TRIAL MONITORING REPORT ON DETENTION ON REMAND

October 2023

OSCE Organization for Security and Co-operation in Europe
Mission in Kosovo

TRIAL MONITORING REPORT ON DETENTION ON REMAND

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CCJE	Consultative Council of European Judges
CCK	Criminal Code of Kosovo
CoE	Council of Europe
CPC	Criminal Procedure Code of Kosovo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
KAJ	Kosovo Academy of Justice
KJC	Kosovo Judicial Council
KPC	Kosovo Prosecutorial Council
KBA	Kosovo Bar Association
OSCE	Organization for Security and Co-operation in Europe, Mission in Kosovo
ODIHR	OSCE Office for Democratic Institutions and Human Rights
UN	United Nations

EXECUTIVE SUMMARY

This report provides an analysis of data collected in 2022 and 2023 by the Organization for Security and Co-operation in Europe Mission in Kosovo ("OSCE") trial monitoring programme on the use of detention on remand against adult defendants in Kosovo.[1] The purpose of this report is to analyse the application of detention on remand in the seven Basic Courts in Kosovo[2] for compliance with internationally accepted fair trial standards, based on OSCE trial monitoring. It is intended to serve as a learning tool for judges, prosecutors and attorneys, and provides training recommendations for the Kosovo Academy of Justice and Kosovo Bar Association.

Excessive use of detention on remand is a global issue that poses rule of law and human rights concerns. Kosovo is not an exception in this respect. Available statistics show that since December 2020, there has been a significant increase in the number of accused persons held in detention, who have not been convicted.

The report is based on findings from 70 detention on remand hearings that were monitored and analysed by the OSCE. The OSCE initiated analysis in part due to anecdotal reports that detention on remand was treated differently in different Basic Courts – with some courts more readily ordering detention on remand than others. The OSCE analysis benefits from the OSCE Mission's five Regional Centres,[3] all of which have trial monitoring staff who regularly monitor cases at all seven Basic Courts. As such, it was uniquely placed to analyse the application of detention on remand across Kosovo courts.

One of the main findings of the analysis is that there was no detectable difference in the treatment of applications for detention on remand among courts.[4] The analysis found that pre-trial judges rarely refused prosecution requests for detention on remand and there was very little use of the alternatives available through "lesser measures". Only six out of 70 analysed applications were refused, suggesting insufficient oversight and scrutiny that could undermine the use of detention on remand as a measure of last resort.

1 This report only considers detention on remand as it applies to adult defendants. Additional considerations apply to detention on remand against "juvenile defendants" that are beyond the scope of this report. See Article 61, Code No. 06/L –006, Juvenile Justice Code, 18 October 2018.

2 Prishtinë/Priština Basic Court, Prizren Basic Court, Gjakovë/Đakovica Basic Court, Pejë/Peć Basic Court, Mitrovicë/Mitrovica Basic Court, Gjilan/Gnjilane Basic Court, and Ferizaj/Uroševac Basic Court.

3 Gjilan/Gnjilane, Mitrovicë/Mitrovica, Pejë/Peć, Prishtinë/Priština and Prizren.

4 The significance of this finding must be weighed against the relatively small sample size.

The data collected and analysed also show that there have been improvements compared to the findings in earlier OSCE reports.[5] In particular, procedural deadlines for filing and deciding applications, and the requirement of "mandatory defence" (i.e. that all defendants are represented), were respected in all cases. When appropriate, the report highlights examples of good practices in pre-trial detention issues.

However, the report notes shortcomings regarding the quality of reasoning in prosecution requests, defence submissions and judicial decisions. Particular concerns were noted in multi-defendant cases, where the prosecution and courts frequently failed to distinguish sufficiently between the circumstances and alleged involvement of each defendant.

The report concludes with a number of recommendations to the relevant institutions. Key recommendations include: expanding the list of available alternative measures to detention; ensuring that mechanisms exist to monitor and expedite proceedings when a defendant is in detention on remand; collecting and publishing data on the use of detention on remand; providing training to judges, prosecutors and attorneys on issues related to detention on remand.

5 See OSCE report '*The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns* – Part I (November 2009)'. https://www.osce.org/files/f/documents/5/5/40584.pdf (accessed July 18, 2023); and OSCE report '*The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns* – Part II, (March 2010). https://www.osce.org/files/f/documents/b/e/41806.pdf (accessed July 18, 2023)'. See also OSCE report *Review of the Implementation of the New Criminal Procedure Code of Kosovo - June 2016*. https://www.osce.org/kosovo/243976 (accessed July 18, 2023).

1. INTRODUCTION

> *"The right to liberty of person is not absolute. [It] recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws. [It] requires that deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law. […] it should not be the general practice to subject defendants to pre-trial detention."*
>
> *- UN Human Rights Committee, General comment No. 35: Article 9 (Liberty and security of person)*[6]

The OSCE Mission in Kosovo ("OSCE") has been monitoring the Kosovo justice system for compliance with fair trial and international human rights standards since 1999. Based on this monitoring, the OSCE regularly issues reports with the goal of improving the functioning of the Kosovo justice system and compliance with internationally accepted fair trial standards. The OSCE focuses on highlighting systemic, rather than isolated issues, and provides recommendations for justice sector improvement.

The use of detention on remand is a subject of high importance to the OSCE because it touches directly and profoundly on fundamental human rights including the right to liberty, which has been described as of the "*highest importance in a 'democratic society'*".[7] International and regional human rights bodies have underlined that detention on remand must, "*be the exception rather than the rule*",[8] used only when strictly necessary and as a measure of last resort.[9]

Prison populations provide a useful indicator of the use of detention on remand. Statistics from the Kosovo Correctional Service indicate that there has been a significant increase in the proportion of the prison population in detention on remand over the last three years. This peaked in December 2022, when the number of prisoners without a conviction was 660 out of 1726 persons detained (38 per cent of the prison population).

6 UN Human Rights Committee, *General comment No. 35 on Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, paras. 10 and 38, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement (accessed July 18, 2023).

7 *Medvedyev and Others v. France*, European Court of Human Rights, Judgment of 29 March 2010, para. 76.

8 UN Human Rights Committee, *General comment No. 35 on Article 9 (Liberty and security of person)*, para. 38.

9 Council of Europe, *Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*, para. 3. https://pjp-eu.coe.int/documents/41781569/42171329/CMRec+%282006%29+13+on+the+use+of+remand+in+custody%2C+the+conditions+in+which+it+takes+place+and+the+provision+of+safeguard+against+abuse.pdf/ccde55db-7aa4-4e11-90ba-38e4467efd7b (accessed July 18, 2023).

