

PROTECTION OF HUMAN RIGHTS UNDER KOSOVO'S CRIMINAL CODE AND CRIMINAL PROCEDURE CODE

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INTRODUCTION

The protection of human rights in an independent Kosovo will depend primarily on the effective enforcement of an appropriate criminal code. Many human rights violations in Kosovo and elsewhere arise from abuses by law enforcement and other criminal justice authorities. Thus, good procedural protections for those accused of crimes will help prevent these human rights violations. Other human rights violations involve violence by private citizens against members of minority groups or their property. Effective enforcement of criminal laws against "hate crimes" helps prevent this kind of violation.

No matter how effective international mechanisms are in enforcing human rights, protection of human rights ultimately depends on a state's power to support criminal investigations, to ensure vigorous criminal prosecution and defense, and to enforce judicial decisions.

Currently, Kosovo is in the process of reforming its criminal law and procedure. Sound analysis of the prospect of human rights protection in an independent Kosovo requires an understanding of these reforms.

I. OVERVIEW

The Special Representative of the U.N. Secretary-General ("SRSG") approved the Provisional Criminal Code of Kosovo ("CC") and the Provisional Criminal Procedure Code of Kosovo ("CPC") with special regulations on July 6, 2003.¹ These two codes were signed into law on April 6,

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1. On the Provisional Criminal Code of Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2003/25 (July 6, 2003) (approving the criminal code) [hereinafter Provisional Criminal Code]; On the Provisional Criminal Procedure Code of Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2003/26 (July 6, 2003) (approving the criminal procedure code) [hereinafter Provisional Criminal Procedure Code]. The correct names of these codes in Albanian and in English are the "Provisional Criminal Code of Kosovo" and the "Provisional Criminal Procedure Code of Kosovo." The same codes in Serbian are named as "Laws" and not "Codes." It is not known why the naming of these codes in Serbian is not harmonized with their naming

2004.² Subsequently, work has continued on drafting additional criminal laws, including a draft of a Juvenile Criminal Code, a draft on the Execution of Criminal Sanctions, and a draft on the Law for Mentally Incapable Perpetrators. The target date for these drafts to be signed into law was April 6, 2004, together with the CC and CPC. However, work on these laws has continued beyond the expected date. Meanwhile, the SRSG approved the Juvenile Criminal Code on April 20, 2004, and it was signed into law on the same date.³

The work on drafting the CC and CPC drew on existing domestic laws, the laws of neighboring and Western European countries, U.S. laws, and laws found in different international conventions, especially those dealing with human rights. These two codes incorporate the content of several United Nations Interim Administration Mission in Kosovo (“UNMIK”) regulations from the criminal and procedural areas. As opposed to the previous agglomeration of laws, the approval of these two codes offers judicial institutions much needed comprehensive criminal and procedural legislation.

II. THE PROTECTION OF HUMAN RIGHTS UNDER THE CRIMINAL CODE OF KOSOVO

After World War II, a series of international documents, both global and European, established and provided for the protection of human rights. This has led to an unusual development in democratic societies—not only are human rights an individual country’s internal concern, countries also have to be cognizant that human rights have an international dimension as well. Consequently, the differences between local laws and international laws, with respect to the protection of human rights, are diminishing, which reinforces the universality of human rights.⁴

In the recent past, the number of human rights enjoying criminal and legal protection has increased. Generally, when states design human rights

in Albanian and English. But, this issue is solved by regulation number 1999/1, which states that in cases of differences in translated documents, the English translation will be taken into account. On the Authority of the Interim Administration in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/1 § 5.2 (July 25, 1999).

2. The nine-month waiting period, called “vokatoi legi,” is for notification and training purposes.

3. On the Juvenile Justice Code of Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2004/8 (Apr. 20, 2004).

4. See Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259 (2004) (critically reviewing the development of universal human rights concepts); see also Bernard Edelman, *Universality and Human Rights*, in *THE CRIMINAL PROCESS AND HUMAN RIGHTS: TOWARD A EUROPEAN CONSCIOUSNESS* 97–107 (Mireille Delmas-Marty ed., 1995).

protections, the main issue is the conflict between the human rights themselves and the broader interests of the state or the society.⁵

In this context, the CC pays special attention to the protection of human rights and freedoms in both its “General Part”⁶ and in its “Special Part.”⁷ The General Part strengthens the well-known principles in criminal law: *nullum crimen sine lege*⁸ and *nulla poena sine lege*.⁹ These principles make possible the protection of human rights and minimize the subjectivity of the government institutions, as required by the International Covenant on Civil and Political Rights.¹⁰ Thus, the actual legal text has been freed from ideological notions, and the legal and criminal protection is oriented towards human rights. Importantly, these maxims have incorporated, and inherently support, the principle that a punishment must be proportional to the intensity of the crime or infringement of rights committed.¹¹ Significantly, the new criminal sanctions reflect an essential transformation when compared to the previously applicable law. Accordingly, the CC provides for the following types of criminal sanctions and measures of mandatory

5. See Ljubo Bavcon, *Kaznenopravna zaštita prava čovjeka [Human Rights Protection by Criminal Law]*, in 4 HRVATSKI LJETOPIS ZA KAZNENO PRAVO I PRAKSU [CROATIAN ANN. CRIM. L. & CRIM. PRAC.] 395–402 (Zagreb 1997), summary available at <http://www.pravo.hr/ljetopis/en/1997/2/bavcon.htm>.

