)040-e, para.53, available at www.venice.coe.int

77. Each of these basic models, the model of absolute individual independence and the hierarchical model, has both advantages and disadvantages. A hierarchical model makes it easier to ensure a consistent approach by the prosecution as a whole. On the other hand, it may tend to stifle the initiative of individual prosecutors especially where they find themselves constantly overruled or subject to so much direction as to amount to a form of micro-management. The greater element of accountability in a hierarchical system makes it more difficult for prosecutors to engage in corrupt behaviour than in a system where prosecutorial independence prevents any real accountability, unless the senior prosecutors are themselves corrupt, in which case the hierarchical model may facilitate corruption. There are many jurisdictions which have sought to combine features of both models by allowing a degree of individual independence to be balanced with measures intended to ensure that there is a consistency of approach among prosecutors.

78. The model adopted in Kosovo, like many others, attempts to combine elements of individual independence (at least in principle) with a degree of hierarchical control. In addition to the references in the law to the independence of the State Prosecutor, discussed above in section 2.2, Article 7 of the Law on State Prosecutor refers to the individual independence of prosecutors by including among other duties of the prosecutors that of exercising prosecutorial functions in an independent manner. Furthermore, Article 4 of the Law on the KPC imposes on the Council a duty to ensure that prosecutors act in an independent manner in the performance of all prosecutorial functions. These provisions envisage a high degree of individual independence for as long as the individual prosecutor concerned retains seisin of the case.

79. However, the law also includes clear elements of hierarchical control and provides for limitations to this independence. The Law on State Prosecutor describes the Chief State Prosecutor as “the Head of the State Prosecution Office” with the function of “managing... the State Prosecution Office and prosecution offices structures which comprise the State Prosecution Office”²⁰. He or she can issue written rules, guidelines and overall binding decisions for all chief prosecutors and prosecutors “in order to implement the legislation, improve efficiency and unique implementation of practices and legislation”,²¹ and may assume jurisdiction over any case at any prosecution office in Kosovo, or reassign it to any other prosecution office, “in order to develop efficient procedure or for other important reasons” where this is justified by “the negligence, professional disability or conflict of interest of prosecutors”.²² This hybrid model adopted by the legislator in Kosovo is a legitimate one, fully in accord with international norms.

80. Chief Prosecutors, too, have important supervisory functions. They are “responsible for the work of the prosecution office” and have a duty to report for this work to the Chief State Prosecutor and the Prosecutorial Council.²³ More junior prosecutors, in their turn, are obliged to report to the Chief Prosecutor.²⁴ Furthermore, each Chief Prosecutor may assume the prosecution function in a specific case which has previously been assigned to a subordinate prosecutor, but only with the prior consent of the Chief State Prosecutor, and by means of a justified decision. Chief Prosecutors also have a duty to carry out an annual evaluation of each prosecutor working in the relevant prosecution,²⁵ although the evaluation is expressly precluded from interfering with the independence of prosecutors.²⁶ This evaluation in turn feeds into the evaluation to be carried out by the Prosecutor Performance Evaluation Committee established within the KPC.²⁷

²⁰ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 11.1.1, available at <https://gzk.rks-gov.net>

²¹ *Ibid.*, Article 11.1.5.

²² *Ibid.*, Article 11.2.

²³ *Ibid.*, Article 13.3.

²⁴ *Ibid.*, Article 13.4

²⁵ Kosovo Prosecutorial Council (2015) *Regulation No. 12/2015 on the Performance Evaluation of Prosecutors*, Article 8, available at www.kpk-rks.org

²⁶ *Ibid.*, Article 3.

²⁷ *Ibid.*, Article 6.

2.4 Written instructions to more junior prosecutors

81. There is an important power to give binding instructions in writing for a specific case²⁸, although the exercise of this power is heavily qualified. Such instructions may be issued by the Chief State Prosecutor personally or by an authorised prosecutor from his or her office, and may be issued to any prosecutor in Kosovo. Similar instructions may also be issued by Chief Prosecutors to the prosecutors of their own office. Instructions “should be justified, and should not violate the functional and professional independence of prosecutors, and in particular, should not contain instructions regarding the qualification of the act, methods of investigation and gathering the evidences, as well as justification of the investigation and indictment.”²⁹ “The instructions shall be given with the purpose of the enforcement of legality, increase of efficiency and unique implementation of practices and legislation.”³⁰ It seems clear, therefore, that these provisions can be used to ensure that prosecutors adopt a consistent view as to the meaning of legislation, including the interpretation to be given to statutory provisions, and that they do not adopt their own unique interpretations to the detriment of the uniform application of law.

82. It will be recalled that the Council of Europe’s recommendation on the role of Public prosecution in the criminal justice system provides that: “all public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.”³¹ While the law of Kosovo requires such instructions to be in writing, there are no provisions setting out a procedure to be followed where a prosecutor believes that an instruction is either illegal or unconscionable. It would be desirable that the law of Kosovo should provide for a clear and effective procedure to be followed in such cases.

83. In addition, the Chief State Prosecutor, as well as persons authorised by him, and Chief Prosecutors with respect to their own offices, may make written requests for reports or other written information on the progress, the status or the solving of certain cases.³²

84. The law in Kosovo regards the concept of the individual independence of prosecutors as an important one which can only be departed from in specified circumstances and pursuant to written and justified directions. But while individual independence may be the default position it is not an absolute one and there is ample power conferred on the Chief Prosecutors to ensure that prosecutors cannot use their independence to justify their negligence, incompetence or misbehaviour.

85. According to the text of the law of Kosovo, therefore, the concept of the independence of prosecutors does not extend to permitting them to adopt their own unique interpretations of legislation and present them to the court, but rather permits the Chief State Prosecutor to ensure that every individual member of the State Prosecutor adopts a uniform approach to the interpretation of legislation.

86. These provisions are therefore not consistent with the idea that the individual prosecutor is wholly independent, or at least with the proposition that his independence cannot be overridden by a decision to remove the case from him in cases of negligence, incompetence or conflict of interest.

²⁸ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 13.7, available at <https://gzk.rks-gov.net>

²⁹ *Ibid.*, Article 13.7.1.

³⁰ *Ibid.*, Article 13.8.

³¹ Council of Europe (2000) *Recommendation Rec(2000)19 of the Committee of Ministers on the role of public prosecution in the criminal justice system*, paragraph 10, available at www.coe.int

³² Official Gazette of Kosovo (2010) *Law on State Prosecutor*, Law No. 03/L-225 of 30 September 2010, as amended by Law No. 05/L-034 of 28 May 2015, Article 13.9 & 13.10, available at <https://gzk.rks-gov.net>

Furthermore, the provisions allowing for cases to be transferred would be pointless and unworkable unless the Chief State Prosecutor and the individual Chief Prosecutors exercised their powers to seek reports concerning individual cases where there was any cause for concern and the law as referred to above confers them with power to do so.

87. During the interviews held with prosecutors of all of the Basic Prosecution offices in Kosovo enquiries were made concerning the practice in relation to the supervision of junior prosecutors' casework. Generally the initial response was that once a case was assigned to an individual prosecutor he or she was in sole charge of it and that it would be an interference with his or her independence for any senior prosecutor to become involved. In response to suggestions that a Chief Prosecutor would be failing in the duty of supervision not to enquire at least about the most sensitive and important cases being dealt with by more junior prosecutors most of the senior prosecutors accepted that they did of course keep such cases under review. All of the offices which the expert visited informed him that there was a practice of having regular meetings between prosecutors, in most cases on a weekly basis although there did not appear to be any uniform practice between the different Basic Prosecution Offices. Almost all of the Chief Prosecutors whom the expert met referred particularly to the quarterly meetings held with each prosecutor to discuss performance which is part of the evaluation process. Despite this, it seems clear that the management practices of Chief Prosecutors varied considerably, with some of them seeing it as part of their duty to supervise whereas others appeared to think their function was no more than to advise and assist when asked. In one Basic Prosecution Office, which appeared to be unique, the expert was informed of a practice of daily meetings of all prosecutors at which decisions were taken following a collective discussion.

88. However, it does not appear that in practice Chief Prosecutors have used their powers to take over cases from subordinate prosecutors and if there have been any such cases they must be extremely rare. An enquiry to the Chief State Prosecutor's Office about the issue of guidelines and directions led only to references to some examples concerning procedural issues. Indeed, it was stated that the issuing of written directions is not part of the legal culture in Kosovo. It seems, therefore, that many of the provisions of Article 13 of the Law on State Prosecutor are not being used. The provisions in question in their present form were enacted on 28 May, 2015, so that while they are relatively new there has been enough time for all concerned to become familiar with them. A somewhat rosy view of certain aspects of the performance of prosecutors in Kosovo was presented to the expert in most of the Basic Prosecution Offices. Almost all Offices, for example, claimed that there had been no cases of prosecutions becoming statute barred while any of their prosecutors had seisin of a case. These claims are impossible to reconcile with the experiences provided to the expert by NGOs, the police and international observers. It is possible that those who hold to such a rosy view might argue that the provisions which allow for the issuing of guidelines and directions and the taking over or transfer of cases are not used because there is no occasion to use them.

89. It is inconceivable that Chief Prosecutors do not regularly discuss important cases with their subordinates, and despite some initial hesitation most of them accepted that this was so. There is nothing improper in this, for the reasons expressed above, and indeed Chief Prosecutors would not be carrying out their functions as managers if they did not do so. The law provides very clear mechanisms for obtaining reports, giving directions, both generally and in individual cases, and transferring cases when appropriate circumstances arise. Yet these laws appear to be used rarely if at all. It may be that it is the heavy emphasis on the independence of the individual prosecutor frequently mentioned in the laws which lies behind the apparent reluctance to make use of these powers. The more sceptical observer might remark that such powers cannot be used without creating a paper trail. Is there sometimes a reluctance to create paper trails which might reveal who was involved in and responsible for certain decisions? In the absence of a paper trail it is impossible

to prove that anybody except the person assigned the case bears any responsibility for its conduct. It is difficult not to wonder about the reasons for the apparent reluctance to use these provisions.

2.5 Standard setting and consistency of approach

90. As referred to above, the Chief State Prosecutor has power to issue in writing “rules, guidelines and overall binding decisions for all chief prosecutors and prosecutors in order to implement the legislation, improve efficiency and unique implementation of practices and legislation”.³³ The Chief State Prosecutor accepts that to date little use has been made of this provision. He accepts that achieving coherence and consistency between the practice of the different basic offices is a challenge and puts forward a number of reasons to explain this. One reason is a certain overload of law reform. Kosovo has gone through quite a number of changes in legislation in its journey from the old Yugoslavian system, through reforms introduced by UNMIK to a new and up to date Criminal Code and Criminal Procedure Code which have introduced some new and exotic elements to the law of Kosovo. Another problem is the lack of clear and effective mechanisms to enforce compliance with any such rules or guidelines. It is true, for example, that even if guidelines were issued, the Chief State Prosecutor would probably find it difficult to monitor and enforce their observance. The Chief State Prosecutor understandably draws attention to the unclear system of subordination with its division of powers between the Chief State Prosecutor and the Kosovo Prosecutorial Council. Nevertheless this appears to be a clear competency which is conferred on the Chief State Prosecutor and despite other overlaps in function between the Chief State Prosecutor and the Council the latter does not appear to have been given a parallel function in this case.³⁴

91. There are quite a number of areas in which there appears to be a difference of approach among prosecutors and this confusion could benefit from the issuance of rules and guidelines. For example, a unified approach to the use of plea bargaining might be of assistance, although one interlocutor suggested to the expert that this is unnecessary since the provision of the Criminal Procedure Code concerning plea-bargaining is very detailed.

92. Despite the fact that the Criminal Procedure Code deals in some detail with the procedures relating to plea bargaining, it is clear that there is a great disparity between the use being made of this procedure in the different Basic Prosecution Offices, some of which told the expert they were making extensive use of these procedures, although this claim was disputed by most observers from outside the prosecution system, and some of whom admitted that they made a little use of the procedures. The general opinion seems to climb towards the latter view rather than the former. It is unfortunate that the system has not been more successful because there is a major problem with delay in the courts and it seems clear that an effective system of plea bargaining could help to clear backlogs in court lists. The basic problem appears to be that there is little or no difference between the sentences given by the judges where there is a plea of guilty and the sentence which is imposed following a contested case. For a system of plea agreements to be effective it is essential that defendants have an incentive to enter a guilty plea. It was also suggested to the expert that lawyers for the defence have an incentive to persuade their clients to fight cases because that way they will be paid a higher fee. There are a number of steps which could be taken to try to improve the situation. Firstly, the Chief State Prosecutor should attempt to encourage a degree of uniformity in practice. The Appellate Prosecutors’ Office should rethink their reluctance to try to persuade the Court of Appeal to lay down consistent principles and guidelines in relation to sentencing. If necessary, and if the judges will

³³ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 11.1.5, available at <https://gzk.rks-gov.net>

³⁴ Examples of overlapping powers between the Chief State Prosecutor and the KPC are given in section 3.8 below.

not agree to establish clear guidelines through judicial decisions, then the legislator may have to intervene to establish sentencing principles through legislation.

93. The problems in relation to plea agreements are referred to above as an example of an area in which prosecutors need to be more proactive in trying to ensure a consistency of approach. There are other examples such as the problem already referred to of investigations being ended as a result of becoming time-barred where a consistent approach by prosecutors could lead to an improvement in standards and practice. The problem is that the methods and procedures provided in the law to ensure a consistency of approach are not being used effectively, and indeed they seem to be scarcely used at all.

2.6 Transparency and accountability

94. The keeping of internal written records is an important aspect of transparency which, if properly carried out makes the concealment of corruption more difficult. A complementary aspect of transparency, which also serves to make corruption harder to conceal, is ensuring that interested parties as well as the general public are made aware of what the prosecution is doing and the reasons for its decisions and activities.

95. As a general rule prosecution services tend not to be proactive in making information available. Of their nature prosecutors obtain a great deal of material which is potentially damaging to individuals. If there is insufficient evidence to maintain a prosecution it could be extremely damaging and unfair if the evidence against a person which had been insufficient to ground a prosecution were nonetheless to be put into the public domain, particularly in circumstances where the person affected had no means to vindicate his or her good name as is likely to be the case where no trial is to take place. Moreover, prosecutors collect much information about victims and witnesses which could embarrass them and infringe their privacy if released gratuitously. For these reasons, much of the content of individual prosecution files should never be released except for the purpose of placing evidence before a court of law. Laws and standards (including international standards) relating to prosecutors' offices rightly lay a heavy emphasis on the prosecutor's duty of confidentiality. In addition, data protection laws should protect much of the information in the possession of the prosecutor.

96. These legitimate causes for caution can in practice be misused when they are invoked to avoid releasing information where no such considerations arise. Additionally, independence, which is widely regarded as essential to the proper exercise of the prosecutors function, can easily be made an excuse for an absence both of transparency and accountability. Transparency and accountability are like Siamese twins; each depends on the other. The importance of transparency and accountability from the point of view of a risk assessment is that both are rightly seen as the enemies of corruption, which is exposed when they are present but hidden in their absence.