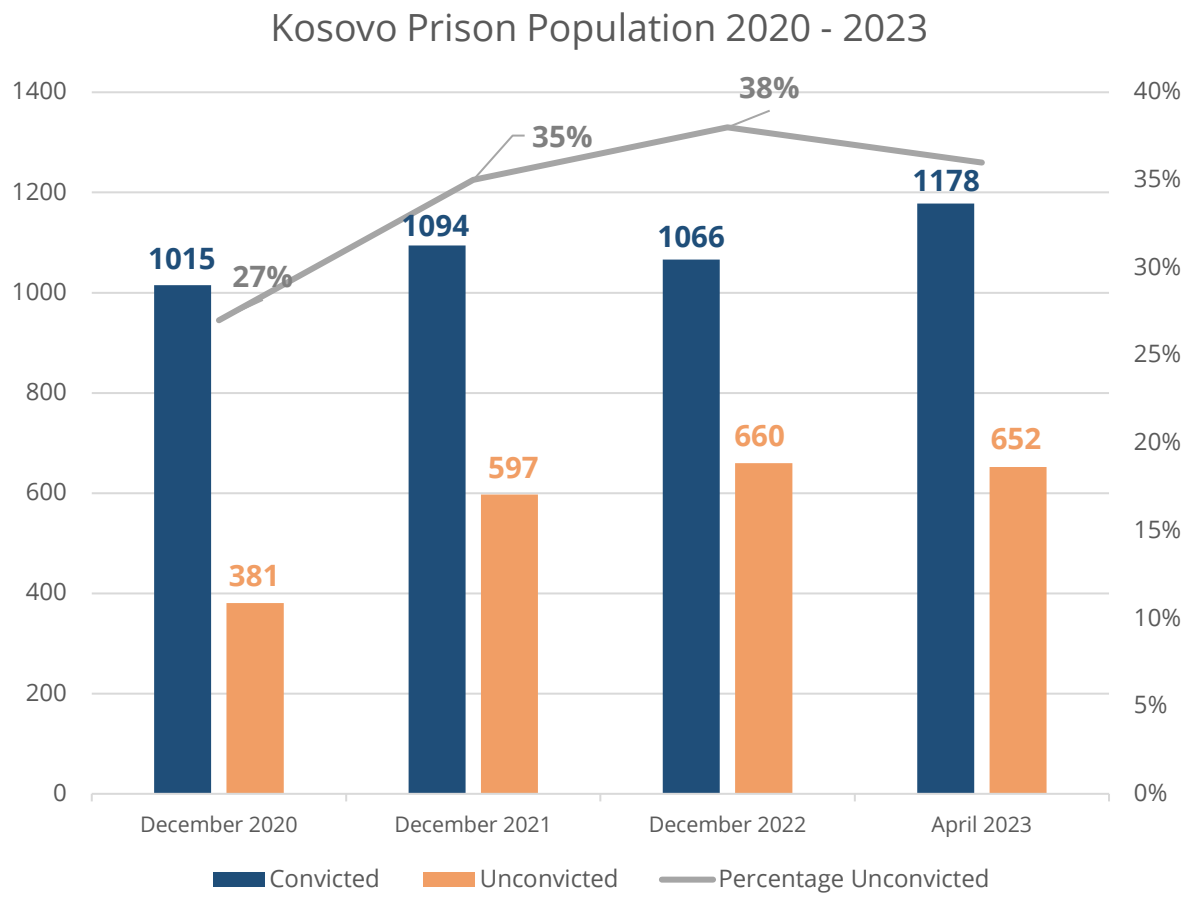

***Figure 1**. Kosovo Prison population 2020-2023*

Kosovo is not unique in this trend. In Europe and globally, the overuse of pre-trial detention has been highlighted by organizations.[10] Data published by the Council of the European Union, shows that in 2021, the average proportion of the "unconvicted" prison population (i.e. not serving a final prison sentence) in European Union Member States was 24.6 per cent.[11]

The OSCE has previously reported on the use of detention on remand in Kosovo. In 2009 and 2010, the OSCE published two reports that concluded that the applicable legal framework was not fully applied and that the use of detention on remand fell short of international standards.[12] Concerns included lack of adherence to procedural deadlines, insufficient reasoning in prosecution requests, poor performance by defence counsel, and lack of sufficient reasoning for detention in judicial decisions.

10 See also Council of Europe Commissioner on Human Rights, *Human Rights Comment: Excessive use of pre-trial detention runs against human rights* (18/08/2011), https://www.coe.int/en/web/commissioner/-/excessive-use-of-pre-trial-detention-runs-against-human-righ-1 (accessed July 18, 2023); Open Society Justice Initiative, "Presumption of Guilt: The Global Overuse of Pretrial Detention" (2014), https://www.justiceinitiative.org/publications/presumption-guilt-global-overuse-pretrial-detention (accessed July 18, 2023).

11 See note on 'Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions' (Council of the European Union, December 2022) available at https://commission.europa.eu/system/files/2022-12/JHA%20Non-paper%20st15292%20en22.pdf (accessed July 18, 2023).

12 See OSCE report '*The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns* – Part I (November 2009)'. https://www.osce.org/files/f/documents/5/5/40584.pdf (accessed July 18, 2023); and OSCE report '*The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns* – Part II', (March 2010). https://www.osce.org/files/f/documents/b/e/41806.pdf (accessed July 18, 2023).

Reports published in 2016 and 2022, while focusing on other topics, also noted ongoing concerns regarding the use of detention on remand.[13]

The purpose of this report is to provide an updated analysis of the application of detention on remand in Kosovo.[14] It aims to assist the relevant institutions and practitioners to apply best practices in the implementation of the existing law in accordance with international standards.

13 See Page 30, *Review of the Implementation of the New Criminal Procedure Code* (June 2016) available at https://www.osce.org/files/f/documents/0/8/243976.pdf (accessed July 18, 2023) and Pages 31 and 33, *Handling of Terrorism Cases by the Kosovo Criminal Justice System* (September 2022) available at https://www.osce.org/mission-in-kosovo/526212 (accessed July 18, 2023).

14 Prishtinë/Priština Basic Court, Prizren Basic Court, Gjakovë/Đakovica Basic Court, Pejë/Peć Basic Court, Mitrovicë/Mitrovica Basic Court, Gjilan/Gnjilane Basic Court, and Ferizaj/Uroševac Basic Court.

2. METHODOLOGY

This report is based on:

i. Desk research on international standards and Kosovo law;
ii. Quantitative and qualitative analysis of data collected from detention on remand hearings directly monitored by OSCE from January to December 2022, and appeal hearings in 2023;
iii. Qualitative analysis of prosecution requests, defence submissions and court rulings on detention on remand;
iv. Monitoring of hearings and assessment of the conduct of those hearings by OSCE trial monitors.

For this report, the OSCE selected and monitored 70 cases, involving 96 defendants, between January and December 2022, before the seven Kosovo Basic Courts. In most cases, the OSCE monitored hearings "in-person" and through analysis of applications and court decisions. Twelve (12) cases (17 per cent), were analysed through examination of the case file and relevant documents, but not in-person.

The only criteria for selection of cases was the location of the Basic Court, with the aim to monitor approximately ten detention on remand hearings at each Basic Court. Consequently, the report includes details of hearings involving a wide range of alleged offences.[15]

The trial monitoring methodology used by OSCE trial monitors is based on the ODIHR trial monitoring method and principles described in ODIHR's 2012 practitioners' manual.[16] In addition, to ensure consistent data collection and analysis for each case, a hearing monitoring form was developed and used by OSCE trial monitors when attending hearings.

The analysis of cases is based on an assessment of the conduct of hearings and a review of relevant documents including prosecution requests, defence submissions and court rulings.

For this report, the OSCE only monitored and analysed first applications for detention on remand, typically these were closed hearings at the investigation stage. The OSCE did not analyse subsequent decisions to extend detention on remand or the overall length of detention on remand in these cases.

In addition, the OSCE obtained and analysed documents from seven appeal hearings between February and May 2023. Key findings from this analysis are detailed in a short section at the end of this report.

15 See more in Chapter 4.1 'Case Mapping and Preliminary Findings'.
16 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. KOSOVO AND INTERNATIONAL LEGAL FRAMEWORK

3.1 International Standards

Detention represents the most severe limitation on the right to liberty and security and has inevitable consequences for other human rights such as the right to private and family life.

Both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) are incorporated into Kosovo law through the Constitution.[17] The Constitution also requires Kosovo courts to interpret human rights and fundamental freedoms in line with the jurisprudence of the European Court of Human Rights (ECtHR).[18] These instruments, combined with the decisions of the Human Rights Committee and ECtHR provide a comprehensive enunciation of the human rights standards applicable to detention on remand.

While recognising that detention may be warranted in certain circumstances, international and regional human rights instruments apply strict limitations on its application. These limitations aim to avoid the arbitrary or excessive application of detention on remand. Many international human rights standards are also reflected in the recent European Commission Recommendation "*on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions*".[19]

3.1.1 International Covenant on Civil and Political Rights

The ICCPR provides that no person should be subject to arbitrary arrest or detention and that any deprivation of liberty must be "*as established by law*".[20] The ICCPR also states *"[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge*" and must be entitled to challenge the lawfulness of their detention.[21] It further prescribes that, "*detention in custody of persons awaiting trial shall be the exception rather than the rule*".[22] Moreover, pre-trial detention "*must be reasonable and necessary in all the circumstances*".[23]

The Human Rights Committee has offered guidance on what constitutes arbitrariness, ruling that even if prescribed by local law, detention can still be arbitrary.
In this context "arbitrariness" includes "*elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality*".

17 Article 22, Constitution of Kosovo, 9 April 2008. The jurisprudence of the European Court of Human Rights is also binding in Kosovo pursuant to Article 53 of the Constitution.
18 Article 53 of the Constitution of Kosovo.
19 Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023H0681 (accessed July 18, 2023).
20 Article 9(1) of ICCPR.
21 Article 9(3) and (4) of ICCPR. On the meaning of "*promptly*", the Committee has indicated that a lapse in time of 48 hours from arrest to the judicial hearing is acceptable. UN Human Rights Committee, *General comment No. 35 on Article 9,* para. 33.
22 UN Human Rights Committee, *General comment No. 35 on Article 9,* para. 38.
23 UN Human Rights Committee, *General comment No. 35 on Article 9,* para. 12.