6. Provisional Criminal Code, *supra* note 1. The General Part contains: General Provisions (Chapter I), Criminal Offence and Criminal Liability (Chapter II), Punishments (Chapter III), Judicial Admonition (Chapter IV), Measures of Mandatory Treatment (Chapter V), General Provisions on the Execution of Punishments (Chapter VI), Confiscation of Material Benefits Acquired by the Commission of Criminal Offences (Chapter VII), Rehabilitation and Disclosure of Information from Criminal Records (Chapter VIII), Statutory Limitation (Chapter IX), Amnesty and Pardon (Chapter X), Applicability of Criminal Laws of Kosovo According to the Place of the Commission of the Criminal Offence (Chapter XI), Meaning of the Terms in the Present Code (Chapter XII).

7. The Special Part of the Provisional Criminal Code contains: Criminal Offences Against Kosovo and its Residents (Chapter XIII); Criminal Offences Against International Law (Chapter XIV); Criminal Offences Against Life and Body (Chapter XV); Criminal Offences Against Liberties and Rights of Persons (Chapter XVI); Criminal Offences Against Labour Relations Rights (Chapter XVII); Criminal Offences Against Honour and Reputation (Chapter XVIII); Criminal Offences Against Sexual Integrity (Chapter XIX); Criminal Offences Against Marriage and Family (Chapter XX); Criminal Offences Against Public Health (Chapter XXI); Criminal Offences Against the Economy (Chapter XXII); Criminal Offences Against Property (Chapter XXIII); Criminal Offences Against the Environment, Animals, Plants, and Cultural Objects (Chapter XXIV); Criminal Offences Against the General Security of People and Property (Chapter XXV); Criminal Offences Against Security of Public Traffic (Chapter XXVI); Criminal Offences Against the Administration of Justice (Chapter XXVII); Criminal Offences Against Public Order and Legal Transactions (Chapter XXVIII); Criminal Offences Against Official Duty (Chapter XXIX); Transitional and Final Provisions (Chapter XXX). *Id.*

8. No crime without law.

9. No punishment without a law authorizing such.

10. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *Covenant on Civil and Political Rights*]. See in particular Article 15 prohibiting *ex post facto* laws and Articles 9 and 14, which prohibit criminal punishment without due process of law.

11. See generally Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 127–32 (2003) (discussing proportionality as an element of a fair approach to punishment).

treatment: principal punishments, alternative punishments, accessory punishments, and judicial admonition.¹² The code provides three measures of mandatory treatment: mandatory psychiatric treatment of mentally incapable perpetrators, mandatory psychiatric treatment of perpetrators with diminished mental capacity, and mandatory rehabilitation treatment of perpetrators addicted to drugs or alcohol.¹³ The CC's determination to humanize criminal sanctions is exemplified by the fact that it allows alternative punishments to be substituted for prison terms. The achievements in contemporary criminal policies have directly resulted in the humanized advancements of these criminal sanctions.

The Special Part of the CC provides legal and criminal protection for a large number of human rights. The most important human rights that benefit from this protection are the right to life and security of person, fundamental rights and freedoms, honor and reputation, personal dignity, marriage and family, and the health of a person. Moreover, the protection of human rights and fundamental freedoms extends to criminal offenses against humanity and international law, against the environment, against the public order and legal transactions, and against public office. The CC's organization, which groups together criminal offenses against human rights, illuminates the focus of legal and criminal protection of human rights.¹⁴ In particular, some of the criminal offenses in this group have harsher punishments than before. For example, this is true in cases where public officials, while exercising their mandate, violate human rights, or where criminal offenses are committed against a child, a minor, or the spouse or the person with whom the perpetrator lives in extramarital communion. Furthermore, the CC has increased protections for private and

12. Provisional Criminal Code, *supra* note 1, at art. 3(1).

13. *Id.* at art. 3(2).

14. Chapter XVI of the Provisional Criminal Code denotes the following conduct as offenses against human rights: Violating Equal Status of Residents of Kosovo (Article 158), Kidnapping (Article 159), Coercion (Article 160), Threat (Article 161), Unlawful Deprivation of Liberty (Article 162), Obtaining Statements by Coercion (Article 163), Mistreatment in Exercising Duties (Article 164), Torture (Article 165), Infringing Inviolability of Residences (Article 166), Unlawful Search (Article 167), Infringing Privacy in Correspondence and Computer Databases (Article 168), Unauthorized Disclosure of Confidential Information (Article 169), Unauthorized Wiretapping and Recordings (Article 170), Unauthorized Photographing and Other Recording (Article 171), Violating Orders for Covert or Technical Measures of Surveillance or Investigation (Article 172), Preventing or Hindering a Public Meeting (Article 173), Preventing Exercise of the Right to Use Legal Remedies (Article 174), Preventing Printing or Distribution of Printed Materials (Article 175), Preventing Exercise of the Right to Vote (Article 176), Violating the Free Decision of Voters (Article 177), Abusing the Right to Vote (Article 178), Violating Confidentiality in Voting (Article 179), Election Fraud (Article 180), Destroying Voting Documents (Article 181). Provisional Criminal Code, *supra* note 1, at arts. 158–81.

family life, physical and psychological integrity, inviolability of residence, and correspondence.¹⁵

The Special Part foresees numerous new criminal offenses such as: intrusion into computer systems, organized crime, false statements of cooperative witnesses, and intimidation during criminal proceedings for organized crime.¹⁶ Moreover, many types of formerly criminal conduct have been decriminalized, indicating that the CC embraces the goal of contemporary criminal law theory—narrowing the criminal realm. Importantly, numerous criminal offenses specify monetary fines rather than incarceration as a principal, cumulative, or alternative punishment.

The Special Part does not include the following criminal offenses in the group of criminal offenses against Kosovo and its inhabitants: armed insurrection, espionage, military encroachment, violation of territorial integrity, acknowledgment of surrender and invasion, or criminal offenses against armed forces.¹⁷ Not including these classic criminal offenses, which protect the state, demonstrates the uncertainty of Kosovo's final status.

