

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

**Defining and Prosecuting the Crime of
Human Trafficking**

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1. EXECUTIVE SUMMARY

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) finds that trafficking in persons (hereinafter trafficking) remains a serious human rights concern because the Kosovo justice system often does not correctly apply the legal framework regulating the crime of trafficking.

The report examines three examples of this misapplication of the law which are routinely identified by OSCE monitors. These include the issuing of trafficking indictments when the relevant elements of the offence of trafficking are not present. A second issue observed is the failure to prosecute traffickers for additional criminal activity which was committed in the course of the specific offence of trafficking. Finally, it appears that trafficking incidents are often characterized as an offence less severe than that of trafficking, which results in lighter penalties for perpetrators.

The failure to properly apply the relevant law hinders the ability of courts in Kosovo to respond to the crime of trafficking. Correct analysis and application of the law by the judicial actors will increase the likelihood of ending impunity for traffickers and reducing the number of new trafficking victims.

With this goal in mind, the OSCE recommends that judges and prosecutors specify the evidence that is linked to each element of the definition of trafficking, and to include in indictments any additional crimes that are committed with the act of trafficking. The OSCE also recommends that the Kosovo Judicial Institute conduct training on the definition of trafficking, emphasizing in particular the difference between trafficking an adult victim versus a child victim.

2. INTRODUCTION

Trafficking remains an outstanding human rights concern in Kosovo.¹ According to the latest report of the Kosovo Prosecutor's Office, in 2010, 125 individuals were suspected of trafficking in persons.² Despite long-standing and ongoing advocacy efforts to prevent trafficking,³ the OSCE has observed that Kosovo legal practitioners often fail to properly apply the law to the established facts in potential trafficking cases.

¹ US Department of State, *Trafficking in Persons Report (TIP) 2010* states that "Kosovo is a source, transit, and destination country for women and children who are subjected to trafficking in persons, specifically forced prostitution, and children in forced begging". <http://www.state.gov/documents/organization/143187.pdf> (accessed 10 August 2011), at p201.

² Office of Statistics and Analysis of the Kosovo Prosecutor's Office *Annual Report on the Work of Prosecutors' Offices in Kosovo*, 2010 (March 2011), p. 37.

³ OSCE report, *Review of the Criminal Justice System* (October 2001). <http://www.osce.org/kosovo/13046> (accessed 28 April 2011); OSCE report, *A Legal Analysis of Trafficking in Persons Cases in Kosovo* (October 2007), <http://www.osce.org/kosovo/28415> (accessed 10 August 2011); OSCE report, *Assessment for Establishing a Referral Mechanism for Victims of Trafficking in Human Beings in Kosovo* (October 2007), <http://www.osce.org/kosovo/28468> (accessed 10 August 2011); 2008 Annual Report of the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings presented at the Permanent Council Meeting, *13 November 2008, Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms*, <http://www.osce.org/files/documents/2/0/36159.pdf> (accessed 10 August 2011); OSCE Book by the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Analyzing the Business Model of Trafficking in Human Beings to Better Prevent the Crime* (May 2001),

The report is based upon a review of trafficking-related cases before the Kosovo courts since a previous OSCE report analysing trafficking cases was issued in 2007.⁴ Review of trafficking cases since 2007 confirmed that many concerns discussed in the 2007 report remain today, including the principle concern discussed in this report: judicial actors not properly applying the law to the facts and how this hampers effective prosecutions of trafficking.

The definition of the crime is analyzed in terms of its three main legal elements: act, illicit means, and purpose of exploitation. A well-reasoned court decision that links the court's findings of fact to the relevant law is provided as a best practice example. The emphasis on explaining the definition of trafficking in this report is in response to the OSCE's observations on the court's application of the law.

The report then focuses on three problems based on findings identified by OSCE monitors: first, the issuing of trafficking indictments when the requisite elements of the offence of trafficking are not present; second, a failure to prosecute additional criminal activity committed in the course of trafficking; and, third, converting trafficking activity into an offence less severe than that of trafficking, which results in lighter penalties for perpetrators.

The report concludes with recommendations for judges, prosecutors and Kosovo institutions to improve the prosecution of trafficking and the identification of victims.