97. While considerations of the protection of privacy interests and the good name of affected persons are good reasons to limit the extent to which individual information can be released they should not inhibit the production of statistics and general information about such matters as procedures which are followed, guidelines which are in operation, prosecution policies which have been adopted and many other matters. Furthermore, it is generally understood that for prosecution, and in particular criminal investigation, to be successful, public trust and confidence is essential. For these reasons, apart altogether from the consideration that prosecution is a public service paid for by the taxpayer who is entitled to know how tax payments are spent, prosecution services are under a particular duty to provide information to the public about their activities.

98. Information which is to be provided should include at least the following; firstly, victims should be kept apprised of the progress of criminal proceedings. The expert was informed that in Kosovo there is a legal requirement to keep victims informed when a case is dropped but he could find no reference to this in the Criminal Procedure Code. Secondly, defendants should be provided in a timely manner with all relevant evidence whether or not it tends to support the case against them. The Criminal Procedure Code imposes a duty "to make available to the defence all the facts and pieces of evidence, which are in favour of the defendant, before the beginning of and during the proceedings."³⁵ They should also, of course, have a right to receive all evidence which favours the prosecution, since the defendant is entitled to know what case he or she has to meet. Thirdly, the general public should be entitled to the same right to receive information concerning public expenditure as would be appropriate in the case of any other ministry or public body. So far as concerns the administration of the prosecution the same rights to freedom of information should apply as with any other ministry or public body. The matter is more complex when dealing with information relating to cases. For the reasons already outlined the interest in the good name and privacy of the persons concerning whom information is stored must be respected. However, once a case is in the public domain the public should be entitled to as much information concerning decisions taken by the prosecution as is consistent with the protection of relevant persons' good name and privacy. Normally most of this information can be conveyed to the public by the media as a result of statements which are made in open court.

99. In addition, the State Prosecutor should report regularly, usually in the form of an annual report which is submitted to an appropriate body. In Kosovo the law requires an annual report on the activities of the State Prosecutor and the expenditures of the Council to be prepared by the KPC.³⁶ But as late as December 2016 the KPC had not yet published its annual report for 2015.³⁷ The body which is responsible for oversight is itself in default, which creates a major cause for concern. The KPC is also required to provide and publish information and statistical data on the prosecution system.³⁸

100. An annual report should include basic statistical information, including the number of cases and their outcomes, which should be broken down according to the type of case, the courts in which the case take place, place of offence, and any other relevant information which is available (for example, information about the age of offenders, recidivism rates, as well as information about the treatment of minorities in the criminal justice system).

101. Other relevant information concerning the State Prosecutor should also be made available. For example, statistics concerning appointments, promotions, evaluations, disciplinary proceedings as well as other matters which are the responsibility of the KPC. Obviously certain material which may be sensitive from the point of view of individuals may not be provided although one would expect that at least the names of persons holding responsible positions in the State Prosecutor should be available. Information concerning the organisation of work should also be available. For example, guidelines, codes of conduct, internal regulations and general instructions which are in force should be public, although it may be reasonable that certain instructions in individual cases would not be published. Asset declarations should be made public subject to legitimate security considerations (for example, it may be reasonable not to disclose the location of dwelling houses). Minutes of appropriate bodies such as the KPC should be made public and their meetings should be held in public, as indeed is the case. The State Prosecutor should have a good website which is kept up-to-date and which should publish most of this information. There is at present a well-designed

³⁵ Official Gazette of Kosovo (2012), *Criminal Procedure Code*, Article 7.2, available at <https://gzk.rks-gov.net/>

³⁶ Official Gazette of Kosovo (2010) *Law on the Kosovo Prosecutorial Council*, Article 4.1.12, available at <https://gzk.rks-gov.net/>

³⁷ Kosovo Law Institute (2016), *Efficiency, Accountability and Integrity of Judicial System and Prosecutorial System*, available at www.kli-ks.org

³⁸ Official Gazette of Kosovo (2010) *Law on the Kosovo Prosecutorial Council*, Article 4.1.13, available at www.gzk.rks-gov.net

website with up-to-date news concerning the activities of the Chief State Prosecutor but beneath that facade much information is lacking. The most recent annual report for the State Prosecutor on the website is for 2014. The only information concerning the basic Prosecution Offices is the contact details of the Chief Prosecutors. There should be an information officer whose responsibility it is to ensure that the website is kept up-to-date. This officer should also handle media relations including the State Prosecutor's engagement with social media, for ensuring that requests for information are appropriately replied to, and for coordinating the publication of statistics. The information officer should have the right to access any files or documents held by the State Prosecutor.

102. The State Prosecutor should also engage in providing the public with information concerning the way in which the criminal justice system operates. This information should be made available on the State Prosecutor's website, and should be written in plain language which avoids jargon. For many lay people law is something of a mystery. The public prosecutor should be under a duty to do what is practicable to try to explain legal procedures in a manner which can be understood by persons of ordinary intelligence who do not have a legal background. A particular effort should be made to ensure that victims of crime and other witnesses who may have to give evidence in court are aware of what is involved and how the process works.

2.7 Specialisation and the organisation of work

103. There is already a degree of specialisation in the way in which the work of prosecution offices is organised. The most important element of this is the creation of the Special Prosecutor's Office³⁹ to deal principally with terrorism, serious organised crime, corruption which is punishable by more than four years imprisonment, and money laundering. Corruption cases involving the senior state officials are sent to the Special Prosecutor's Office whereas minor offences of corruption are dealt with in the Basic Prosecution Office. The Special Prosecutor operates throughout the whole territory of Kosovo. When the Basic Prosecution Offices receive cases in which these elements are present they notify the Special Prosecutor who decides whether to assume jurisdiction.

104. At the time of the expert's visit in November 2016 the SPRK was seriously understaffed with still only 10 prosecutors employed. The complement should be 18 prosecutors rising to 25 when EULEX conflicts its task. There are only two prosecutors assigned to deal with terrorist crimes. At present EULEX are still transferring cases to the Special Prosecutor but it is impossible for two prosecutors to deal with all the caseload. There are still more than 100 war crimes cases to be transferred. If steps are not taken to substantially increase the capacity of the office to deal with terrorist crimes this will lead to serious failures and serious reputational damage for Kosovo. The Office finds it difficult to recruit staff because of the requirement for the minimum experience of six years as a prosecutor. The Office would like to see this reduced to four years. Their wish is understandable but nonetheless it would be a source of concern if such cases were not to be prosecuted by the most experienced prosecutors available.

105. The Office deals with a heavy workload. There are almost 1,000 cases being dealt with at present. There were 22 indictments filed in 2016 in serious corruption cases. While this represents an increase it is still only scratching the surface so far as the problem of serious corruption in Kosovo is concerned. There is a need for a substantial increase in the resources available to SPRK.

106. Another area in which capacity is inadequate is that of money-laundering cases. It is quite clear that money-laundering is widespread in Kosovo and yet there are very few prosecutions. There appears to be a lack of capacity and expertise to deal with this problem.

³⁹ Official Gazette of Kosovo (2008), *Law No. 03/L-052 on the Special Prosecution Office*, available at <https://gzk.rks-gov.net>

107. The capacity of the Special Prosecutor's Office needs to be increased substantially. At present it has neither the numbers of prosecutors nor the expertise to handle the demands which are likely to be made on it in the immediate future. There is a need for more prosecutors capable of handling terrorism cases and war crimes. There is a need for greater technical expertise in the area of money laundering. There is also a need for technical staff with expertise in IT, financial affairs, business and economics to be attached to the office. The investigative resources available to the office need to be strengthened further.

108. Within the Basic Prosecution Offices there is a certain degree of specialisation. Prosecutors in each office are assigned either to serious crime, general crime or juvenile crime. It should be remembered that because of the small size of Kosovo the extent of specialisation which is practicable is rather limited. For example, in many of the offices the expert visited the juvenile crime section consists of one prosecutor only and at most two except in Pristina. This appears to be a rational use of resources. In particular the specialisation of the prosecution of juvenile crime is very important. The juvenile prosecutors generally display a sense of dedication and an understanding of and sympathy with the young offenders with whom they deal. However, the expert was informed that there was no particular training in how to deal with children and it seems that prosecutors were expected to apply their own experience as parents, assuming they have such experience. In addition, the facilities for dealing with children, such as special interview rooms which are child friendly or facilities to give evidence by video link rather than in the formal atmosphere of a courtroom were lacking. The capacity of the Basic Prosecution Offices to deal with cases involving children needs to be strengthened considerably, in particular by the provision of training for staff and facilities for children to give evidence in a manner which is less stressful for them than that provided in the normal courtroom environment.

109. Within each of the three categories cases are assigned at random to prosecutors. The thinking behind this appears to be primarily to ensure a fairer distribution of work rather than for any motive of reducing corruption risks. However, although the system provides for random distribution in principle in practice there are exceptions to this. For example, in Pristina murder cases, sexual offences and commercial cases are all separately distributed. Presumably this is intended to allow for allocation to persons who have experience in these areas and there are logical reasons to support such an arrangement despite its tendency to undermine the principle of random allocation. The expert was informed that there are procedures for taking account of the fact that some cases are heavier and more difficult than others and a weighting system is employed. Of course, systems of random distribution are always in conflict with the opposite principle which would suggest that the more complex cases should be dealt with by the most experienced prosecutors. There is also in some cases a practice of assigning particular prosecutors to particular classes of case. For example, in Gjilan one prosecutor has been assigned to deal exclusively with cases of illegal logging. While this seems a very sensible approach it is difficult to reconcile with the principle of random assignment of cases. Despite the existence of a regulation governing the random allocation of cases in practice the system appears to vary between the different Basic Prosecution Offices.⁴⁰ Generally speaking there appear to be variations between systems and procedures in the different Basic Prosecution Offices in a number of areas including systems for allocating cases and registering them. Such differences may cause problems with the introduction of an electronic case tracking system and it would be desirable to identify where they exist and to take steps to unify the practices in the different offices.

⁴⁰ See also section 6.2 below.

2.8 The relationship between prosecutors and investigators

110. Most of the prosecutors whom the expert discussed the issue at hand said that relations between themselves and the investigators were good. Generally speaking they described a cooperative relationship where requests from prosecutors were usually complied with. However, a significant number of prosecutors described cases where investigations have been insufficient and inadequate and reported that in files sent by investigators the evidence was clearly incapable of supporting a prosecution. Many prosecutors made the point that they have no power to direct investigators but merely to make requests of them. Ultimately the investigators were responsible to their own superiors and not to the prosecutor. Prior to the coming into force of the Criminal Procedure Code there had been judicial police who were under the control of the prosecutor. Some prosecutors expressed the view that particularly in cases of economic crime or corruption prosecutors should have investigators whom they could instruct and that in such cases, because of their complexity, the prosecutor should have a much more hands on role and control over the detail of the investigation. Investigators reported a lack of communication of the outcome of cases to them by prosecutors and were not told why no prosecutions ensued. Such a failure to report outcomes is bad practice and means that where a failure to prosecute results from an inadequate investigation no lessons are learnt. It also ensures that prosecutors' reasoning remains unknown and cannot be queried by the investigator. The requirement for prosecutors to report to the investigators the outcome of the cases submitted to them with a view to prosecution is a valuable means of accountability both for investigators and for prosecutors.

2.9 Professional support for prosecutors

111. In Kosovo there is a system whereby legally qualified staff and paralegals work in the prosecutor's office to provide auxiliary services to the prosecutors. These consist of Professional Associates, who are legally qualified staff who do work which would otherwise be performed by prosecutors, such as preparing indictments or submissions under the supervision of the prosecutor. In addition there are legal officers were also legally qualified and who do both professional and administrative work. There are also legal secretaries.

112. These staff perform invaluable work. In Pristina during the November 2016 visit there were 53 Prosecutors and 3 Professional Associates, 3 Legal Officers and 22 Legal Secretaries.

113. However, outside Pristina there are virtually none of these auxiliary staff employed. For example, in Prizren there are meant to be 8 Professional Associates but actually there is only one with seven positions vacant. In some cities vacancies are not filled due to overcrowding and consequent lack of office facilities. There are meant to be 16 Legal Officers but there are none. Clearly not enough persons apply for these positions and of those who do most of them apparently choose to work in Pristina. It may be that the salaries or other terms and conditions of work of these auxiliary staff need to be examined with a view to improving them and attracting more applicants. Employing more people in these capacities is a less costly option than employing more prosecutors.

3. The Prosecutorial Council (KPC)

3.1 The establishment of the KPC

114. The KPC is established by the Constitution of Kosovo, which describes it as a fully independent institution in the performance of its functions in accordance with law.⁴¹ Its primary functions are to ensure that all persons have equal access to justice and that the State Prosecutor is independent, professional and impartial and reflects the multi-ethnic nature of Kosovo and the principles of gender equality.

115. The Constitution further provides that the KPC “shall recruit, promote, transfer, reappoint and discipline prosecutors in a manner provided by law”.⁴²

116. The Constitution also contains a number of provisions concerning the appointment of prosecutors. Preference for appointment is to be given to members of underrepresented communities. All candidates are to fulfil the selection criteria, which are not specified in the Constitution but are to be provided for by law. Proposals for appointment must be made on the basis of an open appointment process, on the basis of merit, and are to reflect the principles of gender equality and the ethnic composition of the relevant territorial jurisdiction.

3.2 The composition of the KPC

117. The composition of the KPC is not prescribed in the Constitution which merely states that it is to be determined by law. The law providing for its composition is the Law on the Kosovo Prosecutorial Council which dates from 2010 and was extensively amended in 2015.

118. The original composition of the KPC consisted of five prosecutors and four non-prosecutors. The prosecutors were the Chief State Prosecutor, who also served as chair, and four elected prosecutors, one each from the Special Prosecution Office and the Appellate Prosecution Office, and two from the Basic Prosecution Office. The Minister of Justice was an ex officio member, and the remaining three members were appointed by the Council itself from among five nominees for each position nominated by the Chamber of Advocates, the university law faculties, and civil society.⁴³

119. The amendments in 2015 radically altered this structure. The total number of prosecutors was increased from 5 to 10 by providing that each of the seven Basic Prosecution Offices should elect one member. At the same time the Minister of Justice ceased to be a member. The three non-prosecutor members are no longer appointed by the Council but are supposed to be elected by the Assembly of Kosovo. The Chief State Prosecutor is no longer the chair of the KPC. The chair must be elected from amongst the prosecutor members but the chair then suspends his or her service as a prosecutor in order to serve as full-time chair.⁴⁴

120. It is difficult to see what the thinking was behind these changes. What was formerly a bare prosecutors’ majority on the council has been transformed into an overwhelming majority. In fact, the change to date has been even more dramatic than the text of the law provides because the Assembly has failed to elect the three non-prosecutor members of the Council. The legislator should have anticipated this entirely foreseeable risk and provided for an anti-deadlock mechanism in such an eventuality. A logical provision would have required the Assembly to fill the vacancy within a

⁴¹ Official Gazette of Kosovo (2008), *Constitution of Kosovo*, Article 110, available at <https://gzk.rks-gov.net>

⁴² *Ibid.*

⁴³ Official Gazette of Kosovo (2010), *Law on the Kosovo Prosecutorial Council*, Article 5, available at <https://gzk.rks-gov.net>

⁴⁴ *Ibid.*, as amended by Article 3 of the 2015 amendments.

certain period in default of which the Council would make the appointments itself. The result is now that the body which is supposed to be responsible for independent oversight of the prosecution service consists entirely of serving prosecutors accountable only to their fellow prosecutors, thereby rendering it incapable of carrying out an independent oversight.