Also relevant in the Kosovo context is the finding of the Human Rights Committee that,

> *"[d]etention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime."*

In addition, that *"[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances"* and should not be based only on *"the potential sentence for the crime charged."*[24]

3.1.2 The ECHR and the jurisprudence of the ECtHR

Similar to the ICCPR, the ECHR stresses, under Article 5, that no one shall be deprived of his/her liberty, except in listed circumstances,[25] which includes:

> *"the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."*[26]

Any deprivation of liberty must be in accordance with a procedure prescribed by law.[27] In addition, the person must be "*...brought promptly before a judge...*" and is "*...entitled to a trial within a reasonable time...*".[28] The ECHR further states that the "*...release may be conditioned by guarantees to appear for trial*".[29]

As is the case for all qualified rights under the ECHR, any limitation must be necessary and proportionate. The authorities must balance the importance of respecting the fundamental human right to liberty against the necessity of ensuring participation in proceedings. Judicial authorities must consider whether less severe measures than detention could be sufficient to ensure the presence of the defendant at trial and only impose detention when it is strictly necessary.[30]

24 UN Human Rights Committee, *General comment No. 35 on Article 9,* para. 38.
25 Examples when detention may be lawful is listed in Article 5(1)(a-f) of the ECHR.
26 Article 5.1(c).
27 Article 5.1 of ECHR.
28 Article 5.1(c) and Article 5.3 of the ECHR.
29 Article 5.3 of the ECHR.
30 *Ladent v. Poland*, ECtHR Judgment of 18 March 2008, para. 55.

The ECtHR has ruled that the ease of fleeing a jurisdiction cannot be the sole reason to justify a risk of flight and must be corroborated by other factors.[31] Thus, judges should provide clear reasoning for their decisions, and outline all factors to ensure that judgements meet international standards and to avoid suggestion of discriminatory treatment – particularly against defendants with multiple citizenships.

When relevant, ECtHR jurisprudence is cited in the body of the report. In addition, Annex B of this Report provides a summary of some of the key principles that can be derived from the case law.

3.2 Kosovo Legal Framework

The rules governing detention on remand are contained in the Constitution and the Criminal Procedure Code ("CPC").[32] Article 29 of the Constitution defines the right to liberty in line with international human rights standards. This provision is supplemented by Article 30 of the Constitution, which defines the rights of the accused and Article 31, which describes the right to a fair and impartial trial.

3.2.1 Criminal Procedure Code

On 17 February 2023, a new CPC in Kosovo entered into force. The following analysis will refer to the CPC currently in force, with some footnotes also citing the equivalent provisions in the previous CPC. Where the new Criminal Procedure Code introduces significant changes, these will be highlighted. Annex A also details some of the main changes in the new CPC related to detention on remand.

The Criminal Procedure Code (CPC) reiterates the right to liberty enshrined in the Constitution.[33] In addition, the CPC provides detailed provisions on the procedure applicable to the use of detention on remand.

The Criminal Procedure Code emphasises that detention on remand must be in accordance with the provisions of the code and imposed for the shortest time possible.[34] The provision creates a duty on the authorities to process cases urgently whenever a defendant is detained and to release defendants as soon as the conditions justifying detention cease to exist.

The court can only remand a defendant in detention if it is satisfied that there is a grounded suspicion that they have committed a criminal offence. This is a pre-requisite to detention on remand that is equivalent to the "reasonable suspicion" test contained in the ECHR. Even if other conditions are met, if the court is not satisfied that there is a grounded suspicion that the defendant committed a criminal offence, s/he must be released.

31 See *Becciev v. Moldova*, ECtHR Judgment of 4 October 2005, para. 58; *Sulaoja v. Estonia*, ECtHR Judgment of 15 February 2005, para. 64; and *Stögmüller v. Austria*, ECtHR Judgment of 10 November 1969, para. 15.

32 Additionally, rules governing detention of children are contained in the Juvenile Justice Code. Consideration of those provisions is beyond the scope of this report.

33 Article 12 of Code No. 08/L-032 Criminal Procedure Code, 17 August 2022.

34 Article 182, *ibid*.

If the court is satisfied that there is a grounded suspicion, the court goes on to consider whether any of the conditions of Article 184 of the CPC justifies detention on remand. The court must consider whether "lesser measures" could meet these conditions and only order detention on remand if satisfied that they cannot.[35] In other words, detention on remand must be a measure of last resort.

Lesser measures are defined in Article 171(5) as: *"a promise of the defendant not to leave his place of current residence;*[36] *a prohibition on approaching a specific place or person; attendance at a police station; bail or house detention".* This is presented as an exhaustive list, seemingly precluding the court from ordering alternative provisions (such as attending appointments for drug/alcohol treatment, electronic monitoring or curfew).[37]

In this regard, of note, the European Commission has recently recommended,

> *"[p]re-trial detention should always be used as a measure of last resort based on a case-by-case assessment. The widest possible range of less restrictive measures alternative to detention (alternative measures) should be made available and applied wherever possible. Member States should also ensure that pre-trial detention decisions are not discriminatory and are not automatically imposed on suspects and accused persons based on certain characteristics, such as foreign nationality."*[38]

35 Article 184, *ibid*.

36 Article 174(2), *ibid,* clarifies that the "*travel document of a defendant obligated [not to leave his place of residence] may be sequestrated*".

37 The surrender of travel documents is a common requirement used in many jurisdictions. While this is seemingly not available as a stand-alone 'lesser measure', it can be required when linked to residence or house detention. See Article 174(2), 'Promise of Defendant not to Leave his Place of Current Residence" and Article 181(9), 'House Detention', Criminal Procedure Code, 17 August 2022.

38 European Commission, *Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions*, para. 23 of the Preamble. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023H0681 (accessed July 18, 2023).

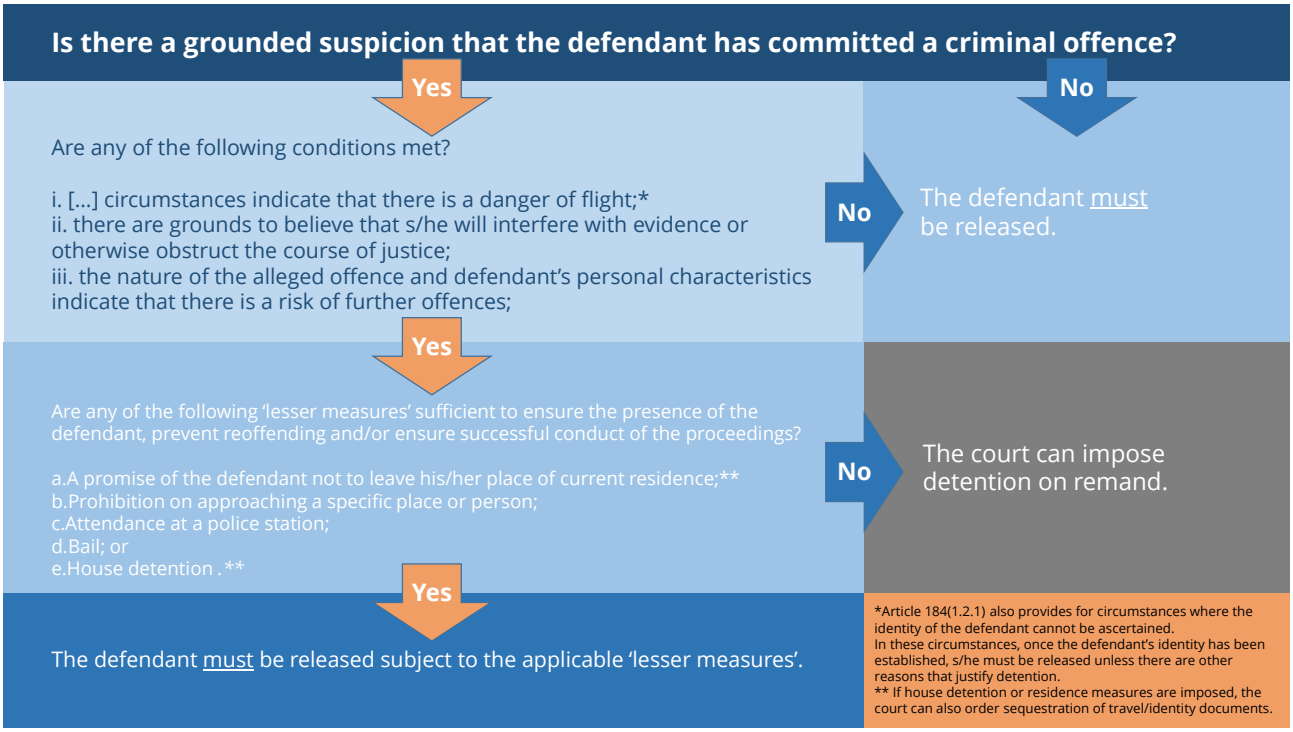

***Figure 2**. Detention on remand as regulated by the Criminal Procedure Code of Kosovo*

Procedure for applications

The prosecutor is responsible for filing the initial request for measures to ensure the presence of the defendant including both "lesser measures" and detention on remand.[39] The request must be filed within 36 hours of the defendant's arrest and should fulfil the specific requirements of Article 163 of the CPC. The prosecutor should follow specific procedures outlined under Article 163(2), when requesting detention on remand, including:

- Describe evidence that supports the grounded suspicion that the arrested person has committed the suspected criminal offense.
- Describe evidence suggesting:
    - there is a risk of flight, or
    - the defendant will obstruct justice, such as by destroying evidence or influencing witnesses/ injured parties, etc., or
    - the seriousness of the criminal offense, a risk that he/ she will repeat the criminal offense, AND
    - Specify why lesser measures to ensure the presence of the defendant are insufficient.

