

Fair Trial Issues for Detained Persons with Mental Health Needs



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1. Introduction

Since 1999, the mandate of the Organization for Security and Co-operation in Europe (OSCE) Mission in Kosovo has included monitoring of the justice system in Kosovo for compliance with fair trial and international human rights standards. Trial monitoring reports are based on direct monitoring by OSCE staff in courts throughout Kosovo with a focus on systemic issues affecting the justice system.

The present focused report analyses the issue of detention on remand in cases involving defendants with mental health needs.¹ The OSCE has previously reported on the use of detention on remand² and had raised concerns – including on the detention of persons with mental health disorders in particular – that remain today.³ Detention on remand is a subject of high importance to the OSCE because it significantly impacts fundamental human rights including the right to liberty. In the specific case of defendants with mental health needs, their detention further raises concerns of potential inhuman and degrading treatment of persons of particular vulnerability.

In 2022, while conducting direct field monitoring of hearings and analysis of related written motions and decisions on detention on remand,⁴ the OSCE observed a number of cases involving defendants with mental health issues. There were instances where such detention measures were imposed and thus raised certain concerns in relation to the handling of defendants with mental health needs. This focused report will analyse those cases and concerns and will provide recommendations.

- 1 This report does not concern involuntary commitment or the use of detention of persons with mental health issues as a security measure within the criminal justice system (i.e., detention of persons due to the risk posed by their mental health), which has been the subject of previous OSCE studies (see e.g. See OSCE, Reviews of the Criminal Justice System: Second Review, February 2021, p. 23–26; Third Review, November 2021, p. 41–42, Fourth Review, February 2002, p. 52–55; Fifth Review, May 2003, p. 34–36; Seventh Review, March 2006, p. 25).
- 2 See OSCE report Trial Monitoring Report on Detention on Remand (2023). See also OSCE, The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns – Part I, November 2009; OSCE, The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns – Part II, March 2010.
- 3 See OSCE, Reviews of the Criminal Justice System: Second Review, February 2021, p. 26–28; Fourth Review, February 2002, p. 55–56; Fifth Review, May 2003, p. 36–37, Seventh Review, March 2006, p. 46–47.
- 4 See OSCE report Trial Monitoring Report on Detention on Remand (2023).

2. Methodology

The methodology of this report is based on:

- i. Qualitative analysis of data collected from detention on remand hearings monitored by the OSCE from January to December 2022, of prosecution requests, defence submissions and court rulings on detention on remand; and
- ii. Desk research on international standards and Kosovo law.

The trial monitoring methodology used by OSCE trial monitors is based on the ODIHR trial monitoring method and principles described in the 2012 ODIHR practitioners' manual.⁵

For the purposes of this report, the OSCE identified five out of 70 cases monitored between January and December 2022 before the seven Kosovo Basic Courts where the defendants were suspected of having mental health issues. The OSCE did not analyse subsequent decisions to extend detention on remand or the overall length of detention on remand in these cases.

⁵ OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Trial Monitoring Manual: A Reference Manual for Practitioners* (revised edition, 2012), <https://www.osce.org/odihr/94216> (accessed July 18, 2023).

3. Legal framework

a. International standards

The right to liberty is a fundamental right enshrined in both international and regional human rights instruments declaring that no one shall be deprived of their freedom except in accordance with a procedure prescribed by law.⁶ Detention on remand, in particular, should be reasonable and necessary in all circumstances, and should constitute the “*exception rather than the rule*”.⁷

As regards the detention of defendants with mental health needs, a proper medical examination of a detained person should be conducted as promptly as possible and appropriate medical care offered thereafter where necessary.⁸ Persons detained in the course of criminal proceedings who are determined to have a mental illness should receive the best available mental health care⁹ and, specifically, severely ill persons should not be detained in prisons but in mental health facilities in order not to exacerbate their condition, while cases of a lesser gravity should be treated in specialised facilities.¹⁰

Importantly, the European Court of Human Rights (ECtHR) has found on multiple occasions that the detention of persons with mental health needs in conditions that do not allow for appropriate mental health care – and which have a tangible detrimental effect on the person’s mental health – could amount to inhuman and degrading treatment, thus violating Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹¹

6 See Art. 9(1) of the International Covenant on Civil and Political Rights, December 1966 (ICCPR); Art. 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 1950 (ECHR).