121. The Venice Commission has consistently maintained the principle that prosecutorial councils should contain a substantial representation from outside the prosecution. In its Report on the Prosecution Service⁴⁵ the Commission, pointed out that the existence of a Prosecution Council cannot be regarded as a uniform standard binding on all European states. In discussing the advantages of having such councils the Commission stated that “if they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence.”⁴⁶ It therefore recommended that “where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics.”⁴⁷ In one report where the Venice Commission had to consider a prosecutorial council consisting entirely of prosecutors it stated the following:

“The composition of the National Council for the Public Prosecutor’s Office, which is regulated in Article 72, also presents problems. It is currently composed exclusively of prosecutors. The President is the State Prosecutor General, followed by the departmental prosecutors and subject prosecutors; the only non-prosecutor member is the Director of the Disciplinary Proceedings.

The Venice Commission has compared many systems and has always considered that where such a type of council exists – its establishment is not an obligation - it should be composed not only of prosecutors but also of other actors such as lawyers or legal academics from appropriate branches of law. The composition of the National Council for the Public Prosecutor’s Office should not grant unduly large internal powers to the public prosecutors, which would prevent them from being publicly accountable and their actions should be transparent.”⁴⁸

122. A further concern with the composition of the Prosecutorial Council is the fear that there are a number of persons who are members of the Council in breach of the applicable legal provisions. In one case a person was renewed for a period despite already having served the maximum term of five years which is allowable. The Kosovo Law Institute, an NGO supported by the British Embassy in Kosovo, has drawn attention to these problems in a number of its papers.⁴⁹ On the other hand the authorities have apparently defended the legality of the current position.⁵⁰ It is not for the writer to form a judgment on who is right. It is, however, a matter of concern that such a public dispute is allowed to continue with the risk that the lawfulness of decisions made by the KPC may be thrown into doubt. It is highly desirable that any doubt about the legitimacy of the current composition of the KPC should be brought to an end.

⁴⁵ Venice Commission (2010) [Report on European Standards as regards the Independence of the Judicial System: Part II - The Prosecution Service](#), CDL-AD (2010)040-e, available at www.venice.coe.int/.

⁴⁶ *Ibid.*, Para. 65.

⁴⁷ *Ibid.*, Para. 66.

⁴⁸ Venice Commission (2011) [Opinion on the Draft Organic Law of the Public Prosecutor’s Office of Bolivia](#), (CDL-AD(2011)007, paras 42-43, available at www.venice.coe.int

⁴⁹ Kosovo Law Institute (2016) [Illegality of Judicial Council and Prosecutorial Council](#), November 2016, [Illegal Decisions of KPC and Bad Practices of Amending Regulations by KJC](#), December 2016, and [Efficiency, Accountability and Integrity of Judicial System and Prosecutorial System](#), December 2016, available at <http://kli-ks.org>

⁵⁰ The website of the KPC not only reports that the person in question remains a member of the KPC but has been awarded a high honour by the Minister of Justice.

123. There are other reasons for concern about the composition of the KPC. A body so composed is very representative of prosecutors. Its members include both very experienced prosecutors, including the Chief State Prosecutor and the representative of the Appellate Prosecutors, but also including some very junior and relatively inexperienced prosecutors, some of them elected before they had even achieved permanent status as prosecutors.

124. If the function of the KPC was to represent the views of prosecutors this composition would be perfectly reasonable. However, this is not the function of the KPC. It is an executive body with important executive powers. The recruitment, promotion, transfer, reappointment and disciplining of prosecutors are important executive functions. Moreover, they are not functions appropriate to be carried out by newly-appointed prosecutors but rather require persons of experience and wisdom who have the capacity to act in an independent manner.

3.3 The functions of the KPC

125. The other duties of the KPC are set out in detail in the Law on the KPC.⁵¹ It is noteworthy that a large number of functions which are not specified in the Constitution have now been conferred on the KPC. Some of these are functions which would normally be the responsibility of line management rather than an elected supervisory body. In addition to the constitutional functions to recruit, promote, transfer, reappoint and discipline prosecutors and matters related to these functions, all of which are of great importance, they include a mixture of managerial, administrative and high level policy functions and include the development of prosecutorial policies and strategies, proposing to the Government and Parliament measures related to the prosecutorial system, overseeing the administration of the prosecution offices and its personnel, issuing rules and regulations concerning performance evaluation, preparing, submitting and overseeing the budget, promulgating codes of ethics, determining training policies, standards and instructions, and promulgating rules and regulations relating to public information. Neither these matters nor the important matters specified in the Constitution are suitable to be decided by junior prosecutors not yet appointed to permanent function. It is interesting that the KPC has recognised this problem itself in its Regulation on the recruitment of prosecutors which requires members of the Recruitment Committee to have been appointed to permanent mandate and have work experience as a prosecutor.⁵² It is somewhat ironic that such requirements are applied to a subcommittee but not to the Council itself.

126. It is not clear why the situation in which a number of members of the KPC are junior prosecutors of limited experience has come about. The result of the most recent elections may suggest that experienced prosecutors are more interested in prosecuting than in the management and administration of the office. It may be unrealistic to expect that 10 experienced and competent prosecutors who want to engage in managerial and administrative work and are competent to do so can be found in a staff of only 178 persons. Or it may be that there are those who would prefer to see inexperienced people on the KPC in the hope that they might be easy to control. It is striking that one result of providing a member of the KPC for each Basic Prosecution Office is that some of these electorates are very small with only a handful of prosecutors electing a member to the Council.⁵³ Such elections by small numbers of electors can be easily manipulated. Furthermore, Pristina Basic Prosecution Office is home to nearly as many prosecutors as the other six Basic Prosecution Offices combined, yet has only one seat out of the seven for Basic Prosecution Offices on the KPC.

⁵¹ Official Gazette of Kosovo (2010), *Law on the Kosovo Prosecutorial Council*, Article 4, available at <https://gzk.rks-gov.net>

⁵² Kosovo Prosecutorial Council (2015) *Regulation No. 07/2015 on State Prosecutors' Recruitment, Exam, Appointment and Reappointment*, Article 4.3, available at www.kpk-rks.org/

⁵³ During the expert visit to the Basic Prosecutors' Offices in November 2016 the number of prosecutors in each office was given to us as follows: Pristina, 53; Peja, 10; Gjakova, 10; Prizren, 16; Ferizaj, 10; Gjilan, 15; and Mitrovica, 9.

127. It is not clear to what extent this lack of experienced prosecutors on the KPC is partly responsible for the poor work rate of the Council. Much of the work of the Council is now in arrears. In its monitoring report of the work of the KJC and the KPC for the first six months of 2016 the Kosovo Law Institute identified the following functions which the KPC had failed to perform during the monitoring period despite the fact that the performance of all these functions was a legal obligation: publication of the annual work report of the State Prosecutor, publication of its own annual work report, carrying out a performance assessment of one third of the prosecutors, appointment of the Director of the Prosecutors Performance Assessment Unit, appointment of the KPC member by civil society, receiving the reports of the Chief Prosecutors, adoption of the work plan of the State Prosecutor for 2015, and reporting to the public on the implementation of its objectives set out in a specific manner and based on measurable indicators which is required to be done every six months.⁵⁴

128. Meetings of the Council take place in public and are monitored by NGOs. The Kosovo Law Institute monitored all the Council's meetings during the first six-months of 2016. At these meetings many of the members made few or even no interventions, and discussion was dominated by only three members. One member never spoke at all, and four others spoke for a total of less than five minutes each. Out of 42 decisions adopted during the period 41 were adopted unanimously. In the other decision only the abstention of one member prevented it from also being unanimous.⁵⁵

129. There is a further problem caused by another aspect of the composition of the KPC which arises in relation to the functions of recruiting, appointing, evaluating, promoting and disciplining their fellow prosecutors. Kosovo is a very small jurisdiction. There are only 178 prosecutors active in Kosovo at present although the number will probably rise a little more in the future and at present the prosecutors chosen from the Serb minority are not active. It is inevitable that a very large proportion of these active prosecutors will be known to most if not all of the members of the KPC on a personal basis. One of the key attributes of a body making appointments, reappointments, promotions and evaluations, and dealing with disciplinary complaints is that it must act impartially. With the best will in the world it would be very difficult for all the members of the KPC to be impartial given the small scale of the prosecutors' profession in Kosovo. On the contrary, there is a serious risk that in future such decisions could be made on the basis of favouritism, nepotism or cronyism. A structure such as that provided for in the law of Kosovo could work without leading to nepotism or cronyism in a large and populous country, but the risk is far higher in a jurisdiction as small as Kosovo. Furthermore, it should be borne in mind that the conferring of such important powers which have huge consequences for the lives of individuals on an elected council has created opportunities for corruption in other Balkan states with a similar system, and while there have to date not been any suggestions that a similar problem has arisen in Kosovo one has to guard against future risks of corruption by ensuring a degree of transparency in decision-making on the Council.

130. This problem could be avoided to a considerable extent if the KPC confined itself to the high-level tasks of setting the rules and procedures for recruitment, evaluation, promotion, and discipline and acting as overall guarantor of the fairness of the procedures rather than attempting to carry out the actual selections and decisions itself. Apart altogether from the risk of nepotism, cronyism and corruption it is very doubtful if an election by prosecutors is the best way to select persons who have the necessary aptitude and skill to interview applicants, select them for appointment, evaluate the performance of prosecutors and make decisions concerning discipline. The qualities which make people likely to succeed in elections are not necessarily the qualities one needs

⁵⁴ Kosovo Law Institute (2016) *Efficiency, Accountability and Integrity of Judicial System and Prosecutorial System*, pages 33-34, available at <http://kli-ks.org>

⁵⁵ *Ibid.*, pages 39-44.

in persons performing such tasks. It would be preferable for the KPC to hire persons having the necessary skill to perform most of these tasks. In relation to the appointment of prosecutors the provisions establishing a Recruitment Committee meet these concerns. So far as hearing disciplinary complaints is concerned it would be much better that they be heard by a body which did not know either the persons complained about or the persons making the complaint. Indeed, it is essential that such judgments be made by absolutely impartial people with no preconceived ideas about any of the parties. This could be achieved in various ways which are discussed further below.

131. It might be added that as a matter of practicality a body which already appears to be struggling to perform all of the tasks required of it, and not always doing so very successfully, is hardly going to be in a position to perform all the tasks in question. This is a further reason why a supervisory role would be more appropriate for the KPC.

3.4 Recruitment, vetting and appointment of prosecutors

132. The recruitment of prosecutors is one of the functions conferred on the KPC by the Constitution. In addition, the amendments to the Law on the KPC have added the function of making a regulation determining the procedures and rules for the organisation of the exam for prosecutor candidates.

133. Pursuant to these powers on 1 December 2015 the KPC issued Regulation No. 07/2015 on State Prosecutors' Recruitment, Exam, Appointment and Reappointment. The Regulation established two new committees of the KPC, the Recruitment Committee, which is in charge of organising and ensuring execution of the recruitment process, drafting and evaluation of the exam, as well as evaluation of the candidates for prosecutors, and the Review Committee which hears appeals regarding the recruitment process. Interestingly, because the amendments to the law which changed the composition of the Council and the rules regarding its chairmanship postponed the coming into effect of those particular changes, the new Regulation was signed by the Chief State Prosecutor in his continuing capacity as chair of the KPC.

134. The Regulation provided that members of the Recruitment Committee must have work experience as prosecutors and have been appointed to permanent mandate. They are also required to have organisational, training and evaluation skills and they must not have had disciplinary measures imposed on them and must enjoy a solid professional reputation. These are reasonable requirements for persons carrying out such functions. The Regulation went on to provide for a Recruitment Committee having five members and two reserve members to replace the regular members where obstacles such as conflict of interest made it impossible for them to act. The five members consist of the Chief State Prosecutor, who is to chair the Committee, and one other prosecutor from his office and one from the Appellate Prosecution Office, as well as two prosecutors from the Basic Prosecution Office.

135. This appears to be an appropriate composition for such a committee. It is important that the Chief State Prosecutor should have a say in appointments to the State Prosecutor and the addition of colleagues from the same office and from the Appellate Prosecutors weights the committee in favour of seniority and experience. The Kosovo Law Institute⁵⁶ has objected to giving such a role to the Chief State Prosecutor. The objections are based on an opinion of the Venice Commission in which the following passage appears:

⁵⁶ Kosovo Law Institute (2016), *Legality of the Judicial and Prosecutorial Council*, April 2016, in particular at pages 42-45, available at <http://kli-ks.org/>

“An additional problem is that Article 53 of the draft Law empowers the Chief Prosecutor to select deputy chief prosecutors from among the appointed prosecutors in the office who satisfied the necessary requirements. He or she then notifies the decision to the HJPC. It seems these appointments are entirely in the hands of the Chief Prosecutor. In a hierarchical system such as that of BiH, giving so much power over appointments to a single individual especially without any requirement to consult with anybody else, could be a recipe for the Chief Prosecutor to select deputies chosen for their compliance and lacking the necessary independence of thought necessary in a good prosecutor.”⁵⁷

136. The situation described in this opinion of the Venice Commission was one in which a chief prosecutor had the sole and untrammelled power to appoint prosecutors and the objection of the Commission was to placing such a power in the hands of a single individual. The Venice Commission has never suggested that a chief prosecutor should have no say or influence whatsoever in the appointments of prosecutors. The system now adopted in Kosovo does not give the Chief State Prosecutor the sole power to make appointments. He is one member of a committee of five, though undoubtedly a very influential one. Furthermore, the final decision rests with the KPC which is entitled to reject the recommendation of the Recruitment Committee, although they must justify their decision to do so in writing.⁵⁸

137. Because the final decision on recruitment rests with the KPC itself the Kosovo Law Institute is wrong to conclude that the establishment of a committee of which no member of the KPC is present except the Chief State Prosecutor’s is not aligned with Article 110 of the Constitution which provides that it is the only body which recruits and proposes candidates for the position of prosecutor. That in fact remains the position under the law applying in Kosovo.