39 Articles 165(1) and (2) and 173(4), Code No. 04/L-123 Criminal Procedure Code, 28 December 2012; Articles 163(1) and (2) and 171(4), Criminal Procedure Code, 17 August 2022.

Under the 2012 Criminal Procedure Code, the time limit for the prosecution to file a request for detention on remand was 24 hours. The new CPC (effective February 2023) extends that time limit to 36 hours. This allows the prosecution more time to consider the necessity for detention on remand and draft an application if required. However, the time within which the court must consider an application remains unchanged at 48 hours. It remains to be seen whether this will be a challenge for Basic Courts who might have as little as 12 hours within which to hear a detention on remand application.

The arrested person has the right to the immediate assistance of defence counsel of their choice and to be represented by a defence counsel at the pre-trial detention hearing.[40] If the person does not engage a defence counsel within 24 hours, the court must appoint a defence lawyer *ex officio*.[41]

In accordance with international standards, the CPC stipulates that, on receipt of the prosecution request for detention on remand, the pre-trial judge must hold a hearing in the presence of the defendant and the defence counsel. The hearing must take place within 48 hours from the time of arrest.[42] If a hearing does not take place within that time, the person must be released.[43]

The pre-trial judge has a maximum of 48 hours after the hearing to issue a decision determining whether the detention or any other measure, shall be imposed.[44] In practice, OSCE monitoring has found that decisions are usually issued immediately.

Appeal of a ruling on detention on remand

Parties have the right to appeal a ruling on detention on remand. Among the amendments in the new CPC is a change to the time limit for filing an appeal to allow 48 hours from receipt of the decision of the Basic Court.[45] Under the old provisions, this time limit was 24 hours.[46]

If a party files an appeal, the court will serve the appeal on the other party, who can file a reply within 24 hours of receipt.

Thereafter, the Court of Appeals must determine the application, "*within 72 hours of the filing of the reply to the appeal or the expiration of the time limit for filing of a reply [...]*". This represents an increase in the time for deciding an appeal from 48 to 72 hours.[47]

Time Limits and Review of Detention on Remand

The use of detention on remand must be proportionate. Where detention is imposed for prolonged periods, particularly for less serious offences, concerns regarding proportionality increase.

40 Article 162(10), Criminal Procedure Code, 17 August 2022.
41 Articles 185(4) and 164(2), *ibid.*
42 Article 162(8) and 185(1) and (3) *ibid*.
43 Article 162(9), *ibid*.
44 Article 162(11), *ibid,* states that, within 48 hours, the pre-trial judge shall issue "*a decision determining whether the defendant shall be subject to one of the measures under Article 171*", namely, any of the authorized measures to ensure the presence of the defendant, replacing the specific mention to solely detention on remand.
45 Article 186(3), *ibid*.
46 Article 189(3), Criminal Procedure Code, 28 December 2012.
47 Article 186(3), Criminal Procedure Code, 17 August 2022.

The initial order for detention on remand should be for a maximum period of one month from the day of arrest.[48]

Before an indictment is filed, the CPC creates time limits for pre-trial detention.[49] The time limits are determined by the term of imprisonment available for the alleged offence. For an offence punishable by up to five years' imprisonment, the time limit is four months.[50] If the offence is punishable by more than five years' imprisonment, the time limit is eight months. In the latter case, the time limit can be extended by up to four months in "exceptional cases", but only when the delay is not attributable to the prosecution. A further extension of up to six months (i.e. up to a total of 18 months) is available if there are grounds to believe that the release of the defendant could create a risk of violence or public danger.

After an indictment has been filed, there are no time limits for detention on remand. Compared with other jurisdictions, this is not unprecedented. However, of note, most European Union Member States opt for some time limits on detention on remand post-charge.[51]

Post indictment, detention on remand must be reviewed by the court every two months, even in the absence of any submissions from the parties.[52] During this review, the court is obliged to hear the opinions of the defence and prosecution (if they file submissions) and to determine whether the reasons for detention on remand remain valid. The parties are also entitled to appeal the court's decision in the same way as for any ruling on detention on remand.[53]

In addition, the CPC creates a general duty that

> *"[d]etention on remand shall last the shortest possible time. All authorities participating in criminal proceedings and authorities that provide legal assistance to them have a duty to proceed with special urgency if the defendant is being held in detention on remand."*[54]

In addition, *"[d]etention on remand shall, at any stage of the proceedings, be terminated and the detainee released as soon as the reasons for it cease to exist*".[55]

48 Article 187, *ibid*.
49 Article 187, *ibid*.
50 These time limits were considered recently by the Constitutional Court in the Case No. K185/22, applicant Jadran Kostić and Case No. KI55/22 applicant Saša Spasić.
51 See European Commission Recommendation on Procedural Rights of Suspects and Accused Persons Subject to Pre-Trial Detention and on Material Detention Conditions, C (2022)8987 of 8 December 2022, para. 14. Available at https://commission.europa.eu/system/files/2022-12/1_1_201158_rec_pro_det_en.pdf (accessed July 18, 2023).
52 Article 190, Criminal Procedure Code, 17 August 2022. There is debate within the legal community whether a hearing is required when detention on remand is extended post-indictment under Art. 190 of the CPC (and the Albanian version is not a verbatim translation of the English version of the CPC). Arguably, this ambiguity should be clarified in amendments to the CPC.
53 Article 190(2) and Article 186(3) and (4), *Ibid*.
54 Article 182(2), *ibid*.
55 Article 182(3), *ibid*.

4. TRIAL MONITORING: STATISTICAL ANALYSIS AND CASE EXAMPLES

4.1 Case Mapping and Preliminary Findings

Hearings and defendants

For the purpose of this report, the OSCE monitored 70 cases involving 96 defendants during the period 1 January 2022 until 31 December 2022. Hearings were monitored in all seven Basic Courts as follows:

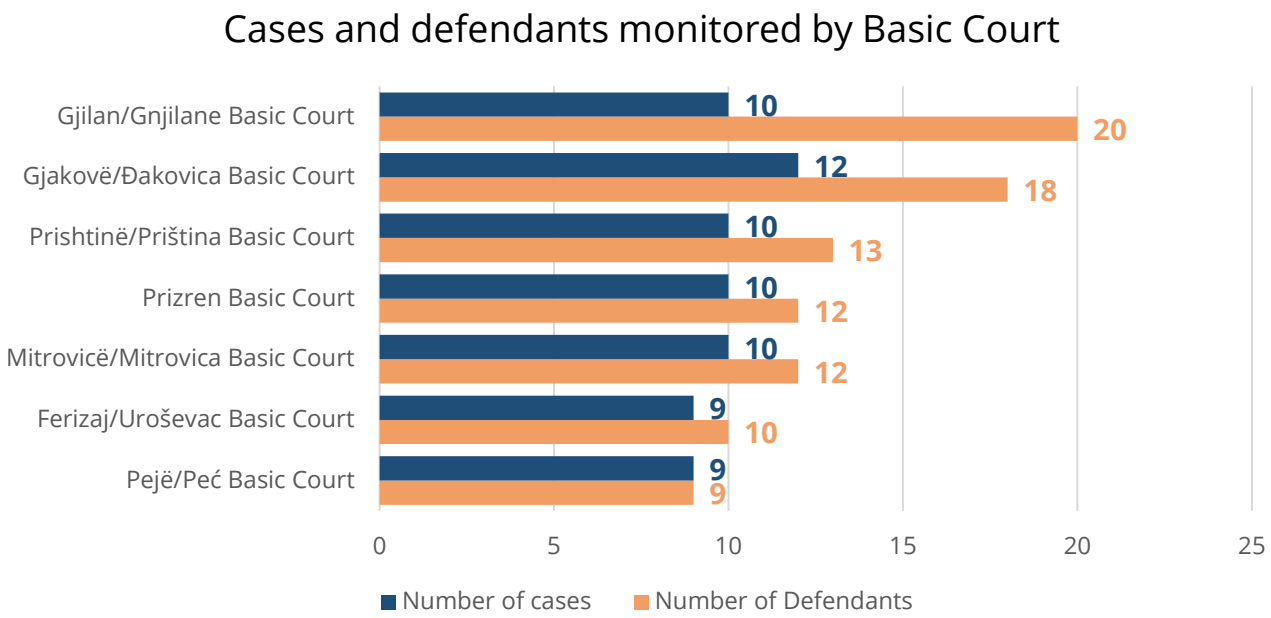

Figure 3. *Cases and Defendants Monitored by Basic Court.*

Only five out of 96 defendants (5 per cent) were women. Ten defendants (10 per cent) were from non-majority communities and four defendants (4 per cent) were from outside Kosovo.[56]

Due to the small number of defendants from non-majority communities and women, it is not possible to draw reliable conclusions on possible differential treatment as a result of gender or community.