7 UN Human Rights Committee, General comment No. 35 on Article 9, December 2014, para. 12, 38.

8 Principle 24 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, December 1988.

9 Principle 20 of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, December 1991.

10 Rule 109 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 2015. See also Principle 12 of the Council of Europe’s Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, June 2006.

11 See e.g., *Dybeku v. Albania*, ECtHR, Judgement of 18 December 2007; *Raffray Taddei v. France*, ECtHR, Judgement of 21 December 2010; *G. v. France*, ECtHR, Judgement of 23 February 2012, *M.S. v. the United Kingdom*, ECtHR, Judgement of 3 May 2012; *Rooman v. Belgium*, ECtHR, Judgement of 31 January 2019 (Grand Chamber).

b. Kosovo legal framework

In Kosovo, the procedures regulating detention on remand are defined in Articles 163, 182-190 of the Criminal Procedure Code of Kosovo (CPC).¹²

The CPC states that – right from the moment of arrest – if a person “*displays signs of mental illness, the police may immediately order an examination by a psychiatrist.*”¹³ The arrested person also has the right to medical treatment, including psychiatric treatment.¹⁴

Further, Chapter XXXIII CPC is dedicated to criminal proceedings involving perpetrators with a mental health disorder. According to Article 508(1) CPC, at any time during the proceedings, “*if there is a suspicion that the defendant was in a state of mental incompetence or diminished mental capacity at the time of the commission of the criminal offence or that he has a mental disorder, a court may, ex officio or upon the motion of a [...] prosecutor or defence counsel, appoint an expert under Article 144 of the [CPC] to conduct a psychiatric examination of a defendant in order to determine whether:*

1.1. at the time of the commission of the criminal offence, the defendant was in a state of mental incompetence or diminished mental capacity; or

1.2. the defendant is incompetent to stand trial.”

Thus, the court and/or parties may request a psychiatric examination when mental illness or capacity issues are suspected (regardless of whether relevant to the alleged offence),¹⁵ including in detention on remand or pre-indictment proceedings.

¹² Criminal Procedure Code of Kosovo, Code No. 08/L-032 (CPC).

¹³ Article 167(4) CPC.

¹⁴ Article 167 (2) CPC.

¹⁵ Psychiatric assessment would usually be used in cases of suspected mental illness. Where other capacity issues are suspected – such as learning difficulties – a psychological assessment would typically be more appropriate. The latter depends on the availability of specialized forensic psychologists.

Article 509(1) CPC specifically provides that, in addition to cases from Article 184, detention on remand can be ordered where:

- i. there is a grounded suspicion that the defendant has committed a criminal offense;
- ii. a psychiatric examination finds that the defendant was in a state of mental incompetence or diminished mental capacity at the time of the commission of the alleged offence; and
- iii. the person currently has a mental disorder and as a result, there are grounds to believe that he will endanger the life or health of another person.

In this case – or when the defendant is already in detention on remand and is subsequently determined to have a mental health disorder – detention on remand must be served at a health care institution.¹⁶ In both cases, it is mandatory that the court renders such a ruling after reviewing the opinion of the psychiatric expert.¹⁷

¹⁶ Article 509(2) and (3) CPC.

¹⁷ Article 509(4) CPC.

4. Case analysis

Out of the 70 cases monitored for this report, the OSCE noted five defendants who were suspected or determined to be mentally ill (i.e., seven per cent of the sample). All five defendants are Kosovo-Albanian males that were prosecuted for a variety of criminal offences.¹⁸

Types of Cases Involving Defendants with Mental Health Issues



Table No.1. Types of cases involving defendants with mental health issues

For three out of five defendants, the prosecutor did not request a psychiatric examination, although the mental health status or suspicion of mental illness of these defendants was mentioned in their requests for detention on remand.

In two of these cases, in Mitrovicë/Mitrovica and Pejë/Peć regions respectively, the courts did not request any psychiatric examination *ex officio* and ordered pre-trial detention, despite noting the mental condition of the defendants. As mentioned above, the prosecutor had also noted the mental health concerns of these defendants although not requesting a psychiatric evaluation and, from the information available to the OSCE, it appears that defence counsel did not raise concerns or request an evaluation.