3. DEFINING TRAFFICKING AND APPLYING THE LAW TO THE FACTS

3.1 The definition of trafficking

The Palermo Protocol⁵ includes the leading internationally recognized definition of trafficking. The Criminal Code of Kosovo⁶ (CCK) defines trafficking using the same language as the Palermo Protocol.⁷ The CCK punishes the offence of trafficking of adults with the penalty of 2–12 years imprisonment.⁸ Trafficking of a child, defined as a person under 18 years of age,⁹ carries a penalty of 3–15 years in prison.¹⁰

<http://www.osce.org/files/documents/c/f/69028.pdf> (accessed 10 August 2011); 2010 Annual Report of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Combating Trafficking as a Modern-day Slavery: a Matter of rights, Freedoms and Security*. <http://www.osce.org/cthb/74730> (accessed 10 August 2011); and the US Department of State, *TIP 2010*, *ibid*.

⁴ OSCE report, *A Legal Analysis of Trafficking in Persons Cases in Kosovo*, *ibid*.

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention against Transnational Organised Crime, U.N. Doc. A/55/383 (15 December 2000), *entered into force* 25 December 2003.

⁶ Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003, with subsequent amendments. On 6 November 2008, the Kosovo Assembly promulgated Law No. 03/L-002 on Supplementation and Amendment of the Kosovo Provisional Criminal Code of Kosovo, which left the code substantially the same as the 2003 law, with only a section on guilty plea agreements added and the name of the code changed to Criminal Code of Kosovo, hereinafter referred to as CCK.

⁷ Trafficking is also prohibited under the Kosovo constitution.

⁸ See Article 139(1) of the CCK.

⁹ See Article 107(21) of the CCK.

¹⁰ See Article 139(2) of the CCK.

Using the same words found in Article 3 of the Palermo Protocol, Article 139(8)(1) of the CCK defines trafficking as:

“[T]he recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”

The definition of trafficking is complex, but it becomes clearer if it is parsed into its three elements: *act*; *illicit means*; and *for the purpose of exploitation*.

1. *Act*: The recruitment, transportation, transfer, harbouring, or receipt of persons.
2. *Illicit means*: The threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving of or receiving of payments or benefits to achieve the consent of a person having control over another person.
3. *For the purpose of exploitation*: The word exploitation is defined as to “include, but not be limited to, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹¹

The OSCE has found that Kosovo legal practitioners often do not correctly apply these elements of the offence of trafficking.

As mentioned above, all three elements are necessary to convict someone for trafficking an adult victim, but the legal elements necessary to convict differ slightly when the victim is a child. When a child is the victim of trafficking then only the elements of act and exploitation are needed for a conviction.¹² Because a child cannot be deemed to give consent to any act that is for the purpose of exploitation, the “illicit means” element is not considered a necessary element of the crime.¹³ Committing any act (recruitment, transportation, transfer, harbouring, *or* receipt of persons) for the purpose of exploitation is trafficking when a child is the victim.

In case the definition remains cumbersome for some, even after parsing the definition into its three elements, a legal practitioner might select a portion of each element as a way to approach the analysis of a suspected case of trafficking.

For example, if an investigation indicates that a defendant recruited an adult victim through deception and abuse of power, with the purpose of sexual exploitation, the three requisite elements of the crime can be summarized as follows:

¹¹ See Article 139(8)(2) of the CCK.

¹² See Article 139(8)(4) of the CCK.

¹³ See Article 139(8)(3) of the CCK.

- 1) The defendant committed an act of recruitment;
- 2) The defendant recruited by illicit means, using deception and abuse of power;
- 3) The defendant's purpose was to sexually exploit the victim.

But the three-step analysis is not this simple. Explaining the results of an investigation is incomplete without the prosecutor developing the explanation further with the inclusion of facts discovered during investigation. These facts should be clearly explained and corroborated by the evidence collected; otherwise, the three requisite elements as stated above remain unsupported allegations. It is necessary to include evidence (fact-based allegations) to support each of the above three elements.

3.2 A decision that applies the law to the facts

An example of best practice with regard to a court decision adequately applying the law to the facts is that of the oral announcement in a district court of Pejë/Peć ruling dated 6 April 2011.¹⁴ The trial panel consisted of two international judges of the European Union Rule of Law Mission in Kosovo (EULEX) and one local judge.

[Act] In January 2007, the defendant *recruited* the injured party *by paying her traveling expenses* from Moldova to Kosovo.