Monitored hearings involved a diverse range of alleged offences from endangering public traffic to murder.

56 Defendants from non-majority communities were: seven Kosovo Serbs, one Kosovo Bosniak, one Kosovo Egyptian and one Kosovo Roma.

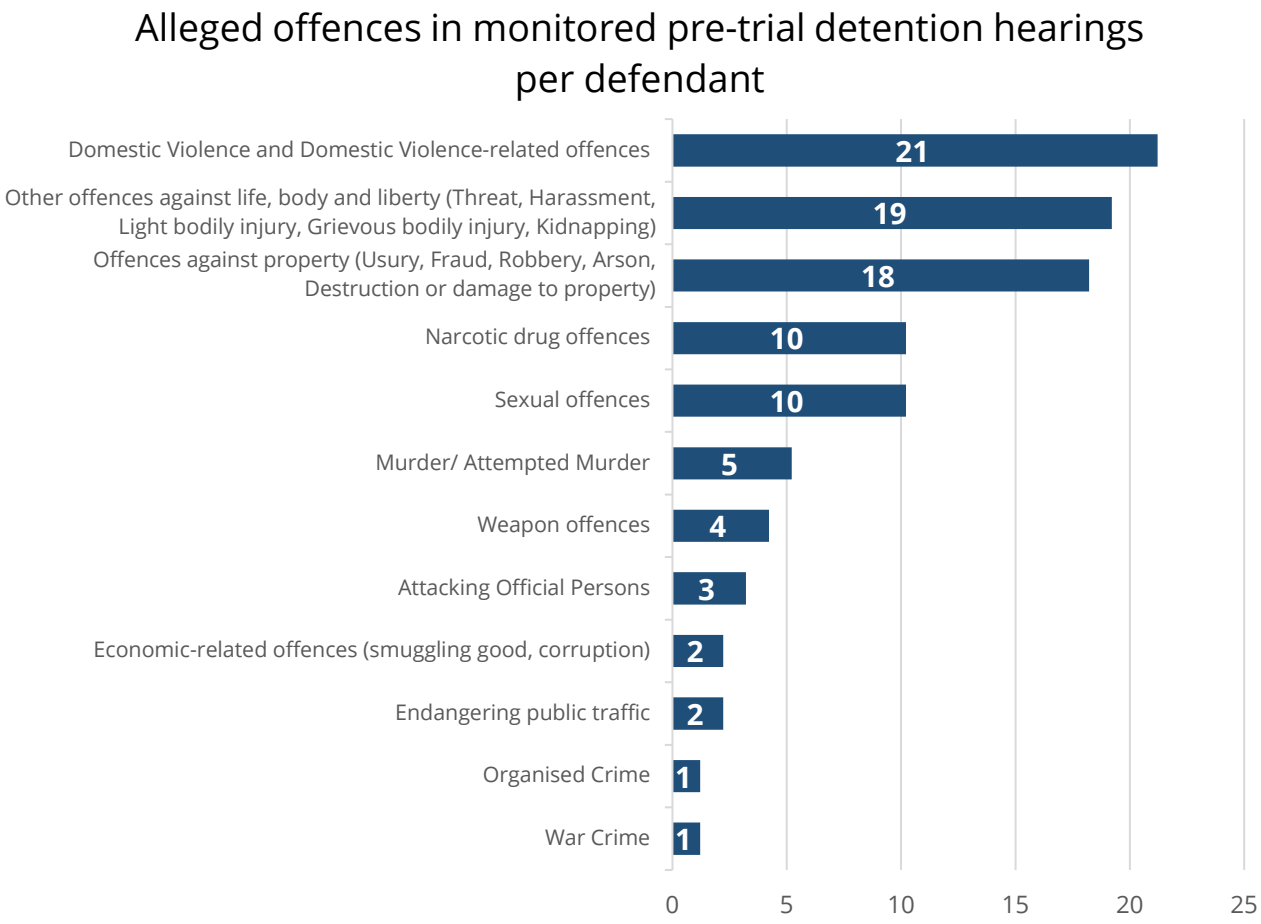

Figure 4. *Alleged main offences (for each defendant) in monitored pre-trial detention hearings*

Adherence deadlines and defence representation

The OSCE assessed compliance with procedural requirements, including procedural deadlines and defence representation.

In all monitored cases, procedural deadlines, including the deadline for the prosecution to file an application,[57] and the deadline within which to hold the hearing, were met.[58] This is a positive finding that shows significant progress since the OSCE last reported on this issue.[59] In addition, all defendants benefited from legal representation in compliance with the CPC.[60] Hearings took place in the presence of the prosecutor and defence counsel as required by the CPC.

57 At the time of the analysis, that time was 24 hours in accordance with Article 164(7), Criminal Procedure Code, 28 December 2012.
58 Article 29, Constitution and Article 162(8), Criminal Procedure Code, 17 August 2022.
59 The OSCE report 'Review of the Implementation of the New Criminal Procedure Code of Kosovo - June 2016' found that, *"[i]n practice, prosecutors generally do meet the new 24-hour deadline imposed in Article 164(7) CPC. In total, 72 per cent of the lawyers responded that prosecutors "seldom or never" fail to file a request for detention on remand within 24 hours of the arrest, and 87 per cent of the judges responded the same*". See page 30. Available at https://www.osce.org/kosovo/243976 (accessed July 18, 2023).
60 Article 185(4), Criminal Procedure Code, 17 August 2022, whenever a defendant is detained, the case becomes one of mandatory defence (regardless of other criteria). Therefore, if the defendant does not engage his own counsel, counsel must be appointed *ex officio*.

Outcome of hearings and use of lesser measures

Lesser measures were requested by the prosecution in only two of the 70 cases analysed for this report – against two out of 96 defendants (two per cent). In both of those cases, the prosecutor proposed house detention to ensure the presence of the defendant. The cases were prosecuted by the same Basic Prosecution Office and in both cases the pre-trial judge accepted the proposal.

In the remaining 68 cases (against 94 defendants), the prosecution requested detention on remand. In only six of those cases against nine defendants (10 per cent, one woman), the court refused that request and instead imposed lesser measures.

Where the application for detention on remand was rejected, lesser measures were imposed including house detention (seven defendants), reporting to the police station (one defendant) and prohibition from approaching a place or person together with reporting to the police station (one defendant).

The Criminal Procedure Code foresees "lesser measures" to ensure the presence of the defendant at trial. These are defined as, "*summons; a promise of the defendant not to leave his place of current residence; a prohibition on approaching a specific place or person; attendance at a police station; bail or house detention.*" [61] While lesser measures represent less of a restriction on the liberty of the defendant, they nonetheless interfere with his/her rights. Therefore, even when imposing lesser measures, the court must do so only in accordance with the applicable law and when necessary and proportionate to meet a legitimate concern (flight, further offending or interference with the course of justice).

One amendment introduced in the 2023 CPC is the removal of "diversion" as a possible lesser measure.[62] However, OSCE trial monitoring shows that diversion was rarely used prior to this amendment. In fact, it was not imposed in any cases monitored by the OSCE in the past two years.

Overall, applications for detention on remand were approved in the clear majority of cases. Where "lesser measures" were used, the most common measure imposed was house detention (the most restrictive of available "lesser measures").

These statistics are broadly similar to those obtained from OSCE trial monitoring in 2021. In 2021, out of 140 defendants (in 89 hearings), only 22 (16 per cent) were released subject to "lesser measures". Of those 22 defendants, 21 were released subject to house detention and one defendant was released subject to attendance at a police station.

61 Article 171(5), Criminal Procedure Code, 17 August 2022.
62 Article 173(1.8) and Article 184, Criminal Procedure Code, 28 December 2012.