III. THE PROTECTION OF HUMAN RIGHTS UNDER THE CRIMINAL PROCEDURE CODE OF KOSOVO

The CPC¹⁸ draws on international standards of human rights and fundamental freedoms of universal and regional character, including those expressed in the Universal Declaration of Human Rights;¹⁹ the International Covenant on Civil and Political Rights and complementary Protocols;²⁰ the Convention on the Elimination of All Forms of Racial

15. Hajrija Sjerčić-Čolić, *Krivični Postupak i Zaštita Prava i Sloboda Čovjeka*, in ČITANKA LJUDSKIH PRAVA 351 (Sarajevo 2001).

16. Provisional Criminal Code, *supra* note 1, at arts. 264, 274, 308, 310.

17. Compare with Articles 108–15 of the former Yugoslav Criminal Code, *reprinted in* 11 COLLECTION OF YUGOSLAV LAWS: CRIMINAL CODE 70–72 (Borislav T. Blagojevic ed., 1964).

18. See Ejup Sahiti, Rexhep Murati & Eduard Kunštek, *Criminal Procedure System of Kosovo*, in TRANSITION OF CRIMINAL PROCEDURE SYSTEMS 125–45 (Berislav Pavišić ed., Rijeka 2004) (discussing the regulation of the criminal procedure according to the new CPC); *see also* Ejup Sahiti & Rexhep Murati, *Kodi i Procedurës Penale i Kosovës: Shqyrtim Teorik*, E DREJTA [LAW: J. JURIDICAL & SOC. ISSUES] 7–36 (Univ. Kosovo L. School publish., 2003).

19. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration of Human Rights*]. Human rights provisions that are especially important include the right to life (Article 3), the right to human dignity and integrity (Article 5), the right to security and freedom of person (Article 9), the right to a fair trial (Article 10), the right to be presumed innocent until proven guilty (Article 11), and the right to privacy (Article 12).

20. Covenant on Civil and Political Rights, *supra* note 10. The human rights provisions in Articles 9–17 are especially important.

Discrimination;²¹ the Convention Against Torture or any Other Cruel, Inhuman or Degrading Treatment or Punishment;²² the Convention on the Rights of a Child;²³ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice;²⁴ the United Nations Standard Minimum Rules for the Treatment of Prisoners;²⁵ the European Convention on Human Rights and its five protocols;²⁶ and the European Convention for the Prevention of Torture or any other Inhuman or Degrading Treatment or Punishment.²⁷

The CPC reiterates the fundamental principles set forth in these international documents on human rights and imposes new procedural principles. For example, the CPC embraces cross examining witnesses.²⁸ Moreover, the CPC defines the rights of an arrested person and other procedural actors that are involved in questioning, regulates how the police may deprive an arrested person of their liberty (provisional arrest and police detention), and regulates detention on remand.²⁹ Additionally, the CPC grants the courts more control over some classic investigative actions, such as house and body searches. It also imposes stricter controls on the authorization of video surveillance, on the interception of communications during an investigation,³⁰ and on medical and DNA controls.³¹

The CPC seeks to increase efficiency and to accelerate progress through all stages of a criminal case. This is made possible through a new investigative stage, carried out by the public prosecutor with aid from the police. The CPC also allows certain cases of alternative conflict resolution;

21. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

22. Convention Against Torture or any Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1985, 1465 U.N.T.S. 112.

23. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

24. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, at 206, U.N. Doc. A/40/53 (1985).

25. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. Res. 2076, U.N. ESCOR, 62d Sess., Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

26. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention of Human Rights*]; MIOMIR MATULOVIĆ & BERISLAV PAVIŠIĆ, *DOKUMENTI VJEĆA EUROPE* (Rijeka 2001) (ISBN 953-6597-22-5) (discussing the changes that the protocols made in the Convention).

27. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>.

28. Provisional Criminal Procedure Code, *supra* note 1, at arts. 165, 372.

29. *Id.* at arts. 210–19, 279–87.

30. *Id.* at arts. 258–64.

31. *Id.* at arts. 191–95.

for example, a public prosecutor may suspend the prosecution of a criminal offense (punishable by fine or imprisonment up to three years) with the consent of the injured party, except in cases of domestic or sexual violence.³² Likewise, the CPC recognizes a mediation procedure.³³ In addition, in certain circumstances a district judge may adjourn a criminal proceeding and issue a punitive order without holding a full trial.³⁴

The CPC contains several norms that serve as bases for punishing organized crime and corruption. These measures include hidden technical surveillance and investigation. In order to fight crime and protect witnesses, the CPC sets forth provisions to regulate the criminal procedure, including protection for injured parties and witnesses.³⁵ The CPC also regulates the proceedings pertaining to cooperative witnesses.³⁶

The CPC has 557 articles and is divided into 8 parts and 51 chapters. The first part contains general provisions;³⁷ the second part contains evidence rules;³⁸ the third part contains pre-trial proceedings;³⁹ the fourth part contains main trial and judgment provisions;⁴⁰ the fifth part contains the procedure for legal remedies;⁴¹ the sixth part contains summary proceed-

32. *Id.* at arts. 226–27.

33. *Id.* at art. 228.

34. *Id.* at arts. 476–80.

35. *Id.* at arts. 168–74.

36. *Id.* at arts. 298–303.

37. The General Provisions contain: Chapter I: Fundamental Principles; Chapter II: Jurisdiction of Courts; Chapter III: Disqualification; Chapter IV: The Public Prosecutor; Chapter V: Filing a Motion for Prosecution, Private Prosecution and Subsidiary Prosecution; Chapter VI: Defence Counsel; Chapter VII: The Injured Party; Chapter VIII: Submissions; Chapter IX: Records; Chapter X: Prescribed Periods of Times; Chapter XI: Costs of Criminal Proceedings; Chapter XII: Property Claims; Chapter XIII: Rendering and Pronouncing Decisions; Chapter XIV: Service of Documents; Chapter XV: Execution of Decisions; Chapter XVI: Inspection of Files; Chapter XVII: Other Provisions; and Chapter XVIII: The Meaning of Legal Expressions Used in this Code.