¹⁸ One case was heard in Mitrovicë/Mitrovica Basic Court and related to the offence of Light bodily injury (domestic violence related); one was heard in Gjilan/Gnjilane Basic Court and involved the offence of destruction or damage to property; one was heard in Pejë/Peć Basic Court, related to the offence of sexual assault in relation to domestic violence; and two in Gjakovë/Đakovica Basic Court, one related to an attempted murder and one related to the offence of domestic violence.

As in the cases above, where the court possesses information or a suspicion that the person has a mental health condition, the judge should appoint an expert to conduct a psychiatric examination of the defendant prior to imposing detention.¹⁹

In the third case, from Gjakovë/Đakovica region, the defence counsel challenged the prosecutor's request, mentioning the mental health issues of the defendant. Indeed, the defence counsel proposed alternative measures of psychiatric treatment at the Institute of Forensic Psychiatry, with the purpose of stabilising the defendant's mental health condition. However, the court instead ordered detention on remand, concluding that the defendant could receive adequate treatment at the correctional centre. A persuasive factor in this decision was that the defendant had already been ordered treatment.

A direct and serious consequence of neglecting to request a psychiatric examination of a defendant suspected of having mental health issues is that the defendant will potentially be detained in an unsuitable environment where they would be deprived of vital mental health care. The absence or inadequacy of treatment, which adversely affects the mental health of these detainees could then raise serious concerns of inhuman or degrading treatment.²⁰

In only two out of five cases, the prosecutors requested a psychiatric examination of the defendants (one in Gjilan/Gnjilane region and one case in Gjakovë/Đakovica region). In both cases, the defence counsel agreed with the proposal by the prosecution, highlighting the precarious mental health state of their clients, and subsequently the court ordered a psychiatric examination of the defendants.

¹⁹ Article 508(1) CPC 2013.

²⁰ See e.g, *Dybeku v. Albania*, ECtHR, Judgement of 18 December 2007; *Raffray Taddei v. France*, ECtHR, Judgement of 21 December 2010; *G. v. France*, ECtHR, Judgement of 23 February 2012, *M.S. v. the United Kingdom*, ECtHR, Judgement of 3 May 2012; *Rooman v. Belgium*, ECtHR, Judgement of 31 January 2019 (Grand Chamber).

The case before the Gjilan/Gnjilane Basic Court is an example of good practice:

In light of information of mental health issues affecting the defendant, the prosecutor requested a psychiatric examination in accordance with Article 508(1)(4) and (5) of the CPC. The defence counsel supported the prosecution's request and underscored that the defendant had been suffering from mental problems for a long time and required continuous treatment. The court, after hearing the psychiatric expert, ordered mandatory treatment at the Institute of Forensic Psychiatry in Prishtinë/Priština, "*with the aim that within this period [the defendant] will be examined and observed*". In this case, it was accepted that there were serious concerns regarding the defendant's mental health that merited long-term treatment.

Of note, the shortage of beds at the Institute of Forensic Psychiatry has been reported to the OSCE as an ongoing challenge in dealing with cases involving defendants with mental health issues. Even with recent renovations of Ward D in the Institute of Forensic Psychiatry, the availability of beds only reaches half of the required capacity. As the only institution in Kosovo able to treat persons with mental health needs, the unavailability of beds greatly restricts judicial options. However, it should be noted that a lack of available spaces in a suitable institution alone does not justify the continued detention of a person with severe mental health issues in an ordinary prison.²¹ For less serious conditions, at a minimum, treatment in the community or in specialised medical wings within correctional centres should be explored – depending on the availability of such specialised treatments and facilities.

In sum, it is evident that the relatively high proportion of defendants with mental illness within the sample of 70 cases monitored (seven per cent) strongly suggests a need for investment in these services.

²¹ *Sy v. Italy*, European Court of Human Rights, Judgement of 24 January 2022, para. 135.

5. Conclusion

In its analysis of cases before Kosovo Basic Courts that involved defendants with mental health issues, the OSCE has observed specific concerns related to detention on remand proceedings. More specifically, the OSCE notes that in a majority of cases, no psychiatric examination was conducted prior to a decision on detention on remand, despite suspicion or information of the defendant's mental condition. This departs from the advisable procedure provided for in the CPC and international standards. Consequently, the defendants whose mental health has not been assessed are not provided with the adequate treatments and conditions. This not only constitutes a breach of the relevant provisions of the CPC, but in more serious situations, it raises issues of inhuman and degrading treatment under Article 3 of the ECHR.