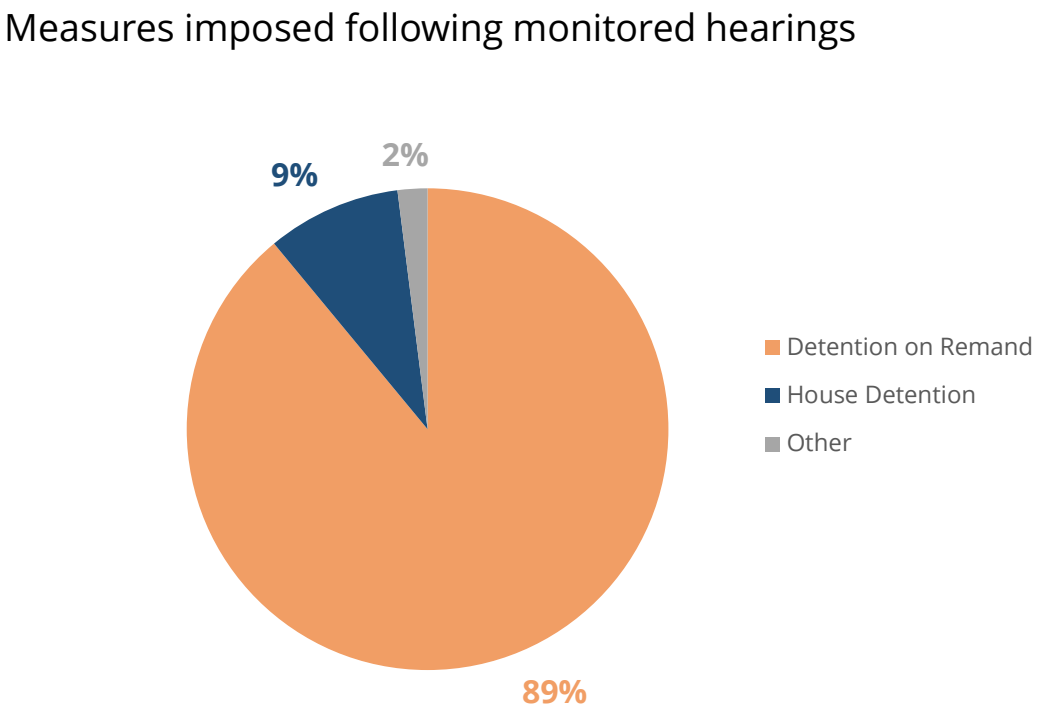

Figure 5. *Percentages of the measures imposed following the hearings monitored by the OSCE.*

4.2 Case Examples

4.2.1 Failure of Prosecutors to Provide Evidence of Grounded Suspicion

As described above, the prosecutor's request for detention on remand must include a description of the evidence that supports a grounded suspicion that the arrested person has committed the suspected criminal offence.[63]

All requests analysed for this report asserted the existence of a grounded suspicion. This was usually substantiated with a list of the evidence collected so far in the case.

However, in several cases, the OSCE assessed that the prosecution did not adequately describe the alleged basis for finding a grounded suspicion. This was a particular concern in multi-defendant cases and where defendants were charged in "co-perpetration". In these cases, the OSCE found that while the prosecution cited evidence to prove that the offence occurred, they often failed to specify the involvement/role of each defendant or how that was corroborated by the evidence.

For example:

> In a case before the Gjilan/Gnjilane Basic Court involving nine defendants, one defendant was charged with the offence of fraud,[64] and the remaining eight defendants were charged with the kidnapping of the first defendant.[65] The prosecutor's request for

63 Article 163(2.4), Criminal Procedure Code, 17 August 2022.
64 Article 323(1) of the Code No. 06/L-074 Criminal Code of Kosovo, 14 January 2019.
65 Article 191(2) and (2.2) in conjunction with Article 31, *ibid*.

detention simply stated that the eight defendants in co-perpetration committed the kidnapping, with a general description of the event. The request did not specify or substantiate how the alleged actions of each defendant individually contributed to the commission of the offence of kidnapping, *i.e*. the request failed to indicate clearly the specific actions and roles alleged of each defendant individually in commission of the criminal offence. Also, no individualization or indication of specific incriminating actions to satisfy the grounded suspicion were mentioned in the request. Nevertheless, the pre-trial judge approved the request and imposed detention on remand against all nine defendants.

In a case before the Special Department of Prishtinë/Priština Basic Court, a defendant was accused of the criminal offence of aggravated murder[66] in connection with the offence of participation in or organization of an organized criminal group.[67] According to the request for detention on remand, the defendant allegedly committed the offence of murder as a member of an organized criminal group, acting together with other persons *"performing in pre-determined roles and during a long period of time with the intention of committing criminal offences".* However, the request was found to be vague and lacked specific reasoning, making it unclear how the prosecution asserted the existence of a *"grounded suspicion".* In particular, the request only provided a general description of the defendant's alleged actions and did not specify how he had contributed to the commission of the alleged criminal offences.

Pre-trial detention hearings are not trials – the prosecution is not expected to prove the alleged offences to the standard of proof required for a conviction. However, the pre-trial judge must be satisfied that there is sufficient admissible evidence against the defendant to establish a "grounded suspicion" against each individual defendant.

The OSCE also noted that concerns regarding prosecution applications often were reflected in court decisions, as pre-trial judges accepted the insufficient reasoning of the prosecution without requesting additional information.

Insufficient reasoning in prosecution requests for detention also affects the quality of defence. More specifically, it is more difficult for the defence to prepare and challenge applications for detention on remand with vague or unreasoned requests.

4.2.2. Failure of Prosecutors to Justify or Individualize Detention Requests

Analysis of prosecution applications for detention on remand showed that prosecutors are frequently citing two or more grounds for detention. However, the OSCE found that the requests often failed to provide a sufficient "*description of the evidence that supports the articulable grounds*", as required by the CPC.[68]

66 Article 179 (1.9) of Code No. 04/L-082 Criminal Code of Kosovo, 13 July 2012.
67 Article 283(3) and (1), *ibid.*
68 Article 163(2.5), Criminal Procedure Code, 17 August 2022.

The applicability of each ground must be carefully considered based on the circumstances of the case and the defendant. However, the main concern identified through monitoring is that prosecution requests often assert grounds without clearly linking them to the alleged facts of the case and/or circumstances of the defendant. In practice, analysed requests were frequently found to be vague, theoretical, abstract or formulaic and lacking in convincing and specific reasons why each defendant should be deprived of their liberty.

Generic or abstract justifications were particularly common in relation to the risk of flight and the risk of interfering with evidence/ influencing witnesses.

The chart below shows the breakdown of trial monitoring analysis of prosecution requests. Significantly, in more than 60 per cent of cases, the OSCE noted some or serious concerns regarding the standard of prosecution requests.

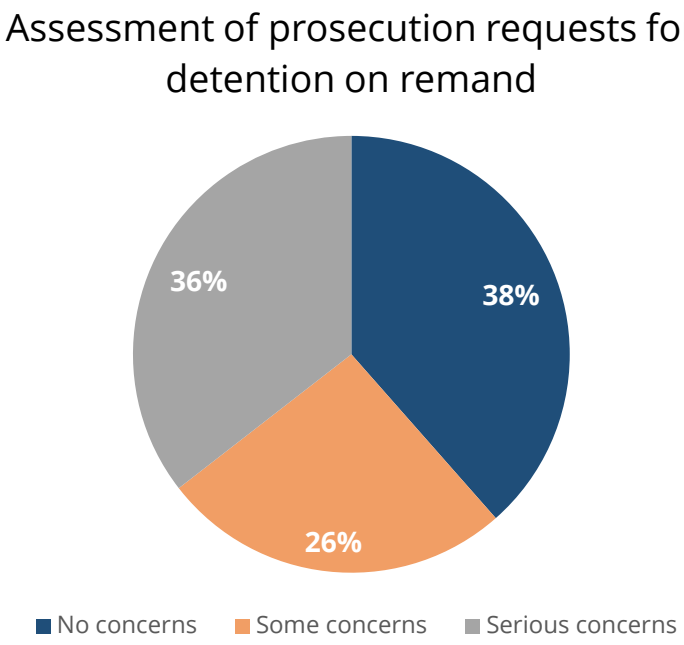

Figure 6. *Assessment of prosecution requests for detention on remand*

To illustrate some of the concerns identified by the OSCE:

> For example, in a case involving unauthorized ownership, control or possession of weapons,[69] before the Prizren Basic Court, the prosecutor argued there was a risk of flight with the general assertion that "borders are easy to cross". No reasons were described as to why the specific defendant might be at risk of hiding or fleeing the jurisdiction. The other ground mentioned is that the criminal offence in question is increasing in Kosovo and this might lead the defendant to repeat the criminal offence or commit another criminal offence. At the same time, the weapon object of the offence was seized. This is a general justification, not based on the past history of the defendant or his personal circumstances. In fact, the court rejected this ground since the weapon had been

69 Article 366(2), Criminal Code of Kosovo, 14 January 2019.

confiscated, and therefore the risk of repeating the crime was no longer present. The pre-trial judge found that the measure of the attendance at a police station was more suitable.