38. The Evidence provisions contain: Chapter XIX: General Provisions Relating to Evidence; Chapter XX: Witnesses; Chapter XXI: Protection of Injured Parties and Witnesses; and Chapter XXII: Expert Witnesses.

39. The pre-trial provisions contain: Chapter XXIII: Criminal Report; Chapter XXIV: Provisional Arrest and Police Detention; Chapter XXV: Initiation and Duration of an Investigation; Chapter XXVI: Suspending, Terminating or Refraining from Prosecution of Less Serious Criminal Offences; Chapter XXVII: Mediation Procedure; Chapter XXVIII: Investigative Actions; Chapter XXIX: Covert and Technical Measures of Surveillance and Investigation; Chapter XXX: Measures to Ensure the Presence of the Defendant, to Prevent Re-offending and to Ensure Successful Conduct of the Criminal Proceedings; Chapter XXXI: Cooperative Witnesses; and Chapter XXXII: Indictment and Confirmation of the Indictment.

40. The trial and judgment provisions contain: Chapter XXXIII: Preparations for the Main Trial; Chapter XXXIV: The Main Trial; and Chapter XXXV: Judgment.

41. The Procedure for Legal Remedies provisions contain: Chapter XXXVI: Appeal Against a Judgment of a Court of First Instance; Chapter XXXVII: Appeal Against a Judgment of a Court of Second Instance; Chapter XXXVIII: Appeal Against Rulings; and Chapter XXXIX: Extraordinary Legal Remedies.

ings, issuance of a punitive order, and rendering of judicial admonition;⁴² the seventh part contains special proceedings;⁴³ and the eighth part contains transitional and final provisions.⁴⁴

The CPC is based on several general principles that are either regulated directly by or are derived from the legal provisions. Some of the principles are judicial and are considered constitutional, whereas others are dedicated to the protection of human rights. The criminal procedure also sets forth certain principles to organize and structure the procedural bodies.

The criminal procedure relies on several procedural principles that are inherent in the due process guarantee and are therefore guaranteed by all human rights laws. These principles include: establishing complete and truthful facts;⁴⁵ deeming suspects innocent until proven guilty;⁴⁶ the maxim *in dubio pro reo*;⁴⁷ the maxim *nebis in idem*;⁴⁸ the maxim *nemo iudex sine actore*, which is valid throughout the procedure;⁴⁹ the principle of legality⁵⁰ (combined with the official principle) and the opportunity to suspend or terminate a prosecution;⁵¹ the guarantee of a fair trial;⁵² the independence of the courts;⁵³ the courts' authority to freely assess all submitted evidence;⁵⁴ the right of any person participating in criminal proceedings to speak their own language;⁵⁵ the contradictory principle, the immediate principle, the principal of equal status;⁵⁶ maintaining the public nature of

42. The sixth part contains: Chapter XL: Summary Proceedings; Chapter XLI: Proceedings for the Issuance of a Punitive Order; and Chapter XLII: Rendering of a Judicial Admonition.

43. The Special Proceedings provisions contain: Chapter XLIII: Proceedings Regarding Persons Who Have Committed Criminal Offences Under the Influence of Alcohol and Drug Addiction; Chapter XLIV: Proceedings for Confiscation; Chapter XLV: Proceedings for the Revocation of Alternative Punishments; Chapter XLVI: Proceedings for Rendering a Decision on the Expungement of Conviction; Chapter XLVII: Procedures for International Legal Assistance and the Execution of International Agreements in Matters of Criminal Law; Chapter XLVIII: Procedures for the Transfer of Defendants and Convicted Persons to and from Foreign Jurisdictions; Chapter XLIX: Proceedings for Compensation, Rehabilitation and the Exercise of Other Rights of Persons Who Have Been Convicted or Arrested Without Justification; and Chapter L: Proceedings for Issuing Wanted Notices and Public Announcements.

44. The Transitional and Final Provisions contain: Chapter LI: Transitional and Final Provisions.

45. Provisional Criminal Procedure Code, *supra* note 1, at art. 7.

46. *Id.* at art. 3(1).

47. *Id.* at art. 3(2) ("In the doubt for the accused.").

48. *Id.* at art. 4 (prohibition on double jeopardy).

49. *Id.* at art. 6(1).

50. *Id.* at art. 47.

51. *Id.* at arts. 226–27.

52. *Id.* at art. 5.

53. *Id.* at art. 8.

54. *Id.* at arts. 152(2), 387(2).

55. *Id.* at art. 15.

56. *Id.* at art. 10.

the main trial;⁵⁷ the right to a speedy trial;⁵⁸ and an unlawfully convicted person's right to just compensation and full rehabilitation.⁵⁹

Many of the procedural principles have been adopted in the spirit of international conventions, in particular Articles 5 and 6 of the European Convention on Human Rights. The principle *in dubio pro reo*, which existed in theory and practice, now has legal grounds.

A. *The Main Characteristics of the Criminal Procedure Code Relevant to the Protection of Human Rights and Freedoms*

The CPC has numerous functions, just like any other contemporary criminal procedure. One of these functions is to protect society from criminality. Apart from this function, the CPC is a way to protect citizens' human rights. Specifically, it protects individuals suspected of committing criminal offenses. On the other hand, the CPC protects citizens whose rights have been violated or threatened by criminal activity.