138. The Kosovo Law Institute has also criticised Regulation No. 07/2015 for its failure to define personal integrity. This is a more defensible point of view. However, to attempt a full definition would seem to require an amendment to the Law on State Prosecutor itself rather than a provision in the Regulation. Secondly, there are already a number of indications in the law as to what is meant by personal integrity. For example, Article 7 of the Law on State Prosecutor requires prosecutors to conduct themselves honourably and professionally in personal and professional life and pursuant to the applicable law and the code of professional ethics, as well as to maintain the honour and dignity of the State Prosecutor. Article 19 of the same law defines the minimum qualifications and criteria for appointment, which include having positive high professional reputation and moral integrity, and having no final convictions for criminal offences, with the exception of minor offences as defined by the law. It follows from this that it is not sufficient to impugn a prosecutor’s integrity that there has been an accusation of a criminal offence against him or her if there has not been a conviction. In the end it does not seem possible to give a comprehensive definition of what is meant by personal integrity which will not use any general expressions, although clearly it would be possible to cite examples of what is meant, such as whether a person has been convicted of a criminal offence.

139. The Regulation requires the evaluation of a candidate’s personal integrity and professional skills to be carried out in accordance with the Recruitment Regulation.⁵⁹ The evaluation process is to be applied to all candidates who have passed the written test before proceeding to the interview stage. This is to include evaluation of the ability to perform impartially, conscientiously, diligently, decisively and responsibly as envisaged by the Law on the KPC. There is a certain overlap between the concept of personal integrity and the idea of professional skills, and most of these qualities relate

⁵⁷ Venice Commission (2014), *Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, CDL-AD(2014)008, adopted by the Venice Commission at its 98th Plenary Session, available at www.venice.coe.int

⁵⁸ Kosovo Prosecutorial Council (2015) *Regulation No. 07/2015 on State Prosecutors’ Recruitment, Exam, Appointment and Reappointment*, Article 34, available at www.kpk-rks.org/

⁵⁹ *Ibid.*, Article 21.

to both. The Regulation goes on to provide that the evaluation is provided through vetting of the information provided by the candidate and any kind of other relevant information decided to be required by the Recruitment Committee. This is not defined, but is stated to include information regarding work experience and performance, publications and professional and academic documents, information regarding eventual disciplinary measures and behaviour outside the office, as well as criminal background. It is furthermore provided that the evaluation is to be conducted in accordance with the legal provisions which protect human rights and freedoms, as well as for purposes of providing relevant information regarding the personality, work and personal experience of the candidate. Candidates have a right to be informed about and to have access to any relevant documents and to deal with relevant issues in the course of the interview. The Report on recruitment and exam process of candidates for prosecutors which was published by the KPC states that only seven of the candidates in the recent interview process availed of this right.⁶⁰

140. In conclusion, it seems clear that references to criminal background mean no less than convictions for criminal offences. While it might be desirable if it were possible to define the concept of personal integrity with the absolute precision to be expected in the definition of a criminal offence, the concept is not capable of such precise definition. The provisions of Regulation No. 07/2015, in particular by expressly making the vetting process subject to human rights principles and affording a right to candidates to have access to relevant documents, are consistent with European standards.

141. During the visit to the various prosecution offices in Kosovo in November 2016, including all of the Basic Prosecution Offices in Kosovo, it was striking how many vacancies among the prosecution staff had been left unfilled. On 12 February, 2016, the KPC announced 22 vacant positions and a competition was commenced on 24 February. The number of vacant positions was subsequently increased to 25. In total there were 184 applications for the vacant positions. A total of 51 candidates did not meet the necessary criteria which reduced the number of candidates to 133. Subsequently 87 of those passed the qualification test and 85 of them took part in the written test, of whom 47 were successful. Following some withdrawals from the process and the conclusion of interviews a total of 25 candidates were recommended for appointment in accordance with the procedures set out in the Regulation.⁶¹ The process was monitored by the international community.

142. Many of these appointments have now taken place. This is very welcome news and will undoubtedly help to relieve the pressure which was placed on the State Prosecutor by the existence of so many vacancies.

⁶⁰ Kosovo Prosecutorial Council (2016), [Report on Recruitment and Exam Process of Candidates for Prosecutors](#), p.16, available at www.kpk-rks.org/

⁶¹ *Ibid.*, at page 21.

3.5 The appointment of the Chief State Prosecutor and other senior prosecutors

143. The Chief State Prosecutor is appointed and dismissed in accordance with Article 109 of the Constitution of Kosovo. This provides for appointment and dismissal by the President of Kosovo on the proposal of the KPC. It seems clear from this that the President has no power to appoint a person who has not been recommended by the Council. Whether he has power to refuse to appoint a person who has been recommended is a separate question which has so far not arisen in practice.

144. The appointment of certain other senior prosecutors is governed by Regulation No. 08/2016 on Chief Prosecutor's Appointment.⁶² The Regulation applies to the Chief Prosecutors of the Special Prosecution Office and the Appellate Prosecution Office as well as to the prosecutors of the Basic Prosecution Offices. It also applies to the appointments of Deputy Chief Prosecutors, Managers of Departments and to the premature termination of the mandate of Chief Prosecutors.

145. The Regulation establishes a number of criteria for appointment. The candidate must be a prosecutor with a permanent mandate, must not have any indictment filed against him or herself, or have been convicted for a criminal offence other than a minor one, must have a positive performance evaluation and have a high professional reputation and moral integrity.⁶³ There are some additional criteria relating to experience for particular posts. Vacancies must be announced in advance and interested candidates must complete an application form and provide a CV as well as a concept paper on the management of the prosecution.

146. The Council then establishes an Evaluation Committee to evaluate the candidates who have applied. Beyond providing that the Committee is to be composed of three members no criteria are established for membership and it seems that the Committee is intended to be established on an *ad hoc* basis each time there is a vacancy. Criteria should be established for membership of a committee exercising such important functions and there may be a case for making it a standing committee. Consideration should be given to ensuring that there is some representation of suitably qualified persons from outside the ranks of the prosecution on this body.

147. The KPC Secretariat are also required to collect certain data including the performance evaluation of the candidate, which if it is not already in place is to be conducted by the PPEU. The Evaluation Committee then interviews all the candidates who meet the criteria. The interview is to be focused on the matters incorporated within the concept paper, on the managerial skills of the candidate and on questions related to the integrity of the candidate. Candidates are to be scored, reasoning is to be provided for the general scores, and a recommendation based on this is to be made to the KPC.

148. The KPC then decide on any appeals made by the candidates. It is not clear what is involved here as this is the first and only mention of appeals in the Regulation. However, having disposed of any appeals the next business of the Council is to make actual decisions on the recommendations. The Council has access to all material which was before the Committee and in addition they can invite any candidate before them to respond to any specific question. They then vote by secret ballot on the proposal to appoint the first candidate recommended to them. If they reject that candidate they then vote on the second candidate, if there is one. The law also makes it clear that if only one candidate is recommended the KPC is not required to approve that person's selection.

⁶² Adopted by the KPC on 14 October 2016.

⁶³ Kosovo Prosecutorial Council (2016), *Regulation No. 08/2016 on Chief Prosecutors' Appointment*, Article 4, available at www.kpk-rks.org

149. This is a very unsatisfactory procedure. The Evaluation Committee interviews all the candidates and ranks them according to a scheme which are set out in the Regulation and, what is more, the Committee is required to justify the scores which they have given. The Council is then empowered to reject this reasoned decision without itself having to give any reasons. Indeed, it cannot give any reasons since the system of voting in secret means that it cannot know with certainty what the reasons might have been. The Council is in effect authorised under the provisions of the Regulation to make an arbitrary, prejudiced or whimsical decision. In the light of the comments elsewhere in this report about the suitability of a Council to make important decisions when some of its members are very inexperienced,⁶⁴ and furthermore in the light of the comments about the risks of the Council taking decisions about persons whom they are likely to know well⁶⁵ the expert questions whether it is appropriate for the Council to make such decisions at all. It is a recipe for the worst kind of favouritism, cronyism and nepotism to permit such decisions to be made, not only without having to give any reason, but on foot of a secret ballot where the voters do not have to give or even have a reason at all.

150. The Regulation empowers Chief Prosecutors to appoint their deputies. There is no requirement for a competition or to invite applications of interest. The Regulation also allows the Council to appoint Managers of the Departments for general crimes, minors and serious crimes on the nomination of the relevant Chief Prosecutor. Again no provision is made for competitions or applications of interest. The absence of any procedure for these appointments is not satisfactory.

151. The Regulation enables the early termination of the mandate of a Chief Prosecutor who is convicted of a criminal offence, who fails to accomplish tasks as defined by law, who obtains a negative performance evaluation from the PPEC, who fails to apply general instructions and decisions issued by the Chief State Prosecutor and the KPC, or due to mismanagement. While conviction for a criminal offence is objectively verifiable, any of the other grounds may give rise to facts which are in dispute, and with regard to performance evaluation the findings of the PPEC are not necessarily conclusive. However, no mechanism to establish any disputed facts or findings is provided. The regulation as drafted opens the possibility of the KPC exercising an arbitrary power.

3.6 Evaluation and assessment of prosecutors

152. In a separate exercise the writer was recently responsible for carrying out an assessment of the system of evaluation of prosecutors' performance currently used by the KPC, for writing a report for the Council of Europe and making proposals for its improvement in order to enhance the transparency and efficiency of the judicial system as a whole. In the following paragraphs of this section the expert has drawn on the conclusions which are summarised in that report.

153. On paper, Kosovo has a detailed and elaborate system for the evaluation of prosecutors. The process involves an initial evaluation of prosecutors by the relevant Chief Prosecutor which takes place once a year, as well as a process of self-evaluation. A more formal evaluation process should take place once every three years for prosecutors who have achieved a permanent mandate. As well as this prosecutors should be evaluated at least twice during their initial mandate. The formal process involves the collection of information by the Public Performance Review Unit, which is a unit of the Kosovo Prosecutorial Council, followed by an assessment by the Prosecutors Performance Assessment Committee (PPEC), a subcommittee of the KPC to which a further appeal can be brought. The KPC is, of course, established under the Constitution which confers on it the functions of recruiting,

⁶⁴ See sections 3.3 and 3.6 of this report.

⁶⁵ *ibid.*

proposing, promoting, transferring, reappointing and disciplining prosecutors. The evaluation of prosecutors is not provided for by the Constitution but by law, and by subordinate regulations made by the KPC itself pursuant to the law.

154. The laws concerning evaluation are, generally speaking, comprehensive and in principle appropriate. There is some inconsistency between the criteria to be applied in evaluations listed in the legislation and those in the regulations (which are generally speaking more detailed) and these inconsistencies should be eliminated. The scope of a provision allowing for conduct outside the office to be taken into account in carrying out evaluations needs to be clarified.

155. There is, however, a large gap between the law on paper and what happens in practice. The evaluations carried out by Chief Prosecutors are largely formalistic and are not linked to the self-evaluations which are meant to take place. The primary focus of the evaluation system should be on ensuring an effective system of day-to-day line management in which evaluation aimed at improving performance would play a central part. Self-evaluation should form an essential part of this process.

156. The more formal evaluations which are meant to take place every three years are not yet fully in place. Although the Law on the KPC was passed in 2010 and provided for the evaluation of prosecutors no implementing regulation was made by the KPC until 2015. In that year one-third of prosecutors were identified for assessment but the identification of the second cohort of one-third due to take place in 2016 never happened. Such assessments as have taken place to date have been largely formal and dependent on an examination of documents and statistics without any examination of the reality underlying those statistics or forms. The persons being evaluated are not even interviewed by the evaluators. No prosecutor has ever been dismissed as a result of an evaluation. Real problems which exist in the prosecution service, in particular the frequency with which cases are allowed to become time-barred, are not investigated with a view to identifying any fault on the part of prosecutors. Evaluations are designed simply to measure the perceived performance of prosecutors rather than to find solutions aimed at improving performance.

157. Although generally speaking it seems that in practice there are reasonable safeguards in place to ensure the fairness of procedures many of these are not specified in the law which is to that extent defective. These include a requirement that all evaluation decisions should be motivated, that dissenting views should be motivated and in writing, that the procedures relating to conflicts of interest should be clarified and the person evaluated entitled to raise such issues, and that the law should expressly provide for an appropriate right of appeal to a court of law.

158. Finally, the ultimate decision on the evaluation (subject to any further appeal to a court of law) lies with the Kosovo Prosecutorial Council itself. This is a body the majority of whom are prosecutors elected by other prosecutors. Most of the members of the KPC will know most of the prosecutors being evaluated. Once more this raises a question over the impartiality of the procedure. Moreover, some members of the KPC are prosecutors who are still in their initial mandate and therefore subject to and awaiting a serious evaluation procedure themselves. Only the most experienced prosecutors should be regarded as suitable to evaluate other prosecutors. For this reason the role of the KPC as the body to decide on appeals concerning evaluations is inappropriate. It would be preferable that the role of the KPC be confined to that of establishing the principles and criteria which should guide the process of evaluation and acting as guarantor for the overall integrity of the system of evaluation.

3.7 Discipline and dismissal

159. The first stage in the disciplinary process is an investigation by the Office of Disciplinary Prosecutor. So far as the State Prosecutor is concerned this body is established by Chapter VI of the Law on the KPC “as a separate and independent body that serves both the Kosovo Judicial Council and the Kosovo Prosecutorial Council”⁶⁶ and its Director answers to both⁶⁷ and is appointed by two-thirds majority of a joint meeting of the two Councils.⁶⁸ The function of the body is to investigate alleged misconduct of prosecutors and to present the evidence and the case supporting disciplinary action for misconduct to the Disciplinary Committee. Chapter VII of the Law on the Kosovo Judicial Council is effectively identical in all respects (apart from some different but parallel provisions where one law refers to prosecutors and the other to judges, and some differences in the name attributed to the Office in the English language which the expert was advised is due to a translation error) so that the Office created is also given the function of investigating complaints against judges and has the function of serving both the KPC and the KJC.⁶⁹ The intent behind the two laws is clear, to create a single body to investigate complaints against judges and prosecutors, even if the drafting method of establishing a single body using two different laws is rather curious.

160. Investigations of alleged wrongdoing by prosecutors are initiated by the Disciplinary Prosecutor on foot of a complaint or on his own initiative where there is a reasonable basis to believe that a prosecutor may have engaged in misconduct. The Director appoints Disciplinary Prosecutors in consultation with the KPC and also appoints Inspectors. The result of the investigation is notified to the Disciplinary Committee of the KPC and the Office of the Disciplinary Prosecutor may recommend the initiation of disciplinary procedures.

161. The Disciplinary Committee consists of three members, one of whom is also a prosecutor member of the KPC and acts as chair of the Committee, one of whom is a prosecutor from the Office of the Chief State Prosecutor and another of whom is a prosecutor from the Appellate Prosecution Office.