In a case involving the offences of endangering public traffic[70] and failure to provide assistance to an injured person in a public traffic accident[71] before the Pejë/Peć Basic Court, the prosecutor justified the detention request on the ground that the defendant was at risk of flight. This was because the defendant had not provided assistance after the accident, and left the scene. However, the court arguably did not weigh all the relevant factors in the decision. The defendant was arrested at his house a few hours after the incident (suggesting no intention to flee the jurisdiction). The court imposed detention on remand in this case, although the offense was arguably minor.

Of concern, the OSCE found that reasoning provided regarding the risk of flight was often based only on the length of the likely sentence if convicted (see example below). Based on ECtHR guidance, the severity of the likely sentence cannot be the only basis to assert that there is a risk of flight. The existence of this risk must be assessed together with other relevant circumstances. This argument was relatively common in cases monitored.

In a case before Gjakovë/Đakovica Basic Court, involving three defendants charged with narcotics related offences,[72] the request for pre-trial detention contained general grounds for all three defendants justifying the risk of flight and the risk of repeating the criminal offence. The prosecutor justified the presence of a risk of flight for all three defendants exclusively with the length of sentence foreseen for the offence. The prosecutor inferred the intention of all the defendants to repeat the offence based solely on the amount of the narcotics seized. The two grounds were not justified for each defendant individually and the request did not refer to the personal circumstances of each defendant in its reasoning. The court nevertheless ordered detention on remand.

In a case before the Prizren Basic Court, involving a defendant suspected of a weapons offence,[73] and a second defendant suspected of committing the offence of light bodily injury,[74] the prosecutor did not present individualized arguments for each defendant. Instead, only general justifications for imposing pre-trial detention, based on the risks of flight and repeating the offence were provided. For the risk of flight, the justification for both defendants was “easy border crossing” and the possible penalties for the offences. The risk of repeating the offence was justified in a conclusory manner, due to the fact that the defendants had a dispute related to their property.

In general, the OSCE found more serious concerns in cases involving multiple defendants as prosecutors often failed to detail the grounds for detention as they relate to each defendant. Such “individualization” of requests is vital to safeguard the right to liberty of the accused and ensure that detention on remand is justified against each defendant.

70 Article 370(2), *ibid.*
71 Article 374(1), *ibid*.
72 Article 267(2) in conjunction with Article 31, *ibid*.
73 Respectively, Articles 366(1) and 367(2), *ibid*.
74 Article 185(1.1) and (2), *ibid.*

However, the OSCE notes that there are also examples of good practices, where the prosecutors sufficiently justified grounds for detention and tailored them to the circumstances of the case and defendant:

> In a case of alleged domestic violence at the Gjilan/Gnjilane Basic Court,[75] the prosecutor elaborated in a well-reasoned manner the grounds for detention on remand, tailoring it to the circumstances of the case, the relationship between the defendant and the injured party and the behaviour of the defendant. The prosecutor supported the assertion of a grounded suspicion that the defendant has committed a criminal offence using the statement of the injured party and a statement of a witness, pictures of the injuries and a medical report.

4.2.3 Failure of Prosecutors to Specify Why Alternative Measures Cannot Ensure the Presence of the Defendant at Trial

The prosecution request for detention on remand must include a "*description of the articulable grounds to believe that lesser measures to ensure the presence of the defendant are insufficient*".[76] In the requests analysed for this report, the prosecution noted this requirement. Usually this was accompanied by an assertion that the prosecution had evaluated available "lesser measures", but found them insufficient to ensure the presence of the defendant at trial, prevent re-offending or the obstruction of justice.

The OSCE notes that many prosecution requests lack analysis or explanation as to why lesser measures are insufficient to meet concerns. Thus, it is difficult to assess whether adequate consideration has been given to the availability of alternatives before requesting detention on remand.

The use of detention on remand must be proportionate to the risk posed by the defendant in relation to the grounds defined in the CPC. If lesser measures can meet that risk, they must be imposed in preference to detention on remand. In short, detention on remand should always be a measure of last resort. Prosecutors should further elaborate consideration of lesser measures and why they are insufficient.

4.2.4 Failure of Defence Attorneys to Adequately Challenge Detention Requests or Propose Less Restrictive Measures

Whenever a defendant is detained and at the detention on remand hearing, defence representation is mandatory.[77] Therefore, if a defendant does not appoint his own counsel privately, he/she must be appointed counsel *ex officio,* regardless of means.

75 Defendant charged with Article 185, *ibid.*
76 Article 163(2.6), Criminal Procedure Code, 17 August 2022.
77 Article 185(3) and (4), *ibid.*

The OSCE noted that all defendants were represented in the monitored hearings. Of 96 defendants, 58 were represented by *ex officio* counsel (60 per cent).

Defence counsel play an important role in rebutting prosecution requests for detention on remand and safeguarding an individual's right to liberty.

As discussed above, grounded suspicion is a prerequisite for detention. The defence must be served sufficient details of the allegation and evidence to assess whether a grounded suspicion exists. Moreover, they should be prepared to challenge this assertion and raise any procedural concerns (deadlines breached, irregularities in collecting evidence, etc.) during the detention on remand hearing.

In addition to countering arguments put forward in favour of detention, defence counsel are uniquely placed to address the court on the defendant's personal circumstances. Factors such as strong community ties, employment, family obligations, medical conditions, good character, co-operation in proceedings to date (including previous cases) and availability of "bail" can all be advanced to persuade a court that the conditions for detention on remand are not met.

The defence should also be proactive in considering and proposing lesser measures as an alternative to detention on the remand. In some cases, defence counsel might also seek to negotiate with the prosecutor to agree on lesser measures prior to a detention hearing. A proactive and realistic stance that offers appropriate lesser measures is often the most persuasive approach to securing release from detention on remand.

In the cases monitored for this report, defence counsel suggested "lesser measures" as an alternative to detention in 81 per cent of cases. House detention was the most commonly proposed "lesser measure", followed by attendance at a police station and prohibition of approaching a specific place or person. The OSCE notes that "bail" is very rarely considered.[78]

78 Article 179, *ibid*, states that bail, "*shall always be defined as an amount of money determined relative to the gravity of the criminal offense, the personal and family conditions of the defendant and the material position of the person who gives bail*." According to Article 177, bail can be used to address the risk of flight.

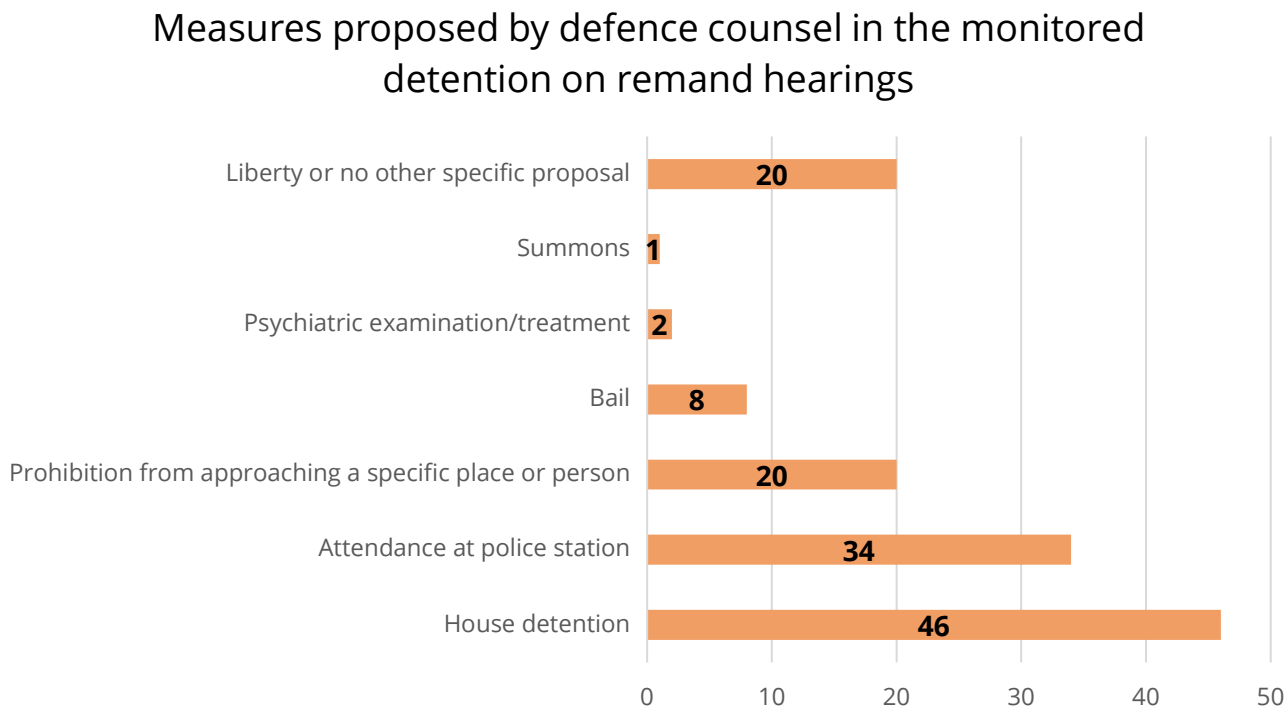

Figure 7. *Measures proposed by defence counsel in the monitored detention on remand hearings*[79]

In general, monitors assessed the performance of defence counsel as sufficient or good. However, there were serious concerns over the quality of representation for 25 out of 96 defendants (26 per cent); while some concerns were observed for the representation of 18 other defendants (19 per cent). Concerns typically related to defence counsel failing to challenge the grounds for detention or failing to put forward lesser measures when appropriate.