Based on these competing functions, there are two antagonist tendencies present in all criminal procedures: an efficient criminal procedure and protecting the rights of citizens that are subject to the criminal procedure.⁶⁰ Maintaining an efficient criminal procedure protects social and individual values by identifying and punishing criminals. Nevertheless, protecting the rights of persons subject to criminal proceedings enables full protection from unjust punishment and abuses by governmental bodies.⁶¹ This protection prevents punishing innocent individuals, thus fulfilling an important goal of criminal procedure. The antagonistic nature of these two goals exclude one another. Therefore, reinforcing one will weaken the other and vice versa. The development of criminal procedure has shown that these two antagonistic trends cannot be fully accomplished in a society. The actual shape of the CPC will be an outcome of these two trends in action.⁶² Through the historical development of criminal procedure three forms have emerged: accusatory procedure, inquisitional procedure, and mixed proce-

57. *Id.* at art. 328.

58. *Id.* at art. 5.

59. *Id.* at art. 16.

60. Regarding these two trends see VLADIMIR BAYER, JUGOSLOVENSKO KRIVIČNO PROCESNO PRAVO: UVOD U TEORIJU KRIVIČNOG PROCESNOG PRAVA (KNJIGA PRVA) 12 (Informator publish., Zagreb 1977); DAVOR KRAPAC, KAZNENO PROCESNO PRAVO: INSTITUCIJE (KNJIGA PRVA) 9, 10, 11 (Informator publish., Zagreb 2000). Regarding CPC seen in the viewpoint of these two trends see Rexhep Murati, *Efikasiteti i Procedurës Penale dhe Mbrojtja e të Drejtave dhe Lirive të të Pandehurit në Procedurën Penale*, E DREJTA [LAW: J. JURIDICAL & SOC. ISSUES] 115–32 (Univ. Kosovo L. School publish., 1996).

61. KRAPAC, *supra* note 60, at 9.

62. *Id.* at 11.

ture. Besides these three historical forms of criminal procedure, presently we have actual criminal procedure, which solves criminal issues through bargaining (consensus).⁶³ For example, the Criminal Procedure Code of Bosnia and Herzegovina⁶⁴ accepts the prospect of solving criminal issues through bargaining between the prosecution and the defendant, if the court agrees.

The government's position on human rights will largely decide which of these tendencies will prevail in a given period of history. Historically, accusatory criminal procedure tends to protect human rights during the criminal process; conversely, the inquisitional procedure tends to be more efficient. Contemporary criminal procedure, however, never completely rejects one of the tendencies and accepts the other. Contemporary criminal procedure balances these two tendencies. Even though contemporary legislations constantly try to put these trends in equilibrium, a true equilibrium is impossible. The procedure attempts to ensure that all perpetrators are punished and that innocents are not.

The concept of protecting human rights has dramatically affected the structure of criminal procedure. This is most evident in the attempt to harmonize the different systems of national rights, which ensure an efficient protection of human rights. Other areas in the field of criminal procedure emphasize the mutual approach of the criminal procedure systems. Efforts to standardize criminal procedures are currently present in Europe, particularly in the European Union countries. For this reason, an international law of criminal procedure is emerging.⁶⁵

B. *The Right to Integrity and Human Dignity*⁶⁶

The right to physical and mental integrity and human dignity is a fundamental right that is potentially violated during the criminal process. For this reason, general provisions of the CPC guarantee integrity and human dignity by prohibiting the taking of declarations by force from a suspect,

63. BERISLAV PAVIŠIĆ, KOMENTAR ZAKONA O KRIVIČNOM POSTUPKU XXXIII (Žagar Rijeka 2003).

64. This law was promulgated by the Office of High Representative on January 24, 2003. It was published in *Službeni Glasnik BiH*, Vol. 7, No. 3, art. 231 (Feb. 10, 2003) (*Službeni Glasnik BiH* is a Bosnian legal gazeteer published in Sarajevo and available in the United States through the University of Michigan library).

65. PAVIŠIĆ, *supra* note 63, at XXV.

66. The right to integrity and human dignity is provided for in the European Convention on Human Rights: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention of Human Rights, *supra* note 26, at art. 3. Similarly, this right is protected by the Universal Declaration of Human Rights, *supra* note 19, at art. 5, and the Covenant on Civil and Political Rights, *supra* note 10, at art. 7.

defendant, witness, or expert. Thus, according to Article 11(3) of the CPC, forcing a confession or any other statement by the use of torture, force, threat, or drugs is prohibited and punishable. This prohibition is made more specific through relevant criminal procedural actions.⁶⁷ Prohibiting the use of force or threat when taking statements accomplishes one of the human postulates of criminal procedure.⁶⁸

During the criminal process, the consequences for violating fundamental rights and lawful treatment may be of a criminal-legal nature or of a criminal-procedural nature.⁶⁹ Violations of a criminal-legal nature are foreseen in the CC.⁷⁰ Violations of a criminal-procedural nature are proscribed by the insupportability of a court decision based on inadmissible evidence.⁷¹ Indeed, unlawful evidence is evidence taken in contradiction with the CPC. Such unlawful evidence can be a defendant's statements taken in the absence of legal counsel, evidence gathered unlawfully during the search of a house or person, or evidence taken by telephone surveillance without or in contradiction of a court order.⁷²

It should be emphasized that in Kosovo, during the dictatorial regime of Serbia (former Yugoslavia), human rights and freedoms were systematically and egregiously violated. In particular, the CPC has addressed the most severe human rights violations, such as torture, unlawful arrest, battery, abduction, unlawful killing, and torturous asphyxiation.⁷³

C. *The Right to Freedom and Individual Security*

The right to freedom and individual security is an essential human right, which is recognized and protected by most important international human rights documents. Based on Article 5 of the European Convention on Human Rights, everyone has the right to liberty and security of person, and no one shall be deprived of his liberty except in cases prescribed by law.⁷⁴ To avoid arbitrary violations of this fundamental right, according to

67. See Provisional Criminal Procedure Code, *supra* note 1, at art. 155, 161(4).

68. Sjerčić-Čolić, *supra* note 15, at 352.

69. *Id.* at 353.