[Illicit means] She was *deceived* by the defendant into believing she was coming to Kosovo *to work as a waitress*.

[Illicit means] The injured party was *economically vulnerable* and *dependant* upon the defendant. *He paid her traveling expenses and she was required to repay those expenses* from her earnings. Those earnings included *money she earned from providing sexual services* to clients.

[Illicit means] The defendant was in a *position of power when compared to the injured party*, and *he abused that power to exploit her into providing sexual services* to clients.

[For the purpose of exploitation] *Upon her arrival* she was forced by the defendant *to provide sexual services* to clients.

The written judgment in the above case then explained, in a well-written decision, which facts from the trial were connected to each of the three elements in the definition of trafficking.

4. THREE EXAMPLES OF INADEQUATELY APPLYING THE LAW TO THE FACTS

4.1 A trafficking indictment when the offence of trafficking is not present

¹⁴ Case Number P.Nr. 445/09, Pitaqaj et al, <http://www.eulex-kosovo.eu/en/judgments/CM-District-Court-of-Peja.php> (accessed 10 August 2011).

The OSCE has observed that evidence acquired during an investigation is sometimes not linked to the applicable law when the prosecutor indicts the defendant.

For example:

The defendants agreed to take a husband and wife to Italy in exchange for 3,000 Euro. The mother of the male victim provided the money, with the understanding that the money would help get her son and daughter-in-law to Italy. The group began their journey (by car) to Italy in December 2005. Although the victims paid an additional 2,000 Euro they did not get transported to Italy. The trip ended in Croatia.

In August 2010, a judge of the district court of Gjilan/Gnjilane confirmed an indictment for trafficking based on the above facts.¹⁵

“...after analyzing the indictment and the evidence found in the case file, [the judge] found that there are sufficient facts indicating that the accused have committed the criminal offence described in the indictment.”

The judge failed to examine whether the evidence supported an indictment for trafficking, or misunderstood how to compare evidence (i.e., the facts) to the relevant law. Because all the elements of the crime are not present, the OSCE does not consider that this constituted the crime of trafficking. An *act* element of transportation is present, but there is no evidence supporting the illicit means or exploitation elements of the crime to support a trafficking indictment. Smuggling of migrants, meanwhile, is a crime that does not need to contain any act of illicit means or exploitation. Smuggling of migrants is an agreement to transport someone illegally across borders, which is what the above case appears to describe. However, there was no indication that the court considered the offence of smuggling of migrants to be the more appropriate indictment.¹⁶

4.2 Failure to prosecute for additional criminal activity

Traffickers often commit additional crimes in the course of their trafficking activity. The OSCE is concerned that traffickers are often not indicted for these additional crimes.

On 1 April 2011, a district court decision ruled on facts that included:

- Two children confined to a basement;
- Clients brought to this basement with the purpose of obtaining sexual services;
- Beating of the two children for refusal to perform sexual services;
- Evidence of intimidation, included sms text messages to friends with threats such as, “I have one girl I want to scare, I said to her that I know a person that can vanish you”;

¹⁵ Both defendants were arrested and indicted for trafficking in 2006. The indictment for one defendant was confirmed in December 2006, but the other not until August 2010. A trial date has not yet been set.

¹⁶ See Article 138(7)(1) of the CCK, “The term ‘smuggling of migrants’ means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into Kosovo, where such person is not a resident of Kosovo, or into a State of which such person is not a national or a permanent resident.”

- The defendant and other men brought to the basement committing forced sexual intercourse with the children.

The defendant who committed the above acts was indicted for trafficking, but this case suggests a need to investigate and prosecute a host of other offences which may have been committed based on the established facts, including repeated rape, infliction of bodily harm, threats, unlawful deprivation of liberty, torture and facilitation of prostitution. In addition, there was no investigation into, or indictment of, clients who went to the basement to obtain sexual services from the children.

Only one other person in this case, the basement owner, was indicted. He admitted to sexual intercourse with a 13, possibly 14 year-old victim, and was indicted for sexual abuse of a person under 16 years of age.¹⁷ He was not indicted for trafficking, although he appeared to have harboured a minor for the purpose of exploitation.