162. Misconduct is defined as either a final conviction for a criminal offence, with the exception of a minor offence; negligence in performing, or a failure to perform, or abuse of a prosecutorial function; failure to perform prosecutorial functions independently and impartially, or a violation of the applicable code of ethics. The first of these, commission of a criminal offence, is entirely appropriate. With regard to the second, mere negligence or failure to perform a function as distinct from a refusal to do so should be regarded as a performance issue rather than a matter for disciplinary liability, except possibly in the case of gross negligence. Breach of the duty of independence or impartiality is also appropriate. With regard to a breach of the code of ethics, one would normally expect a code of ethics to cover a wide range of expected behaviour ranging from very important matters breach of which would justify disciplinary proceedings to much less important matters.

163. The 2015 amendments to the Law on the KPC introduced a requirement that the disciplinary procedure could not be initiated and implemented in the Committee following the expiration of one year from the notification received at the Office of Disciplinary Prosecutor or two years from the date of the alleged violation.⁷⁰ There was no transitional provision. As a result of this substantial number of cases which were then in the pipeline could no longer be dealt with- about 40 cases according to

⁶⁶ Official Gazette of Kosovo (2010), *Law on the Kosovo Prosecutorial Council*, Article 33, available at <https://gzk.rks-gov.net>

⁶⁷ Official Gazette of Kosovo (2010), *Law on the Kosovo Judicial Council*, Law No. 03/L-223 of 30 September 2010, Article 36.2 and Article 46.2, available at <https://gzk.rks-gov.net>

⁶⁸ Official Gazette of Kosovo (2010), *Law on the Kosovo Prosecutorial Council*, Article 36, available at <https://gzk.rks-gov.net>

⁶⁹ Official Gazette of Kosovo (2010), *Law on the Kosovo Prosecutorial Council*, Article 43, available at <https://gzk.rks-gov.net>

⁷⁰ Official Gazette of Kosovo (2010), *Law on the Kosovo Prosecutorial Council*, Article 16 of Law No. 05/L-035, amending Article 25, available at <https://gzk.rks-gov.net>

the Office of the Disciplinary Prosecutor. It is difficult to believe that such a provision could have been enacted without understanding that the consequences would be to bring an end to a large number of complaints against prosecutors, many of which, it is understood, were serious.

164. The prosecutor accused of a disciplinary offence is entitled to represent himself or to be defended by a lawyer and is entitled to access to all evidence and documents in the case. A finding against the prosecutor may lead to a reprimand, a reprimand accompanied by a direction to take corrective actions, temporary reduction of salary of up to 50%, demotion in office, or a proposal for dismissal. The sanctions are required to be consistent with the circumstances of the offence, the level of responsibility of the offender, and the consequences of the misconduct. Where dismissal is recommended the KPC decides whether such action is justified. Where it decides in the affirmative the case is submitted to the President of Kosovo for a decision. Although the involvement of the President is mandated by the Constitution his involvement other than in a formal manner represents a political involvement in the prosecution service which is undesirable. For the reasons already discussed above in relation to appointments and evaluations the expert does not believe that the involvement of the KPC itself in making the recommendation for a decision of dismissal is appropriate.⁷¹ The KPC also hears appeals against decisions not involving dismissal. In the expert's opinion appeals against decisions of the Disciplinary Committee should not lie to either the KPC or the President of Kosovo but rather should be to a court of law or to the Constitutional Court.

165. The Office of Disciplinary Prosecutor has a very unsuccessful record. The Office has been in existence since 2001 having been established originally under UNMIK. Most of the complaints received by it relate to delay. Their mandate does not extend to investigating administrative staff but only prosecutors and judges. One of the reasons for the lack of success is that in many of the small number of cases which have been referred to a Disciplinary Committee the judge or prosecutor complained of was allowed to resign before going through the procedure of the hearing of the complaint. Many of the prosecutors who resigned in such circumstances then went on to practise as lawyers. Naturally this tends to happen in cases where the evidence to support the complaint is strong. In other cases according to the Disciplinary Prosecutor following referral to the Disciplinary Committee delays just managed to happen for long enough to require the case to be dismissed. This is particularly ironic in a system where most of the complaints themselves refer to delay by prosecutors. There had been 87 complaints concerning failure to act before the statute of limitation expired in 2016. Where cases are heard 50% of them result in an acquittal. The Office of Disciplinary Prosecutor considered there was a culture amongst prosecutors of considering themselves to be above the law.

166. It has been suggested that rather than remaining an independent office the Office of Disciplinary Prosecutor should be under the aegis of the Ministry of Justice. However, the central problem with the non-functioning of the disciplinary system appears to be that the ultimate decision rests with the prosecutors. The transfer of an investigation function to the Ministry will not cure this problem. A better solution would be to establish the Disciplinary Committee as an independent body and to remove the final decision-making on the establishment of disciplinary liability from the hands of a Council elected by prosecutors.

⁷¹ See sections 3.3 and 3.6 of this report.

3.8 Relationship between the KPC and the Chief State Prosecutor

167. A key element in the establishment of the KPC appears to have been a view that the Chief State Prosecutor should not have too much power and that the establishment of a prosecutorial council would ensure that not too much power was centralised in the hands of any single person. This is a perfectly reasonable objective and one of the principal reasons why many jurisdictions have established prosecutorial councils.

168. It is, however, in making decisions as to where power should be situated necessary to ensure that the system itself is coherent and to avoid contradictions. It is important to ensure that management remains effective and the dilution of the power of a single individual should not be brought about at the expense of creating too weak a management. Lines of authority should remain clear. The same function should not be given to more than one body. Doing so creates two risks, one of which is that neither will exercise the power because each assumes that the other will do so, and the second risk is that both will attempt to do so but in an inconsistent or incomplete manner leading to internal conflict which weakens the organisation. It should also be borne in mind that some functions can be performed well by a group of people but others are best performed by a single individual.

169. A comparison of Article 11 of the Law on State Prosecutor, which sets out the functions of the Chief State Prosecutor, with Article 4 of the Law on the KPC, which sets out the competencies of the Council, will show that the system is incoherent and contradictory.

170. The Chief State Prosecutor *"is the head of the State Prosecution Office and shall have the responsibility of managing and representing the State Prosecution Office and prosecution offices structures which comprise the State Prosecution Office."*⁷² How is this consistent with the following functions which are conferred on the KPC?

- Determining the number of prosecutors in each prosecution office⁷³;
- Proposing to the Government and the Assembly measures related to the prosecutorial system and to combat criminality⁷⁴;
- Overseeing the administration of the prosecution offices and its personnel⁷⁵;
- Providing the support for the regular periodic assessment of the caseloads of the prosecution offices and implementing a case allocation system to ensure the efficient functioning of the prosecution offices⁷⁶;
- Preparing, submitting and overseeing the budget of the prosecutorial system to ensure efficient and effective functioning of prosecution offices and accounting for the use of fiscal resources⁷⁷;
- Determining policies, standards and instructions related to the training of prosecutors and other personnel and overseeing the implementation of professional training and development of prosecutors by the Institute or other training associations or organisations⁷⁸;
- Promulgating rules and regulations consistent with public information laws related to the management and disclosure of information retained by the State Prosecutor⁷⁹;

⁷² Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 11, 1.1, available at <https://gzk.rks-gov.net>

⁷³ Official Gazette of Kosovo (2010), *Law on the Kosovo Prosecutorial Council*, Article 4.1.7, available at <https://gzk.rks-gov.net>

⁷⁴ *Ibid.*, Article 4.1.10

⁷⁵ *Ibid.*, Article 4.1.14

⁷⁶ *Ibid.*, Article 4.1.16

⁷⁷ *Ibid.*, Article 4.1.17

⁷⁸ *Ibid.*, Article 4.1.23

⁷⁹ *Ibid.*, Article 4.1.25

- Issuing the regulation on the internal organisation of the prosecution offices⁸⁰;
- Guaranteeing an open and liable system of administration or its decisions and entire prosecutorial system⁸¹.

171. The Chief State Prosecutor *“issues, in writing, the rules, guidelines and overall binding decisions for all chief prosecutors and prosecutors.”*⁸² Yet when one examines the range of subjects on which the KPC is given a power to make rules and issue instructions it is difficult to see what is left for the Chief State Prosecutor to make rules or give instructions about.

172. In addition, Chief Prosecutors are under a duty to report both to the Chief State Prosecutor and to the KPC.⁸³

173. There is a need to clarify the respective roles and functions of the two institutions to avoid contradictions and inconsistencies. In some areas there may be a case for giving the KPC an advisory role. The Chief State Prosecutor should in the expert’s view be the authority with primary responsibility for the management of the professional work of the office. The KPC should be responsible for much of the policy-making and standard-setting and ensuring that proper procedures are followed in important areas such as recruitment and appointments, promotions, evaluations and disciplinary proceedings although it should not become involved in making actual decisions about prosecutors at a personal level which should be left to independent people selected through a process overseen by the KPC.

⁸⁰ *Ibid.*, Article 4.1.30

⁸¹ *Ibid.*, Article 4.1.32

⁸² Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 11.5, available at <https://gzk.rks-gov.net>

⁸³ *Ibid.*, Article 13.3

4. Terms and conditions of Prosecutors' employment

4.1 Introduction

174. The terms and conditions of appointment can have a bearing on corruption risks. The simplest and most obvious example is where poor levels of salary lead to an increased risk that staff will engage in corrupt behaviour. Conditions which make it difficult to detect or punish corrupt behaviour may also be relevant.

4.2 Criteria for appointment

175. The criteria for appointment as a State Prosecutor were set out in Article 19 of the Law on State Prosecutor. The candidate must be a citizen of Kosovo, have a university law degree, have passed the bar examination, have a high professional reputation and personal integrity, not have been convicted of a criminal offence, have at least three years of legal field experience, and have passed the written exam for a prosecutor. These are appropriate criteria which if properly implemented should ensure that only qualified persons are appointed as prosecutors. The procedures for appointment have been discussed earlier in this study.

4.3 Probationary period

176. Following appointment the new prosecutor undergoes an initial 12 month training period.⁸⁴ During this period prosecutors are not assigned to cases. This is followed by an evaluation. If this is successful the prosecutor is evaluated twice at 10 monthly intervals during the remainder of the initial three-year term.⁸⁵ At the end of this initial term the prosecutor becomes eligible for permanent appointment (referred to in the law as reappointment). The procedures for evaluation have been discussed above. If the expert has correctly understood these legal provisions the earliest time that a prosecutor can become eligible for permanent appointment is 32 months after the initial appointment. This does not seem to be an unreasonable length for a probationary period.

4.4 Salary and the right to take part in other activities

177. The salary of the Chief State Prosecutor is fixed at the same level as that of the President of the Supreme Court. Salaries of other Chief Prosecutors are fixed at the same level as that of the corresponding Court President. Salaries of junior prosecutors are related in percentage terms to those of their seniors.⁸⁶ These salaries are regarded as good salaries by the standards of Kosovo.

178. Prosecutors are allowed to engage in activities which are in accordance with the Code of Ethics, "such as attending professional or scientific meetings, lectures or training and taking part in the preparation of different legal projects."⁸⁷ Subject to the approval of the Chief State Prosecutor prosecutors may be remunerated for such activities, provided there is no conflict of interest or violation of law.

⁸⁴ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 20, available at <https://gzk.rks-gov.net>

⁸⁵ Kosovo Prosecutorial Council (2015), *Regulation No. 12/2015 on the performance evaluation of prosecutors*, Article 4, available at www.kpk-rks.org/

⁸⁶ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 21, available at <https://gzk.rks-gov.net>

⁸⁷ *Ibid.*, Article 25.

179. On foot of this provision many prosecutors in Kosovo have what effectively amount to second occupations which they engage in outside normal office hours, usually involving teaching. While teaching is not likely to create a conflict of interest and is not in itself an objectionable activity or prosecutor - indeed, the reverse is probably the case- it seems undesirable that prosecutors in Kosovo should devote a large part of their time and energy to a second job. However, it is probably impractical and would probably require the payment of compensation, probably by way of a substantial rise in salary, to try to change this now.

180. With regard to other aspects of employment benefits, including pension arrangements, holiday and leave entitlements and working hours, during the visits to prosecution offices in the course of which prosecutors were invited to make aware of any complaints no issues in this area were brought to the expert's attention.

4.5 Freedom of expression and association

181. There is no provision in the Law on State Prosecutor which expressly guarantees the freedom of expression of prosecutors, although of course the constitution of Kosovo applies to prosecutors as to all citizens. However, the preamble to the Code of Ethics and Professional Conduct for Prosecutors adopted by the KPC recognises the right of prosecutors to freedom of expression, belief, association and assembly.⁸⁸

182. With regards to the freedom of association, prosecutors are prohibited from engaging in any political functions or activities, including membership of political parties, or running for holding political office.⁸⁹ Prosecutors are encouraged to vote but otherwise may not participate in elections or professional activities. In the actual conditions of Kosovo in the expert's opinion a prohibition on membership of political parties is a reasonable, indeed a necessary condition to impose on prosecutors. Of course, banning membership of political parties cannot prevent prosecutors from having close links to politicians but to permit prosecutors to have political involvement would undoubtedly increase the corruption risk.

183. An important provision in the Law on State Prosecutor provides that prosecutors shall not use their status as a prosecutor or the reputation of the State Prosecutor to advance their personal rights or interests.⁹⁰

4.6 Functional immunity

184. Article 23 of the Law on State Prosecutor provides that prosecutors shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made, or opinions expressed that are within the scope of their responsibilities. It goes on to provide that prosecutors shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law. This is a very appropriate provision which gives prosecutors a functional immunity confined to activities carried out within the scope of their responsibilities but not giving them immunity for improper behaviour including corrupt activities.

⁸⁸ Kosovo Prosecutorial Council (2012), *Code of Ethics and Professional Conduct for Prosecutors*, available at www.kpk-rks.org/

⁸⁹ Official Gazette of Kosovo (2010), *Law on State Prosecutor*, Article 26, available at <https://qzk.rks-gov.net>

⁹⁰ *Ibid.*, Article 26.

4.7 Physical Security and Protection

185. Article 22 of the Law on State Prosecutor gives prosecutors the right to request from the KPC special protection measures for themselves and their families where a threat to life, or to the life of a family member, derives from is the result of exercising their prosecution function. This is a good provision as far as it goes but it deals only with the protection of prosecutors in extraordinary circumstances. Indeed, it confers a right on prosecutors only in the most extreme circumstances, that of a threat to life.

186. It hardly needs to be emphasised that threats to the life, person, property or safety may be used to undermine the rule of law and maybe a means whereby prosecutors are pressured to take part in unlawful acts. Inducements to corrupt behaviour are often accompanied by threats – the so-called offer which one cannot refuse.

187. The International Association of Prosecutors has adopted a Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their Families.⁹¹ Its recommendations include that States should take all necessary measures to ensure that public prosecutors and their families are physically protected by the appropriate state parties when their personal security is threatened as a result of the proper discharge of their functions, that security should be provided at the workplace, including the courthouse, for prosecutors when travelling. It is recommended that an appropriate state authority should be given the responsibility to assess security risks to prosecutors, as well as to provide information, training and advice concerning personal safety.

188. During the visit to Pristina the expert was made aware of the concern of prosecutors who have to travel to and from the courthouse using public transport which they share in many cases with persons who they are prosecuting in the court. They consider that both the person and the papers which they take to court are potentially at risk.