70. Such criminal offenses are: Unlawful Search (Article 167), Infringing Inviolability of Residences (Article 166), and Unauthorized Wiretapping and Recordings (Article 170). Provisional Criminal Code, *supra* note 1. Obtaining statements by coercion is prohibited by the CC. *Id.* at art. 163.

71. See Provisional Criminal Procedure Code, *supra* note 1, at arts. 153, 235.

72. Cf. Sjerčić-Čolić, *supra* note 15, at 353.

73. Ejup Sahiti, *Të Drejtat dhe Liritë e Njeriut të Vështruara nga Aspekti Proceduralo-Penal*, E DREJTA [LAW: J. JURIDICAL & SOC. ISSUES] 74 (Univ. Kosovo L. School publish., 1998).

74. This fundamental right is foreseen in Articles 3 and 9 of the Universal Declaration of Human Rights, *supra* note 19, and Article 9 of International Covenant on Civil and Political Rights, *supra* note 10.

this Convention, state bodies are authorized to deprive a person from his or her liberty only in specific cases and in a strict manner, as prescribed by law, to satisfy the needs of the criminal procedure. The CPC, based on Article 5 of European Convention on Human Rights, has strictly determined the conditions under which a person may be arrested, detained,⁷⁵ or detained on remand, and the CPC has also prescribed the rights to which a person is entitled when such actions are undertaken.⁷⁶ Therefore, if a person is caught in the act of committing a criminal offense prosecuted *ex officio* or is being pursued, the police or any other person shall be authorized to arrest him or her provisionally even without a court order. In special conditions, the arrest and detention shall be authorized by the public prosecutor. When due to exigent circumstances such authorization cannot be obtained prior to arrest, the police must inform the public prosecutor immediately after the arrest. Upon arrest, the person is informed of his or her rights that are set forth by law.⁷⁷

A person may not be detained more than seventy-two hours from the moment of arrest. Moreover, the public prosecutor or an authorized senior police officer shall issue the arrested person a written decision on his or her detention as soon as possible after the arrest and no later than six hours from the time of the arrest. Importantly, the arrested person shall have the right to appeal to a pre-trial judge, who must decide on the appeal within forty-eight hours of the arrest.⁷⁸

Detention on remand can be imposed only in compliance with the CPC. Under the CPC, the court may order detention on remand against a person if there is a grounded suspicion that such person has committed a criminal offense and when one of the following conditions is met: there is a danger that the person may flee; there are grounds to believe that he or she will destroy, hide, change, or forge evidence of a criminal offense or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties, or accomplices; or when circumstances indicate a risk that he or she will repeat the criminal offense, complete an attempted criminal offense, or commit a criminal offense that he or she has threatened to commit.⁷⁹

The detainee may be held on remand after the initial ruling for a maximum period of one month from the day he or she was arrested. How-

75. Provisional Criminal Procedure Code, *supra* note 1, at arts. 210–19.

76. *Id.* at arts. 279–87.

77. *Id.* at art. 214.

78. *Id.* at art. 212.

79. *Id.* at art. 281.

ever, a three-judge panel may extend the pre-trial judge's order, but only for a period that does not exceed two months, which is the limit set forth in Article 285 of the CPC.⁸⁰

Prior to a filed indictment, detention on remand shall not exceed three months (nine months in exceptional circumstances) if proceedings are conducted for a criminal offense punishable by imprisonment of less than five years, and six months (twelve months in exceptional circumstances) if proceedings are conducted for a criminal offense punishable by imprisonment of at least five years.⁸¹

Unlawful deprivation of liberty is a criminal offense under the CC. In cases where persons have been convicted or arrested without justification, the CPC allows, among other provisions, compensation for damages and rehabilitation of the person's character.⁸² While a person is detained, the individual cannot be deprived of rights that are derived from Article 5 of the European Convention on Human Rights. Therefore, even when an individual voluntarily surrenders to government officials, this detainment may be considered unlawful under the convention. The European Court of Human Rights, in its decisions, has emphasized that the right to freedom is extremely important for democratic societies and that an individual cannot voluntarily consent to the loss of this right.⁸³

In applying Article 5 of the Convention, the CPC also has established post-detainment procedural guarantees providing for informing the person of the reason for detention and of the current charges, the duration of the detention, the court that will verify the lawfulness of the detention, and the compensation available for individuals that are unlawfully detained.⁸⁴

D. *The Right to a Fair Trial*

The right to a fair trial is a fundamental human right set forth in Article 6 of the European Convention on Human Rights.⁸⁵ The CPC has

80. *Id.* at art. 285(3)–(4).

81. *Id.* at art. 284.

82. *Id.* at art. 534–42.

83. De Wilde, Ooms and Versyp v. Belgium (Vagrancy Cases), 12 Eur. Ct. H.R. (ser. A) (1971); DONNA GOMIEN, KRATKI VODIČ KROZ EVROPSKU KONVENCIJU O LJUDSKIM PRAVIMA [SHORT GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS] 27 (2d ed.1998) (page 22 in English language edition); Sjerčić-Čolić, *supra* note 15, at 354.

84. Davor Krapac, *Europska Konvencija o Zaštiti Ljudskih Prava i Temeljnih Sloboda i Hrvatski Kazneni Postupak* [The European Convention on Human Rights and the Croatian Criminal Procedure], 2 HRVATSKI LJETOPIS ZA KAZNENO PRAVO I PRAKSU [CROATIAN ANN. CRIM. L. & CRIM. PRAC.] 15 (Zagreb 1995), summary available at <http://www.pravo.hr/ljetopis/en/1995/1/krapac.htm>.