4.3 Converting trafficking into a less severe offence than trafficking

In July 2009, a district court convicted two defendants for the offence of attempting to traffic, rather than for trafficking itself. One defendant received a ten-month sentence, the other defendant received five months. Below is a summary of the verdict:

After an agreement was reached between the defendant and a person from Albania, who controlled the minor, the victim was sold to the defendant for 300 Euro. After the defendant gained control over the minor he told her that she would work in Kosovo as a dancer for a daily payment of 10 Euro, although she was not a professional dancer. He knew that the minor was in a vulnerable position, with no shelter or family support (she was previously abused by a family member). He was in the process of transporting her to Kosovo, with the purpose of exploiting her in his restaurant, when he was caught by the Kosovo border police.

Therefore, it was found that the defendant committed the criminal offence of attempting to traffic in persons.

With regard to the requirement to prove an *act*, *only one act is needed* to satisfy the required *act* element within the definition of trafficking. In this case however, *multiple acts were committed*:

- *Recruitment*: The offer to the child to work at his restaurant;
- *Recruitment*: The request made to the other adult for purchase of this child;
- *Transfer*: Purchasing the child for 300 Euro is a transfer of control over the child;
- *Receipt*: Moment when the defendant received the child from the other person;

¹⁷ Article 192 of the CCK limits the ability to “consent” to a sexual act only to those who have reached the age of 16. The CCK has an article on rape (Article 193) and an article on sexual abuse of persons under the age of 16 (Article 198). The OSCE has observed that a defendant suspected of sexual intercourse with a child under 16 is generally not charged with rape if there is no evidence of force, but instead charged under the lesser crime of sexual abuse of persons under the age of 16. The lack of clarity in this area of the CCK, combined with how the code is interpreted in practice, is troubling.

- *Transportation:* Moment when transportation of the child began.

All of these activities constitute *acts* within the scope of the legal definition of the crime of trafficking. Because the word “or” is used in the definition of trafficking, the commission of any one of these acts – if done for the purpose of exploiting the child – is trafficking.

Because all the elements of the crime of trafficking were fulfilled, it is difficult to know why the defendant was not convicted of trafficking itself. Although Kosovo police protected the child from additional harm, this arrest did not convert the act into a differently characterized or less severe offence.

5. CONCLUSIONS

The frequent failure of legal practitioners to apply the legal offence of trafficking correctly hinders the ability of the Kosovo courts to respond to the crime of trafficking. The result is greater impunity for perpetrators, ongoing vulnerability of victims and the continuation of trafficking in Kosovo, constituting a major human rights concern.

This report analyses common problems in effectively prosecuting cases including: firstly, the issuing of trafficking indictments when the requisite elements of the offence of trafficking are not present; secondly, a failure to prosecute additional criminal activity occurring alongside trafficking; and thirdly, a failure to indict for trafficking when all the elements of trafficking are present.

The examples and best practice guidelines contained in this report can assist legal practitioners to think about how to effectively prosecute the crime of trafficking. Correct analysis and application of the relevant legislation will have a greater likelihood of punishing traffickers, identifying victims, and decreasing the number of future victims of trafficking.

6. RECOMMENDATIONS

The OSCE offers legal practitioners in Kosovo the following specific recommendations.

To Judges:

- Judges should compare available evidence to each element of the definition of trafficking when reviewing indictments and drafting their decisions.

To Prosecutors:

- Prosecutors should specify the factual evidence that can be linked to each element of the definition of trafficking;
- Prosecutors need to expand their investigations to all potential additional crimes which may be committed in the course of trafficking – such as intimidation and threats, physical and sexual assault, rape, unlawful deprivation of liberty, torture or slavery – and to indict suspected perpetrators when there is sufficient evidence of criminal activity alongside trafficking.

To the Kosovo Judicial Institute:

- The Kosovo Judicial Institute should continue to provide training to prosecutors and judges on how to apply the definition of trafficking to a court's findings of fact (the factual evidence of what happened);
- The Kosovo Judicial Institute should train legal practitioners regarding the three elements contained in the trafficking definition, and to emphasize the significance of the use of the word "or" in the definition;
- Training should particularly emphasize the difference between trafficking of an adult versus trafficking of a child, as well as the need to investigate and indict additional crimes that are often committed in the course of trafficking;
- Training should highlight the need to prosecute everyone involved in the crime of trafficking, including the owners of premises who harbour the victims, other individuals who profit from this criminal activity and clients who use the services of trafficked victims, particularly when the victims are children.