189. Prosecutors were also concerned about the poor security in the prosecution office in Pristina. There was only one security guard in a building which had two entrances. The expert was also informed that the security staff were not very well-paid and hence the jobs did not attract a high calibre of applicant. Doubts were expressed as to whether the security guards would be any use in a crisis.

190. The KPC seem to be an appropriate body to undertake the work of ensuring the protection of prosecutors. It is recommended that they examine this issue as a matter of urgency.

⁹¹ International Association of Prosecutors (2008), *Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their families* available at www.iap-association.org/

5. Working conditions of prosecutors and support staff

5.1 Pristina

191. Although prosecutors and support staff in Pristina work in a new building there were many complaints from staff. These focused on two issues, firstly, the location of the courthouse and the atmosphere within the building.

192. The location of the courthouse is remote from the centre of the city. It is very inconvenient for litigants and for those who work there. There is a very infrequent bus service which is the only option for those who do not own cars and who cannot afford taxis. Many of the support staff in the prosecutor's office are in this category. The issue of potential risks to prosecutors sharing public transport with their "clients" has already been commented upon. The State Prosecutor should consider making arrangements for the transportation of its staff from the centre of Pristina to the offices at the courthouse.

193. Many of the staff complained that the building was an unhealthy one to work in. The principal complaint concerned the air conditioning system and an alleged lack of oxygen. Workers complained that they regularly felt unwell in the building and suffered from headaches and respiratory problems. Although the expert spoke to a number of people who were familiar with the building from visiting there regularly and who claimed that the poor air condition in the building was a myth it has to be said that the expert's observation supports the complaints, therefore it is recommended that the air conditioning system be thoroughly inspected. Workers also complained of an absence of drinking water in the building.

194. Many of the staff in the building were working in very overcrowded conditions. This was particularly true of the registry staff. The overcrowding was surprising considering how recently the building was constructed. It would seem that somebody miscalculated the level of demand for the services in the building. It was surprising to find how poorly designed much of the building was the further one got from the grand entrance rooms. A significant number of the rooms had no natural lighting. Many of the smaller offices were tiny and would be claustrophobic to work in. The room holding the archived documents had what appeared to be a home-made construction preventing the shelves from collapsing. Files were tied together with what looked like shoelaces.

5.2 Other locations

195. Overcrowding appears to be a general problem in prosecution offices throughout Kosovo.

196. In Peja meetings took place in a large room which understandably was chosen because it could accommodate most of the staff. The expert did not visit the rest of the building. The room where the meeting took place was cold and appeared to be unheated. Many of the staff wore outdoor coats throughout the meeting.

197. The meetings in Gjakova was held in the Chief Prosecutor's office apparently because there is no meeting room which can hold more than a very small number of people. The building seemed to be very overcrowded and inadequate for the number of people working there. The expert was informed that a new premises was being built.

198. In Prizren the prosecution office is housed in a new building. Conditions appeared to be quite good with the exception of the basement where the archives were kept. The moment one entered this part of the building one was conscious of a musty damp smell which was quite overwhelming. Files were visibly deteriorating as a result of wetness.

199. The prosecution office in Ferizaj also had a serious problem with archived file storage. Files were simply stored against the wall in in a large garage in which a car was parked. During the daytime when the garage was also used for parking cars the doors were open to the yard and from there to vehicular access to the street.

200. The worst conditions of all were in Mitrovica. The building is very overcrowded and is unfit for purpose. The main problem here was that a new building has been completed but is situated in the part of the town under occupation by the Serbian authorities. It seems, therefore, that a resolution of this problem must await a political solution. Archived files were being stored in a building in the Serbian occupied part of the town which at one point had been vandalised and some files damaged and destroyed. One of the officers working in Mitrovica visited the building from time to time to try to keep some order on it. Staff in this office is encouraged in many cases to work from home. Much-needed staff had not been recruited because there was nowhere to put them.

6. The organisation of work

6.1 IT support

201. The single biggest obstacle to the proper organisation of work in the State Prosecutor is the absence of an electronic case management system. As a result the office is entirely dependent on paper files and on its staff to keep the files properly and to ensure that all relevant transactions are recorded on them. The system of registration of files is also a manual one. There is a project financed by the Norwegian government to provide an electronic case management system which is generally expected to commence within the next year, initially being rolled out in the courts and subsequently extended to the prosecution service. However, it was difficult to get any hard information about the current state of play in relation to this project which is one of vital importance for the future of the judicial system. It was a little surprising that so few of the working prosecutors the expert met had any hard information about the project. One would have expected that a project that was well-advanced would have engaged in widespread consultation with prosecutors generally and that preparations to roll the system out would be well advanced. The expert did not see any evidence of such activity.

202. There is a considerable amount of legal material available online. For example, all of the legislation appears to be published both in Albanian and in Serbian and much of it is available in English. Reported cases from the courts, however, are not generally available. Prosecutors are not equipped with laptops so they do not have electronic access to legal materials when they go to court.

203. The State Prosecutor has a website (see section 2.6.8 above).

204. The State Prosecutor should be planning now for a future with IT. There is no evidence that this is happening at the local level.

6.2 The registration and allocation of cases

205. The registration and allocation of cases in all of the offices visited has to be done manually. The practice is to copy files which are received from the police. Files are given a number and are recorded using a mechanical seal. The number allocated by the prosecutor's office is different from the number on the court file. It is the practice when further material is received in relation to a file that the prosecutor or legal officer dealing with the matter ensures that it is recorded in the system. They have an incentive to do so since they are required to achieve a certain quantity of work and if cases were not recorded in the system they would not be credited with the work involved. Most of the offices which the expert visited keep an electronic list of files but this is not a case tracking system, merely a list containing some basic information such as the date received, the name of the case, names of defendants, addresses, and charges preferred. These electronic lists are not standardised but appear to have been developed in each particular office and are subject to some variation. Generally speaking, while the practices in the offices visited by the expert appeared to be similar they were not uniform.

206. Allocation of files to prosecutors is carried out at the same time as files are registered. While in principle files are allocated to prosecutors at random there are some exceptions to this which are referred to above.⁹² Some of the arrangements for case allocation which are made appear to be

⁹²At section 2.7

peculiar to particular offices and depend on local arrangements, such as the assignment in Gjilan of one particular prosecutor to deal with all illegal logging cases.

6.3 File handling and management

207. Once a file is assigned the prosecutor is responsible for its custody. It appears to be a general practice in the Basic Prosecutor's Offices for prosecutors to be permitted to take files out of the office. This is not regulated in any way. There is, for example, no instruction or guideline which specifies the circumstances in which files may be taken from the office.

208. There are, of course, circumstances in which it is quite reasonable for files be taken from the office. If a prosecutor has to attend court in the morning it may be convenient to be able to go directly to court. The prosecutor may wish to work on the file in the evening preparatory to a court appearance. The prosecutor may be very busy in the office and may need to do some work at home in the evenings and weekends. Finally, the accommodation problem in many of the offices in Kosovo is such that the management may wish to encourage prosecutors to work from home, although as far as it seems this particular solution to alleviating the problem of overcrowding does not seem to have been encouraged in Kosovo.

209. However, as a safeguard against abuse it would seem appropriate that a written record of all movement of files out of the office should be kept.

210. There was no indication that the management of any office regard this as a problem. The expert was informed that the risk of losing a file is not important since duplicates are made. However, the more serious risk is not the possible loss of a file, embarrassing though that can be, but that a person who wants to have access to a file might put a prosecutor or other employee of the prosecution office under pressure to take a file from the office to show it to that person or to allow him or her to copy material from it. It is clear that access to the prosecutor's file could in many circumstances be advantageous to a person under investigation or charged and failure to keep proper records of files taken from the office represents a clear corruption risk.

211. How to deal with files in cases which have concluded is a major problem in Kosovo. Most of these files will never be needed again. However, there is always a small category of past files which will need to be accessed. For example, sometimes cases have to be revisited where there has been an alleged miscarriage of justice. Or a past file may be relevant to a new case. The practice in Kosovo is to store the archived files on site. In a number of offices old files are being stored in unsuitable conditions. The expert saw archived files which were being stored in a damp basement and were visibly deteriorating. In one extreme case files were being stored in a basement room which was in use as a garage stacked along the wall and sitting on a concrete floor. Some of these files had so badly deteriorated that they were no longer recognisable as files but rather appeared to be piles of waste paper. The expert was informed of a plan to send archived files to the State Archive and this plan should be put into operation.

6.4 Avoiding investigations becoming time-barred

212. A major problem in Kosovo is the phenomenon of investigations becoming time-barred. It is necessary here to distinguish between this prevention of any further investigation and time barring in the normal sense of cases having to be prosecuted within a certain time of the commission of the offence. Such rules also exist in Kosovo but generally speaking the most serious offences either have no time limit for prosecution attached or have relatively long ones. In some cases the time limits may be unreasonably short and this is something which the legislator in Kosovo should review. For example, there are time limits on corruption cases even though the offence may have been concealed and nobody knows about until many years later- in some cases even perhaps after the statute of limitations has expired.

213. In Kosovo there is, however, in addition to the normal rule that a prosecution is statute barred after a certain lapse of time (in its relative and absolute forms) a time limitation on the period within which investigations must be completed. Once the prosecutor decides to open an investigation against an identified individual that investigation must be completed within a period of two years, which may be extended by six months in certain circumstances. There was general agreement that this period is too short.

214. The view which the expert heard expressed in Kosovo by a number of NGOs and representatives of the international community was that this is a major problem in Kosovo. Indeed, it was suggested that this was the primary mechanism by which "inconvenient" investigations can be disposed of. Needless to say, where investigations are not completed within the time limit there is often a suspicion that this arises because the persons responsible for ensuring that the investigation has been completed in time are acting corruptly. The virtually unanimous view which the expert heard in each of the prosecutors' offices was that this did not happen in their office, although they had heard of it happening elsewhere. Either somebody is not being truthful or the international community and the NGOs have vivid imaginations. Requests for statistics about this phenomenon led to the response that since there are no such cases there are no statistics indicating the number.

215. On enquiring whether there was a mechanism to flag an impending date on which an investigation would become statute barred the expert learnt that there was not. In the expert's opinion such a mechanism is a most basic precaution to avoid a major risk which could be a cause of serious reputational damage to the State Prosecutor of Kosovo, that is to say, the risk that the case is lost because an investigation has not been completed. It would be very simple to keep a register of all cases in which the prosecutor directs an investigation and to flag the progress of these cases at, for example, three monthly intervals, so that steps can be taken to put pressure on investigators to complete investigations on time. It is difficult to imagine that nobody has thought of doing this since it is a very obvious and simple mechanism which clearly should be adopted. Even in the absence of an electronic case tracking system such a mechanism could very easily be set up and handled without the use of IT.

6.5 Training of the State Prosecutor's staff

216. Training is of vital importance not only to prosecutors but to every member of the staff of the prosecutor's office. Recommendation Rec (2000) 19 refers to training as both a duty and a right for all public prosecutors, both before their appointment and on a permanent basis. That training should cover the principles and ethical duties of the office of prosecutor, the protection of suspects, victims and witnesses, human rights, the principles and practices of work organisation and management, as well as mechanisms of materials which contribute to consistency in their activities. The Recommendation is, of course, reference only to prosecutors but there is no reason in principle

why the exact same proposition should not apply to all members of the State Prosecutor to the extent to which such training is necessary to enable them to perform their functions properly.

217. With regard to the training of prosecutors in relation to professional matters, this is a responsibility of the Judicial Academy in conjunction with the KPC. The expert information is that in this area a good range of courses is provided which cover such matters as recent legal developments and particular issues which need to be addressed in training. Prosecutors are given time to attend courses and have a choice over which training courses they would find most beneficial.

218. With regard to training concerning the principles and ethical duties of the office of prosecutor, however, when the expert raised questions about this he was informed that it was fully covered in the initial training of prosecutors. In the expert's opinion this is not adequate. Training should deal with real issues which may arise at any time. For example, on enquiring whether there was any training as to how staff should respond to improper approaches for information or assistance from persons outside the office the answer was given that prosecutors are well aware of what is involved in a conflict of interest. Training should cover practical questions as well as principles. For example, what procedures should be followed in the case of an improper, and, in particular, a corruptive approach? To whom is information concerning the approach to be referred? Furthermore, it transpired that staff other than the prosecutors had received no training whatsoever on this issue. The question of what to do when a conflict of interest becomes apparent is, however, dealt with in the Code of Ethics and Professional Conduct for Prosecutors in some detail.⁹³ A person seeking improper access to a file might well approach a member of registry, or for that matter any member of staff who had access to the building. Any member of the staff of the State Prosecutor could be open to an attempt to compromise or blackmail them as a means of obtaining information or other favours.

219. Other than in relation to purely professional issues there appears to be little training. For example, basic management skills, how to manage meetings, how to cope with stress, how to recognise and deal with bullying and harassment, security issues and many other matters. So far as staff other than prosecutors are concerned there appears to be an absence of training. It is important that auxiliary staff understand the context in which they work as well as receiving training in relation to their specific tasks. Many of the non-prosecutorial staff complained about the absence of training, even as respects the core functions of their work.

6.6 Budgets and spending

220. All purchasing for the prosecutor's office is handled centrally. While there are proposals to allow for local purchasing by the Judiciary there are no corresponding proposals to apply such procedures to the State Prosecutor.

221. The principle of central purchasing allows for economies of scale and for proper tendering procedures to be applied. It is easier to apply financial controls to one centralised office than to large numbers of persons who can purchase items. To decentralise purchasing would require financial units to be established in each separate office which would almost certainly involve hiring additional staff to supervise the whole process as well as involving training costs and an increased risk of corruption.

222. Having said that, it is a little inflexible and it undoubtedly can be very inconvenient if managers in offices outside Pristina have no discretion whatsoever to spend anything. This is a question which should be examined by the KPC to see whether some flexibility can be introduced into the system without undermining the basic central purchasing system which should enable the best value for money to be obtained

⁹³ Kosovo Prosecutorial Council (2012), *Code of Ethics and Professional Conduct for Prosecutors*, Article 3.5-6, available at www.kpk-rks.org/

7. Ensuring the integrity of prosecutors

7.1 Transparency of procedures

223. The importance of ensuring that all procedures carried out within the prosecutor's office relating to criminal prosecutions are fully documented cannot be overemphasised. Insisting on all instructions and decisions being reasoned and reduced to writing reduces the potential for arbitrary decision-making as well as making it more difficult for corrupt decision-makers to cover their tracks.