85. This fundamental right is foreseen in Articles 6, 7, 10, and 11 of the Universal Declaration of Human Rights, *supra* note 19, and in Article 14 of the International Covenant on Civil and Political

adopted these provisions of the Convention and of other international documents. According to the European Convention, a fair trial impliedly reserves a series of rights for any person subject to a criminal proceeding. Thus, the CPC followed Article 6 of the Convention and determined that “a criminal sanction may be imposed on a person who has committed a criminal offense only by a competent, independent and impartial court in proceedings initiated and conducted in accordance with the . . . Code.”⁸⁶ The CPC, based on the above-mentioned provisions of this Convention, provides for the accusatory principle of publicity.

The CPC also accepts that a defendant is presumed innocent and has adopted other provisions that ensure a fair trial, including the right to be informed of the evidence, the right to a defense, the right to sufficient time for defense preparation, the right to bring witnesses, the right to question the witnesses brought by the prosecutor, and the right to a free and unbiased trial.⁸⁷ The CPC creates the conditions for a fair trial by ensuring these rights for all individuals. Regarding the independence of the courts in Kosovo, despite the declarative efforts of UNMIK, in practice UNMIK infringes on the independence of the court system because UNMIK regulations 2000/4 and 2001/2 both provide for the appointment and reappointment of international judges and prosecutors.⁸⁸

Rights, *supra* note 10. However, the International Covenant on Civil and Political Rights offers more guarantees for the protection of the defendant rather than the European Convention on the Protection of Fundamental Rights and Freedoms. European Convention of Human Rights, *supra* note 26. Thus, Article 14, paragraph 3(b) provides for the right of the defendant to communicate with the defense counsel; Article 14, paragraph 5 provides for the right to present legal remedies due to factual and legal mistakes; Article 14, paragraph 3(g) provides for prohibition of forcing a person to testify against himself or herself or to confess the act; Article 14, paragraph 3(d) and 3(e) provides for the right to be judged only in his or her presence; Article 14 paragraph 4 provides for the obligation of the state to constitute a special procedure for juveniles. The European Convention on the Protection of Human Rights does not explicitly foresee such rights, despite the fact that some of them are implied from the other provisions. Krapac, *supra* note 84, at 21. The right to remain silent is not explicitly foreseen in the Convention, but it can be implied from the right of the defendant to not declare him or herself. PAVIŠIĆ, *supra* note 63, at 15.

86. Provisional Criminal Procedure Code, *supra* note 1, at art. 2.

87. See Krapac, *supra* note 84, at 23.

88. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, MISSION IN KOSOVO, DEPT. OF HUMAN RIGHTS & RULE OF LAW, KOSOVO, REVIEW OF THE CRIMINAL JUSTICE SYSTEM, MAR. 2002–APR. 2003, PROTECTION OF WITNESSES IN THE CRIMINAL JUSTICE SYSTEM 28–30, at http://www.osce.org/documents/mik/2003/05/859_en.pdf; see also Supreme Court of Kosovo, Bulletin of Case Law, 1999–2002, at 5 (2002), available from Kosovo Law Center: www.kosovolawcentre.org; Letter of Nekibe Kelmendi to the SRSB, Ndryshimet e domosdoshme për arritjen e standardit Sundimi i ligjit, KOHA DITORE, Mar. 3, 2004, at 11 (Koha Ditore is a local Albanian-language newspaper).

E. *The Right to Respect for Private and Family Life, and the Right to Inviolability of Residence and Correspondence*

Article 8 of the European Convention of Human Rights (“ECHR”) determines that everyone has the right of respect for his private and family life, home, and correspondence. Article 8(2) dictates that the public authorities shall not interfere with this right, except pursuant to the law. This exception is necessary in a democratic society to protect national security, public safety, and the economic well-being of the country; to prevent disorder or crime; to protect health or morals; or to protect other individuals’ rights and freedoms.⁸⁹ The state is obliged to respect the privacy rights of its citizens, except where the law limits the right for the benefit of a democratic society and where those benefits cannot be attained any other way.⁹⁰

In order to ensure that the right to privacy is infringed only to the extent necessary, the person must be suspected of committing a certain criminal offense, the legitimacy of that suspicion must be decided on only by a court, the infringement on the right to privacy must be restricted in time, and procedural and legal sanctions must be present for violations of these restrictions.⁹¹

The CPC has determined covert and technical measures of surveillance and investigation that may restrict privacy rights at the same time as they achieve other goals of the criminal law system.⁹² To apply these measures, however, strict conditions must be met. For example, if an individual is suspected of a criminal offense and that offense is prosecuted *ex officio*, the information that could be obtained by the measure must be likely to contribute to the investigation of the criminal offense and be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.⁹³ The CPC sets forth measures

89. These fundamental human rights are regulated by the provisions of Article 12 of the Universal Declaration of Human Rights, *supra* note 19, and Article 17 of the International Covenant on Civil and Political Rights, *supra* note 10. The International Covenant is less protective of citizens than the ECHR if we consider how the ECHR regulates the restriction of this fundamental right in Article 8(2), *supra* note 26. The International Covenant prohibits arbitrary and unlawful interference to private and family life only in principle. KRAPAC, *supra* note 60, at 34.

90. In *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) at 4 (1977), the European Court on Human Rights held for the first time that telephone conversations are protected under Article 8 of the European Convention, *supra* note 26, which provides for respect for private and family life, home, and correspondence. *Klass*, 28 Eur. Ct. H.R. at para. 41; *see also* *Huvig v. France*, App. No. 11105/84, 12 Eur. H.R. Rep. 528 (1990); *Kruslin v. France*, App. No. 11801/85, 12 Eur. H.R. Rep. 547 (1990); *Malone v. United Kingdom*, App. No. 8691/79, 7 Eur. H.R. Rep. 14 (1984); KRAPAC, *supra* note 60, at 35.