224. At the same time the State Prosecutor should ensure that, without compromising the duty to protect the rights of citizens, including their right to their good name, to respect for the presumption of innocence, and to have their privacy interests protected, as much information as possible is provided to interested persons as well as the public in general, both in response to specific and particular enquiries as well as more generally through the provision of information through the media, including social media and through interaction with members of the public.⁹⁴

7.2 "Four eyes"

225. It is obvious that when more than one person is involved in, or aware of, a decision the risk of corruption is reduced. It is easier to corrupt a single person than a larger number. One way to involve more than one person is through the use of team working but this does not appear to be used at all in Kosovo even in very heavy cases. However, the combination of proper written recording of decisions taken combined with supervision provides an alternative way to ensure that more than one person can be kept aware of what is going on. As already stated earlier in this report both the keeping of written records and a culture of proper supervision of the work of junior prosecutors appear to be somewhat patchy.

7.3 Asset Declarations

226. All prosecutors in Kosovo, together with the judges, are legally obliged to make an asset declaration annually. The declarations are sent to the Anti-corruption Agency. The Agency is responsible for carrying out verification of the declarations. However, this verification is only directed to ensure that the forms are correctly filled out. The agency does not check the origins of wealth. Nor does the Agency have access to all the information it would require in order to verify the truth of the declarations. For example, the Agency does not have access to information concerning the bank accounts of persons making declarations. The Agency has no mechanism whereby it can verify the value of property declared. Nor is there any mechanism whereby it can seek cooperation from abroad. Declarations are published online but not all the information in them is accessible in this manner. Declarations do not have to cover members of the family of the person other than the spouse, children and parents making them which makes it very easy to hide property by attributing it to a family member. There have apparently been a small number of prosecutions of judges and prosecutors under the legislation. Failure to make a declaration is a criminal offence, but in order to succeed the prosecution must prove that the failure was intentional and not merely an oversight. Such proof would be impossible to produce in all but a very small number of cases. The making of the annual asset-declaration is obligatory under the Code of Ethics.⁹⁵

⁹⁴The question of transparency is covered in more detail in section 2.6 above.

⁹⁵Kosovo Prosecutorial Council (2012), *Code of Ethics and Professional Conduct for Prosecutors*, Article 4.8, available at www.kpk-rks.org/

227. It is beyond the scope of this report to enquire into the effectiveness of the asset declaration system in Kosovo. Clearly it has its limitations and there are other countries in which the corresponding anticorruption agency has far more powers than has the agency in Kosovo.

7.4 Vetting of candidates for prosecutorial office

228. The subject of vetting candidates for prosecutorial office was discussed above in relation to the appointment of prosecutors. While on paper the law appears to provide a reasonable checks with safeguards against their abuse there is a lack of transparency about the process which makes it difficult to know whether the practice corresponds with what is said in the law. There is a difficulty in establishing criminal records in Kosovo because each region keeps its own records without any centralised system and it is possible to obtain a certificate from one region saying one is of good behaviour despite having a conviction in another part of Kosovo.

7.5 The Code of Conduct and Professional Conduct for Prosecutors

229. The Code was adopted by the KPC on 31 July 2012. It is a clear, concise and well drafted document which, while it is clearly based on the leading international standard-setting instruments relating to the functions of prosecutors, does not simply copy any of them.

230. It is expressly provided that a breach of the Code constitutes grounds for sanctions, and that it applies to every prosecutor at every level.⁹⁶

231. The Code does not purport to set out the forms of misconduct in an exhaustive manner. It states that other forms of misconduct or action not expressly referred to but having a similar effect are to be considered a breach of the Code.⁹⁷ The duties to observe high standards of professional and personal conduct, to respect and comply with the law, to perform the duties of office impartially and diligently, to avoid any conduct and situation that could lead to a questioning of integrity or impartiality and to perform all duties in conformity with internationally recognised human rights standards are proclaimed.⁹⁸ These provisions are to apply to private life as well as to professional life “whenever a prosecutor’s actions may impair the prosecutor’s image in the public’s eyes thus affecting the institution of the prosecution system as a whole”.⁹⁹ Political activity is prohibited.¹⁰⁰ The prosecutor is declared to have a duty to search for the truth taking into account all the evidence, whether it favours the defendant or not, to act in good faith and to honour the presumption of innocence at all times.¹⁰¹

232. The Code goes on to provide a number of specific rules. These include engaging in continuing legal education and training, respecting the legal rights of suspects, victims and witnesses, respecting human rights as well as “principles and practices regarding organisation of work, management and human resources in a prosecutorial, judicial, and prosecutorial context”.¹⁰² This latter provision seems to be rather obscure as it is not clear precisely what principles and practices are in question. There are duties to be aware of and learn about the legal framework, mechanisms and resources and the types and development of criminality and the modalities of international cooperation.

⁹⁶ *Ibid.*, Article 1

⁹⁷ *Ibid.*, Article 2.1.

⁹⁸ *Ibid.*, Article 2.3.

⁹⁹ *Ibid.*, Article 2.4.

¹⁰⁰ *Ibid.*, Article 2.5.

¹⁰¹ *Ibid.*, Article 2.7.

¹⁰² *Ibid.*, Article 3.

233. The Code contains provisions concerning conflict of interest. Any conflict based on family or social relationships or financial or professional relationships is prohibited in compliance with the legislation.¹⁰³ Where a prosecutor becomes aware of conflict here she must discontinue all activity and report the circumstances to the supervisor who will rule on the matter in writing.¹⁰⁴ Where a prosecutor fails to do this any colleague who becomes aware of it is under a duty to report the matter to the Chief Prosecutor.¹⁰⁵

234. In the relationship with the supervisor, the prosecutor must be permitted to work without unjustified interference or exposure to civil, penal or other liability. He or she must respect legal instructions and has the right to request that they be put in writing. He or she has a duty to account periodically to the supervisor.¹⁰⁶

235. The prosecutor has a duty to respect the independence and impartiality of judges, not to cast doubt on their decisions nor hinder their execution except in accordance with the law. He or she must be objective and fair during court proceedings and not to publicly criticise judges in an inappropriate manner.¹⁰⁷

236. Regarding relations with the police, where the prosecutor has power to give instructions they must be clear and lawful with a view towards an effective criminal prosecution. The prosecutor should promote reporting and sanctioning of criminal activity and appropriate and functional cooperation with the police and other law enforcement agencies.¹⁰⁸

237. In relations with attorneys the prosecutor should act with integrity and refrain from improper or unfair conduct.¹⁰⁹

238. Regarding duties towards individuals, the Code of Ethics and Professional Conduct follows very closely the provisions of paragraphs 24 to 33 of Recommendation Rec (2000) 19 of the Council of Europe.¹¹⁰ However, there are one or two exceptions to this. Paragraph 31 of the Recommendation states that “where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible”. This important provision is not replicated in the Code. Another important provision of the Recommendation is paragraph 34 which provides that “interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an (sic) hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution”. Presumably these two important provisions are omitted from the Code of Conduct because neither of them at present form part of the law of Kosovo. This should be remedied; for individuals to have rights to seek judicial remedies in such cases is an important protection against abuse by prosecutors and a safeguard against corruption.

239. The Code then deals with non-prosecutorial activities. It states that in principle a prosecutor may carry out such activities, particularly those which are the embodiments of his or her rights as a citizen or which represent professional interests and independence. By way of exception, activities incompatible with the reputation of the institution, or which negatively affect professional and public confidence in the prosecutorial system are prohibited. There is an express prohibition of

¹⁰³ *Ibid.*, Article 3.4.

¹⁰⁴ *Ibid.*, Article 3.5.

¹⁰⁵ *Ibid.*, Article 3.6.

¹⁰⁶ *Ibid.*, Article 3.7.

¹⁰⁷ *Ibid.*, Article 3.8.

¹⁰⁸ *Ibid.*, Article 3.9.

¹⁰⁹ *Ibid.*, Article 3.10.

¹¹⁰ *Ibid.*, Article 3.11

political activity or membership of a political party. Engagement in non-prosecutorial activity during working hours without the prior approval of the KPC is prohibited. There is an express prohibition on using one's position or information obtained in that capacity for personal gain of oneself or anybody else. There is a prohibition on soliciting funds for any person or organisation, or allowing one's name or the authority of the State Prosecutor to be used for that purpose. Prosecutors may not belong to organisations that support or promote discrimination or engage in any type of activities incompatible with the prosecutors' functions. The prosecutor is to refrain from financial dealings that may reflect adversely on ability to carry out functions in an impartial, professional and independent fashion. These are important provisions from the anticorruption perspective.¹¹¹

240. Finally, the Code deals with administrative responsibility, requiring professionalism and diligence, cooperation with other actors in the criminal justice system, respect for duties of supervision and obedience to instructions subject the prosecutor's right to right to free decision-making in a particular case. The prosecutor is to avoid undue influence and maximise the proper operation of the system.¹¹²

¹¹¹ *Ibid.*, Article 4.

¹¹² *Ibid.*, Article 5.

V. CONCLUSIONS AND RECOMMENDATIONS

1. The President of Kosovo retains a strong influence over appointments. The complete de-politicisation of appointments to the prosecution service would be welcome. If the President is to have a role in the appointment of prosecutors it would be better if it were a ceremonial one only.
2. Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe recommends that where a prosecutor believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement. This requirement should be implemented in the law and practice of Kosovo.
3. The Chief State Prosecutor and other Chief Prosecutors should make more effective use of their powers to seek reports and to issue written rules, guidelines and overall binding decisions in order to implement the legislation of Kosovo, to improve the efficiency of the State Prosecutor and to achieve a greater coherence and consistency in its activities. Particular issues which could benefit from such an approach include the use of plea agreements and mediation and taking steps to avoid investigations becoming time-barred.
4. The transparency of the prosecutors' work should be enhanced by placing a greater emphasis on ensuring that all transactions are recorded on the relevant file, all documentation retained and all written instructions recorded.
5. The transparency of the work of the State Prosecutor should be improved by a series of measures to improve communication with the citizens of Kosovo and the provision of information to them. There is a well-designed website with up-to-date news concerning the activities of the Chief State Prosecutor but beneath that facade much information is lacking. The website should be kept up-to-date by an information officer reporting to the KPC and the Chief Prosecutors. The information officer should also be responsible for relations with the media, including the State Prosecutor's engagement with social media, for ensuring that requests for information are appropriately replied to and for coordinating the publication of statistics. The information officer should have the right to access any files or documents held by the State Prosecutor.
6. The capacity of the Special Prosecutor's Office needs to be increased substantially. At present it has neither the numbers of prosecutors nor the expertise to handle the demands which are likely to be made on it in the immediate future. There is a need for more prosecutors capable of handling terrorism cases and war crimes. There is a need for greater technical expertise in the area of money laundering. There is also a need for technical staff with expertise in IT, financial affairs, business and economics to be attached to the office. The investigative resources available to the office need to be strengthened further.
7. The capacity of the Basic Prosecution Offices to deal with cases involving children needs to be strengthened considerably, in particular by the provision of training for staff and facilities for children to give evidence in a manner which is less stressful for them than that provided in the normal courtroom environment.
8. There appear to be variations between systems and procedures in the different Basic Prosecution Offices in a number of areas including systems for allocating cases and registering them. Such differences may cause problems with the introduction of an electronic case tracking system and it would be desirable to identify where they exist and to take steps to unify the practices in the different offices.

9. Investigators reported a lack of communication of the outcome of cases submitted by them to prosecutors and were not told why no prosecutions ensued. Such a failure to report outcomes is bad practice and means that where a failure to prosecute results from an inadequate investigation no lessons are learnt. It also ensures that prosecutors' reasoning remains unknown and cannot be queried by the investigator. The requirement for prosecutors to report the outcome of the cases submitted to them with a view to prosecution is a valuable means of accountability both for investigators and prosecutors.
10. Steps should be taken to fill the numerous vacancies in legal auxiliary staff, professional associates, legal officers and legal secretaries, particularly in the offices outside Pristina.
11. The Assembly should as a matter of urgency fill the vacant positions for non-prosecutors on the Kosovo Prosecutorial Council. These vacancies represent a serious threat to the proper functioning of the Council.
12. The Law should be amended to provide that in future if the Assembly fails to fill the non-prosecutor vacancies within one month that the nominating bodies themselves, or, failing that, the Council, will fill the vacancies.
13. The eligibility criteria for prosecutor members of the Council should be amended to provide that only prosecutors elected to permanent function with a minimum experience to be specified are eligible for election.
14. The total number of prosecutor members - at present 10 - should be reconsidered with a view to reducing it.
15. The Chief State Prosecutor should remain as an ex-officio member of the KPC. The other members should be elected but the system of election should be more proportionate than at present and constituencies should not ever represent only a tiny number of prosecutors as is the case at present.
16. In carrying out its constitutional mandate to recruit, promote, transfer, reappoint and discipline prosecutors, as well as in carrying out its statutory mandate to assess them, the KPC's primary function should be to ensure that the regulations and procedures enabling this to be done are appropriate and fit for purpose and to act as guarantor for the integrity of the system by ensuring that the rules and procedures are observed in practice. It should, however, rely as appropriate on independent professional and technical expertise to carry out assessments and evaluations and should not substitute its own judgment for theirs other than for reasons which are stated in writing and subject to review by a court of law.
17. Regulation No.08/2016 on Chief Prosecutor's Appointment, which provides for the establishment of an Evaluation Committee to evaluate the candidates, should establish criteria for membership of that body. Consideration should be given to providing for some representation for suitably qualified independent persons from outside the ranks of the State Prosecutor or the KPC on this body.
18. The existing provision which allows the KPC to hold a secret ballot on the recommendation of the Evaluation Committee for the appointment of the Chief State Prosecutor and to substitute its own view for theirs without giving any reason should be scrapped. (See recommendation 15 above.)
19. Provision should be made for a competitive procedure to fill the positions of Deputy Chief Prosecutors and managers of departments within prosecution offices.

20. Where the early termination of the mandate of a Chief Prosecutor is proposed the regulations should provide a mechanism to determine any question which may be in dispute and to allow the Chief Prosecutor to be heard in his or her defence. No decision should be taken other than on foot of a report into the matter by a person or persons of undoubted independence and integrity.
21. The evaluation system for prosecutors should have its primary focus on ensuring an effective system of day-to-day management in which evaluation aimed at improving performance would play a central part and in which self-evaluation should form an essential part of the process.
22. The evaluation system, which at present exists mainly on paper, should be less formalistic and paper-based, should examine the reality of what happens, in particular in court, rather than being based on statistics, should involve interviews by the evaluators, and should aim primarily at finding solutions aimed at improving the performance of the individual prosecutor as well as the State Prosecutor as a whole. The KPC should not be the ultimate decision-maker on appeals against evaluations.
23. The 2015 amendments to the law on the KPC should be revisited and amended further to ensure that disciplinary complaints which were still alive on the date of its passing can still be dealt with.
24. The Office of Disciplinary Prosecutor should remain an independent office and should not report to the KPC but rather should have its own independent disciplinary committee which would make decisions on complaints. If an appeal to the KPC has to be retained for constitutional reasons this should be limited to setting aside the decision of the independent disciplinary committee for reasons which would have to be stated in writing.
25. The respective roles and functions of the KPC and the Chief State Prosecutor need to be clarified and contradictions and inconsistencies eliminated. At present there is a considerable overlap. An elected body consisting mainly or even entirely of working prosecutors is not the best body to engage in day-to-day management and the Chief State Prosecutor should have the primary responsibility for the management of the professional work of the State Prosecutor. The KPC should be responsible for much of the policy-making and standard-setting and ensuring that proper procedures are followed in important areas such as recruitment and appointments, promotions, evaluations and disciplinary proceedings although it should not become involved in making actual decisions about prosecutors at a personal level which should be left to independent people selected through a process overseen by the KPC.
26. In the actual conditions of Kosovo a prohibition on prosecutors' membership of political parties is a reasonable, indeed a necessary condition to impose on prosecutors and should be retained.
27. Prosecutors' immunity from prosecution, civil lawsuit and dismissal for actions taken, decisions made, or opinions expressed that are within the scope of their responsibilities is a very appropriate provision, which does not give them immunity for improper behaviour, including corrupt activities, and should be retained.
28. It is recommended that an appropriate state authority should be given the responsibility to assess security risks to prosecutors, as well as to provide information, training and advice concerning personal safety, in accordance with the International Association of Prosecutors' Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their Families.

29. The KPC should examine the actual security situation at the prosecutors' offices in the courthouse in Pristina as well as in travelling to and from that location.
30. The KPC should also examine the working conditions in prosecutors' offices generally.
31. The KPC should urgently consider the condition of archived files in the prosecutors' offices and should enter into discussions with the State Archive to try to find a solution to the problem of deteriorating archived files.
32. There is a need for a protocol to deal with the circumstances in which files may be removed from the office, to deal with their safekeeping and the records that should be kept in relation to custody while outside the office.
33. A system should be introduced to flag all cases where the prosecutor directs an investigation to ensure that the prosecutor is kept informed of progress at regular intervals and to ensure that deadlines for the completion of the investigation are not missed.
34. There should be a review of the time limits after which cases become statute barred to examine whether they are all appropriate. Particular attention should be given to cases whose existence may only come to light years after an offence is committed, in particular offences involving secret corruptive acts.
35. Training in relation to issues concerning ethics, conflicts of interest and corruption should be carried out on a regular basis. Such training should cover all staff and not only prosecutors.
36. In general there is a need for training for the general staff working in prosecutors' offices. Such training is largely absent at present. Training should cover both the specific jobs start work on as well as general issues pertaining to the prosecutor's office and the system of criminal prosecution.
37. The system of centralised purchasing for the prosecutor's office should be retained. However, some consideration should be given to examining whether managers in offices outside Pristina could be given flexibility to purchase small quantities of material and to enter into small contracts which require to be completed urgently.
38. The provisions of paragraphs 31 and 34 of Recommendation Rec (2000)19 of the Council of Europe which provide for judicial control over the activities of prosecutors which interfere with fundamental rights and freedoms, and which provide for the rights of interested parties, in particular victims, to challenge decisions of public prosecutors not to prosecute, should be given effect in Kosovo.
39. If a case management system is to be introduced to the State Prosecutor in the near future there should be planning at all levels for how this will impact on work at every level. The KPC should address this as a matter of urgency.

VI. ANNEXES

Annex 1: List of prosecution offices, institutions, organisations and experts visited and interviewed

First on-site mission: 31 October 2016 to 4 November 2016

Prosecutors and Support Staff in Seven Basic Prosecution Offices in Kosovo:

- Pristina
- Peja
- Gjakova
- Prizren
- Ferizaj
- Gjilan and
- Mitrovica

Second on-site mission: 21 to 25 November 2016, Pristina

- Chief State Prosecutor
- Special Prosecution Office of Kosovo
- Civil Society representatives monitoring courts and prosecution services
- Appellate Prosecution
- Office of Disciplinary Prosecutor
- Kosovo Prosecutorial Council
- Agency for Management of Sequestered and Confiscated Assets
- Chamber of Advocates
- Ministry of Justice
- OSCE Court Monitoring Unit
- USAID, UNDP and EU Project dealing with Prosecution

Third on-site mission: 22 to 24 February 2017, Pristina and Tirana, Albania

- British Embassy
- Dutch Embassy
- Turkish Chamber of Commerce
- Court experts
- Focus Group in Tirana with main Prosecution stakeholders as well as prosecutors from the region

Missions	Total participants	No. Women	% Women	No. Men	% Men
First on-site mission	158	82	52%	76	48%
Second on-site mission	46	19	41%	27	59%
Third on-site mission	20	5	25%	15	75%
	224	106	47%	118	53%

Annex 2: Questionnaire on perception and experience of corruption for judges and prosecutors

Questionnaire for judges, prosecutors and the staff of courts and prosecutors' offices in Kosovo on corruption risks in the judiciary and prosecution offices

This questionnaire forms part of a corruption risk-assessment of the judiciary and the prosecution service in Kosovo that is being carried out by the Council of Europe and the European Commission under the Project against Economic Crime in Kosovo (PECK II) in 2016/2017.

The questionnaire is a follow-up to two Council of Europe expert missions to assess corruption risks in the judiciary and prosecution offices undertaken during October and November 2016. The missions included meetings with judges and court staff in all Basic Courts in Kosovo, the Court of Appeals and the Supreme Court, as well as meetings with staff from the Kosovo Judicial Council, prosecutors and their staff at all prosecution offices, the Chair and staff of the Kosovo Prosecutorial Council, lawyers' associations, NGOs and the international community.

The present questionnaire seeks to avoid duplication of the International Bar Association (IBA) questionnaire that the Kosovo Democratic Institute intends to disseminate to judicial actors in January 2017. The present questionnaire has adapted some of the corruption related questions from the IBA questionnaire, but focuses on more detailed questions concerning corruption risks on which the Council of Europe experts gathered information during the two missions to Kosovo in October and November 2016.

There are 15 questions. Questions 1 – 9 are for all respondents; questions 10 and 11 are to be answered by JUDGES AND PROSECUTORS ONLY, questions 12 and 13 by JUDGES ONLY and 14 and 15 by PROSECUTORS ONLY.

The basic questionnaire should not take more than 15 – 30 minutes. Many questions include boxes where respondents can provide more detailed information.

For the purposes of completing the questionnaire certain key terms are defined here (all definitions are taken from the IBA questionnaire):

judicial corruption is defined as 'all forms of inappropriate influence that may damage the impartiality of justice and may involve any actor within the justice system, including (but not limited to) judges, prosecutors, lawyers, administrative court support staff, parties and public servants';

bribery is defined as encompassing:

- the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; or
- the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

extortion is defined as an extension of the act of bribery and states that 'the solicitation of bribes is the act of asking or enticing another to commit bribery, thus it becomes extortion when this demand is accompanied by threats that endanger the personal integrity or the life of the actors involved';

undue influence is defined as a situation in which 'someone uses their power or authority in an unfair way in order to influence a legal decision';

undue political influence is defined as the manipulation of policies, institutions and rules of procedure including, but not exclusively, in the allocation of resources and financing by political decision-makers, who abuse their position to sustain their power, status and wealth;

misuse of funds is defined as an act by a person who holds office in an institution, organisation or company and who dishonestly and illegally appropriates, uses or traffics public funds, public property or public assets, directly or indirectly for personal enrichment – or the enrichment of others – or other activities;

Bribery, extortion, undue influence, including undue political influence, and misuse of funds are all different aspects of **corruption**.

QUESTIONNAIRE

Questions 1 – 15 (The questionnaire should take between 15 – 30 minutes to complete)

1. What is your gender?

- Male Female

2. What is your occupation?

- Judge
 Court employee
 Prosecutor
 Prosecutor’s office employee

3. For how many years have you worked in this capacity? Include your full period of service as a judge, court or prosecution office employee or prosecutor, and not merely the time spent in your current office or position.

- 0-4 years
 5-9 years
 10-19 years
 20-29 years
 30-39 years
 40 years or more

4. Please rate the level of corruption that you perceive in the different groups listed in the first column of the below table. For each group please place an x in one of the boxes ‘Very High’; ‘High’; ‘Moderate’; ‘low’; ‘Very Low’ or ‘Don’t Know/No opinion’

Rating corruption levels in different groups

	Very High (5)	High (4)	Moderate (3)	Low (2)	Very Low (1)	Don't Know/ No Opinion
Kosovo society in general						
The Judicial System in general						
The Judiciary						
Basic Court Judiciary						
Court of Appeals Judiciary						
Supreme Court Judiciary						
Court staff						
Police						
Prosecutors						
Basic Court Prosecutors						
Court of Appeals Prosecutors						
Chief State Prosecutor’s Office						
Special Prosecutors Office						
Prosecution staff						
Advocates						

5. In your experience, have you encountered, or do you know of any other person who works within the justice system who has encountered, any form of corruption among judges, prosecutors or their staff, including bribery, extortion, political influence or misuse of funds?

- Yes I personally have encountered corruption
- Yes I know of another person who has encountered corruption
- No I have not personally encountered corruption
- No I do not know of another person who has encountered corruption

Please use the below box to describe your experience or views (question adapted from IBA questionnaire).

6. In your experience has the 2016 process to decentralise administrative duties from the Kosovo Judicial Council to the Basic Courts resulted in mismanagement of funds, judicial corruption or encumbered the operations of the courts in any other way?

- YES NO

Please describe.

7. What are the most common reasons for the unjustifiable failure of cases or for delays in resolving cases? Please choose as many reasons from the following list as you like or add your own as appropriate. Please use the boxes to describe particular experiences or examples.

- Shortage of judges and court staff to conduct hearings and process cases
- Lack of preparation by prosecutors, lawyers, judges or court staff
- Unjustifiable failure to initiate investigations
- Failure by investigators or prosecutors to carry out investigations in a competent manner or to obtain or secure necessary evidence
- Unreasonable failure of prosecutors to prefer charges
- Other failure by prosecutors to conduct cases in a competent manner
- Failure by investigators to complete their work before expiry of the statute of limitations
- Delay by prosecutors resulting in expiry of the statute of limitations
- Loss of or tampering with evidence or interfering with witnesses
- Other reasons for application of the statute of limitations or the failure of cases
- Judicial corruption
- Inadequate laws; lack of higher court guidance on application of the law
- Other

8. Do you have adequate working conditions including

	YES	NO	NOT APPLICABLE
a) Office space and environment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Technical equipment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Support staff	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Salary	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e) Security from physical threats or intimidation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f) Access to legal materials (court judgments, statute law, regulations, etc., information about legal developments)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g) Adequate training (including continuing education)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

9. Do you have an effective relationship with:

	YES	NO	NOT APPLICABLE
a) Junior colleagues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Senior colleagues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Staff who report to you	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Staff to whom you report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please use the below box to describe your views and experience.

10. FOR JUDGES AND PROSECUTORS ONLY

Is there an effective working relationship between the judiciary and the prosecution service?

- YES NO

Please use the below box to describe views and experiences concerning your working relationship with the prosecution service (or judiciary) and note any concerns, problems or improvements that could be made.

11. FOR JUDGES AND PROSECUTORS ONLY

Is there is a clear and transparent disciplinary procedure governing judges' or prosecutors' conduct (as applicable)?

- YES NO

Please describe views and experiences of the disciplinary process in the below box.

12. FOR JUDGES ONLY

Does the Kosovo Judicial Council adequately fulfil its responsibilities to recruit and vet judges?

- YES NO

Please describe views and experiences on the KJC's recruitment and vetting responsibilities in the below box.

13. FOR JUDGES ONLY

Does the Kosovo Judicial Council adequately fulfil its responsibilities to manage and audit the judiciary?

- YES NO

Please describe any views and experiences on the KJC's responsibilities to manage and audit the judiciary in the below box.

14. FOR PROSECUTORS ONLY

Do you think the new procedures for a role for the Kosovo Prosecutorial Council in relation to the recruitment, promotion and assessment of prosecutors and the management of the prosecution offices as compared with the former arrangements will represent:

Don't know	A serious disimprovement	Some disimprovement	Much the same	Some improvement	A substantial improvement
0	1	2	3	4	5

15. FOR PROSECUTORS ONLY

Is there an effective working relationship between prosecutors and the police and other investigators?

- YES NO

Please use the below box to describe views and experiences concerning your working relationship with the police or other investigators and note any concerns, problems or improvements that could be made.

Annex 3: Overview of recipients and respondents to the Questionnaire

Corruption Risk Assessment in Prosecution and Judiciary - PECK II Project

Number of recipients and respondents of the questionnaire

City	Judges	Responses	Prosecutors	Responses	Support Staff Court	Responses	Support Staff Prosecution	Responses
Gjakova	15	2	10	2	23	0	21	2
Prizren	41	10	16	1	119	2	29	1
Mitrovica	13	1	12	3	46	1	22	3
Prishtina	7	1	50	2	9	1	64	8
Ferizaj	24	3	14	0	78	0	19	0
Peja	34	4	13	3	113	12	27	2
Gjilan	32	1	15	1	82	17	30	0
Supreme Court	23	1	0	0	0	0	0	0
Appellate Prosecution	0	0	6	0	0	0	6	0
Special Prosecution				2				2
Prosecutorial Council	0	0	10	3	0	0	46	6
Sub-total	189	23	146	17	470	33	264	24

Total responses **97**

The **present publication** contains the first assessment of the areas of corruption risks within the prosecution system of Kosovo and makes recommendations for reform. Recommendations for reform are guided by international standards on effective prosecution systems and draw on information and analysis collected from a series of meetings held between October 2016 and February 2017 with prosecutors, prosecution officials, including members and employees of the Kosovo Prosecutorial Council, judges, police, government officials, civil servants, lawyers, civil society, diplomatic missions and international organisations which are active in Kosovo. The assessment of corruption risks is performed through a participatory process of involved officials of different levels from relevant beneficiary institutions, other public institutions as well as active and interested stakeholders in the prosecution system. Introducing and further strengthening management of corruption risks is of critical importance to effectively control and combat corruption in prosecution.

The report has been prepared within the framework of the European Union and Council of Europe Joint Project against Economic Crime in Kosovo (PECK II), funded by the European Union and the Council of Europe, and implemented by the Council of Europe. The main objective of the project is to strengthen institutional capacities to counter corruption, money laundering and the financing of terrorism in Kosovo in accordance with European standards, through targeted technical assistance and assessment for improving and streamlining economic crime reforms.

www.coe.int/peck2

The Economic Crime and Cooperation Division (ECCD) at the Directorate General Human Rights and Rule of Law of the Council of Europe is responsible for designing and implementing technical assistance and co-operation programmes aimed at facilitating and supporting anti-corruption, good governance and anti-money laundering reforms in the Council of Europe member states, as well as in some non-member states.

www.coe.int/corruption

ENG

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

www.coe.int

The European Union is a unique economic and political partnership between 28 democratic European countries. Its aims are peace, prosperity and freedom for its 500 million citizens – in a fairer, safer world. To make things happen, EU countries set up bodies to run the EU and adopt its legislation. The main ones are the European Parliament (representing the people of Europe), the Council of the European Union (representing national governments) and the European Commission (representing the common EU interest).

<http://europa.eu>