91. Sjerčić-Čolić, *supra* note 15, at 361.

92. Provisional Criminal Procedure Code, *supra* note 1, at arts. 256–65.

93. *Id.* at art. 257(1), para. 1–2.

that may be ordered by the public prosecutor⁹⁴ and measures that may be ordered by the pre-trial judge upon request of the public prosecutor.⁹⁵ The code clearly establishes that the pre-trial judge may order a majority of these measures. For example, a three-judge panel can order the surveillance of telecommunications.⁹⁶ The CPC mandates that the orders for these measures be in writing and specify necessary elements, including the period of validity.⁹⁷ Importantly, the authorizing judicial officer may terminate an order at any time if he or she determines that the prerequisites for ordering a measure are not fulfilled.

The CPC recognizes that measures that contradict the law violate fundamental human rights. Therefore, the CPC provides that individuals who feel their privacy rights have been violated can appeal to the Surveillance and Investigation Review Panel.⁹⁸ Individuals may submit a complaint through the head of the competent public entity in the field of judicial affairs to an adjudication review panel within a period of six months of being informed of the surveillance measure.⁹⁹ An order to intercept telecommunications, to intercept computer network communications, or to search postal items may not be implemented for communications between a suspect and his or her lawyer unless there is a grounded suspicion that the suspect and the lawyer are engaged together in criminal activity.¹⁰⁰ Any evidence that has been obtained through an unlawful measure or an unlawfully implemented measure shall be inadmissible.¹⁰¹

The CPC has set forth the procedures and mandatory conditions for searching a house or person in order to preserve the fundamental right of inviolability of residence.¹⁰² Due to the importance of this fundamental right, the CPC mandates a written order, issued by the pre-trial judge on the motion of the public prosecutor or in urgent cases, on request by the judicial police, before searching a house or person. A search may be conducted without presenting an order issued by the pre-trial judge only when fulfilling the conditions set forth by law.¹⁰³ The CPC provides for material, legal, and procedural sanctions when a search is conducted in contradiction with

94. *Id.* at art. 258(1), para. 1.

95. *Id.* at art. 258(2).

96. *Id.* at art. 259(5)–(6).

97. *Id.* at art. 259(1).

98. *Id.* at art. 265(5).

99. *Id.* at art. 263(1).

100. *Id.* at art. 260(10).

101. *Id.* at art. 264(1).

102. *Id.* at arts. 240–46.

103. *Id.* at art. 245.

law.¹⁰⁴ Thus, evidence that was gathered in contradiction with the law is inadmissible.¹⁰⁵

CAVEATS

The approval of these two codes and other laws of the criminal field represents a great achievement in rationalizing and modernizing criminal and procedural law in Kosovo. These two comprehensive codes are very important for Kosovo, in large part because they protect human rights according to international standards.

Ironically, the manner in which the codes were adopted violated human rights norms. The CC and the CPC, despite being reviewed by the Assembly of Kosovo, which made comments and concrete suggestions, were approved by the SRSG and not by the Assembly of Kosovo. Despite the fact that these codes were based on contemporary democratic legislation, the manner in which these two codes were promulgated greatly differs from the procedure for the promulgation of laws in other democratic countries. Furthermore, the procedure for the endorsement of these two codes is unusual in democratic states and does not ensure a proper climate for their consequent application. Namely it does not provide adequate conditions for a functional and democratic society with established rule of law.

These irregularities in adoption, which are likely to undermine the legitimacy of the new laws in the minds of the public and rank-and-file law enforcement and judicial personnel, are compounded by the dualism in the exercising of powers and responsibility, namely, the lack of a clear definition between UNMIK and Kosovar institutions. A further problem is the lack of efficiency on the part of the judicial bodies (police, public prosecutors, and courts) to apply laws in general and protect human rights in particular. The inability to maintain public order and security for citizens and to protect human rights and freedoms can best be seen from the tragic events of March 17–18, 2004. During this time, mutual efforts were made by UNMIK and the Kosovar institutions to share responsibility, despite that the authority for security and justice falls within the powers of the Special Representative of the U.N. Secretary-General. The reasons for this inefficient model of governance in Kosovo must be sought in Security Council Resolution 1244.¹⁰⁶

104. Violating the inviolability of residence is a criminal offense. Provisional Criminal Code, *supra* note 1, at art. 166.

105. Provisional Criminal Procedure Code, *supra* note 1, at art. 246.

106. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999) (establishing the international civil administration and the international security force in Kosovo).

Even laws that are well drafted, such as the criminal codes in Kosovo, have to be applied by the judicial bodies and respected by the citizens; therefore, they need to be endorsed through a democratic procedure. On the other hand, willing compliance of the citizenry with laws is an important component of a democratic society. The readiness of the citizens is maximized by their involvement in the drafting process and through their elected representatives in the approval process. Democratic societies are distinguished by their efforts to increase the awareness of citizens on the necessity of respecting laws. This is the path that Kosovo should follow. Currently, the citizens of transitional societies are known for disrespecting or dodging laws. Unfortunately, Kosovo is one of these societies as well.

Due to this deficit, Kosovo lacks the proper legal means to protect the human rights of each of its citizens, regardless of ethnic and religious origin. In order to make the Kosovar self-governing institutions accountable for the protection of human rights, they first must have the authority and responsibilities that currently fall under the U.N. administration. If these two codes are adopted legitimately and democratically, their application will ensure practical protection of human rights and freedoms to a greater extent for all citizens living in Kosovo, regardless of their ethnic, religious, or political background. Then, Kosovo will have fulfilled one of the most important standards set forth by the international community. This will create grounds for the status of Kosovo to be resolved pursuant to the political will of the people of Kosovo.