To illustrate:

> In a case before Prishtinë/Priština Basic Court involving two defendants charged with domestic violence,[80] the OSCE observed that both counsel failed to challenge the prosecutor's submissions, provided very general arguments in favour of release from detention and did not offer any lesser measures – even though there were lesser measures that would have been relevant and might have met concerns. These included a prohibition on approaching a specific place or person or house detention, considering that the defendants assaulted one another. The court imposed detention on remand on both defendants.
>
> In a case, before the Ferizaj/Uroševac Basic Court, involving the offence of robbery,[81] the defence counsel objected to the request for detention on remand, stating that the conditions for the detention on remand were not met, but failed to provide specific reasons or propose an alternative lesser measure.

79 In Article 171(5), *ibid*, lesser measures are defined as: "*summons; a promise of the defendant not to leave his place of current residence; a prohibition on approaching a specific place or person; attendance at a police station; bail or house detention*." Note, the statistics in this figure represent the overall number of times that a measure has been proposed; often, defence counsel proposed more than one measure.

80 Article 248(3) (3.1) (3.2), Criminal Code of Kosovo, 14 January 2019.

81 Article 317(3), *ibid.*

> In another case, before the Gjakovë/Đakovica Basic Court involving five defendants accused of the offence of usury,[82] the defence counsel of one of the defendants claimed that he did not have all the documents necessary for a proper defence. However, he nonetheless went on to challenge the application. In so doing, he attempted to address one of the concerns – fear of flight – by asserting that his client had promised to co-operate, but failed to address the other grounds alleged by the prosecution. The counsel did not ask the court to provide him with the documents or request additional time to consider those documents and prepare. Here, the court imposed detention on remand.

Of note, the OSCE observed less concerns in relation to privately instructed defence counsel than those appointed *ex officio*.[83] This might have been because privately instructed counsel were more familiar with the case and/or had more time to prepare to represent their clients.

Below is an example of a good practice by defence counsel:

> In a case in Prishtinë/Priština Basic Court involving a defendant accused of committing weapon offences,[84] the privately-selected defence counsel provided a comprehensive submission to challenge the request for detention on remand against his client. The defence counsel disputed the prosecutor's version of the events, rebutting the fact that the defendant had a weapon with him on the day of the arrest and therefore challenging the grounded suspicion. Secondly, the defence counsel stated that there was no risk of flight for the defendant because he did not escape the scene of the incident and co-operated with the police. The defence counsel proposed house detention as an effective and less restrictive measure than detention on remand.

4.2.5 Failure of Judges to Sufficiently Reason or Individualize Pre-trial Detention Decisions

According to the CPC, after holding a pre-trial detention hearing, the pre-trial judge must issue a ruling containing an "*explanation of all material facts which dictated detention on remand, including the reasons for the grounded suspicion that the person committed a criminal offense and the material facts under Article 184 [findings required for detention on remand].*"[85]

Analysis of monitored cases shows a striking tendency for courts to approve prosecution requests. In fact, courts only rejected prosecution applications against 9 out of 96 defendants in the cases analysed (9 per cent, one woman).

In all but two cases, the prosecution requested detention on remand as opposed to lesser measures. In other words, lesser measures were imposed against only 11 out of 96 defendants (11 per cent) – for two defendants this was in accordance with the prosecution application.

82 Article 331(2) in conjunction with Article 31, *ibid.*
83 In 31 out of 58 submissions from defence counsel analysed for the report, concerns were noted regarding the performance of defence counsel (53 per cent). This compares to 10 out of 36 submissions from privately instructed counsel (27 per cent).
84 Articles 366(1) and 367(1), Criminal Code of Kosovo, 14 January 2019.
85 Article 186(1), Criminal Procedure Code, 17 August 2022.

While mindful of the relatively small sample size of the study, the percentage of prosecution applications rejected and defendants released subject to "lesser measures", seems low.[86] This is especially the case when taking into account that lesser measures must be imposed by the court and cannot be imposed by the prosecution/police *ex officio* during the investigation stage (unlike in some other jurisdictions).

In analysing all rulings on detention on remand, the OSCE noted either some or serious concerns in relation to the quality of reasoning in the rulings related to 48 per cent of the defendants. However, when counting only the rulings resulting in the imposition of detention on remand, the percentage is slightly higher, amounting to 53 per cent.

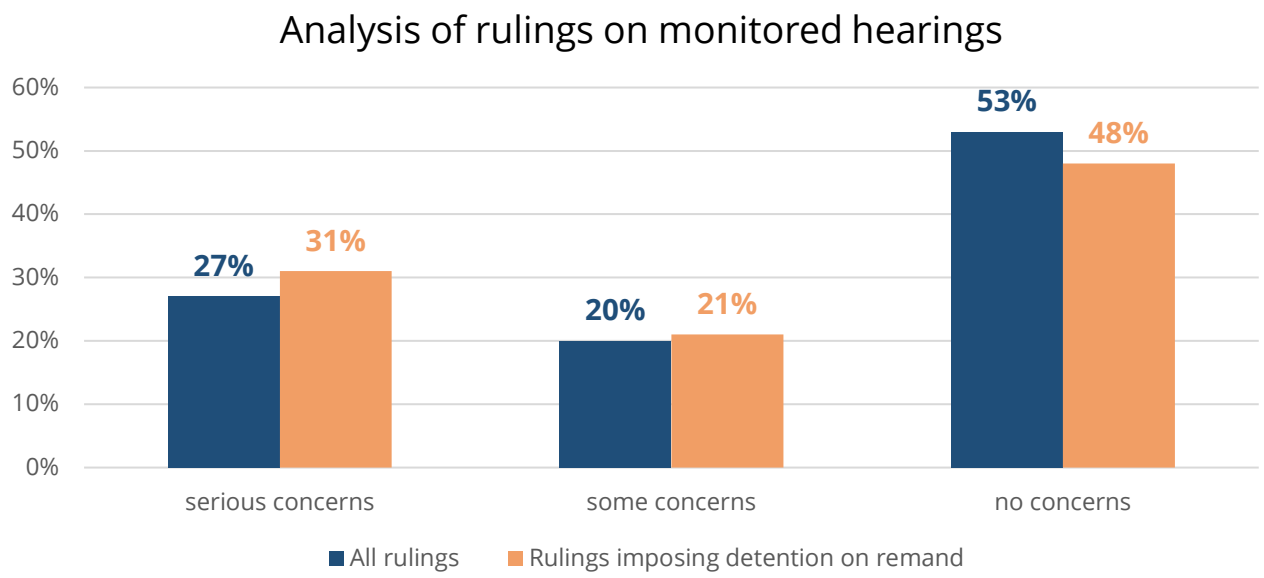

Figure 8. *Analysis of the rulings related to the monitoring hearings*

With regard to the presence of grounded suspicion, the OSCE observed that pre-trial judges generally listed evidence and compared it with alleged facts. However, in cases with multiple defendants, the OSCE noted concerns. In these cases, rulings sometimes failed to describe the alleged role of each defendant, making the existence of a grounded suspicion against each individual less clear. This reflected similar concerns found by the OSCE in relation to prosecution requests.

The OSCE noted that most rulings raised some concerns with regard to the standard of reasoning provided by the pre-trial judge. Arguments advanced by the prosecution were frequently repeated verbatim and many rulings were consequently found to be generic and/or abstract. Another concern identified was that some rulings did not provide detailed analysis or consideration of the arguments presented by the defence or consider why lesser measures were insufficient. In addition, rulings frequently failed to individualize the basis for the decision on detention on remand.

86 By comparison, figures from England and Wales show that in the year ending June 2021, 20 per cent of defendants appearing at the Magistrates' Court in detention were released subject to conditional or unconditional 'bail", and in the year ending June 2022, the same figure was 15%. See https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-june-2022/criminal-justice-statistics-quarterly-june-2022-html#remands (accessed July 18, 2023).

Even when detention on remand is clearly warranted, the court must provide sufficient and well-articulated reasoning for its decision. Rulings should address defence arguments, consider the suitability of lesser measures and explain why such measures are insufficient and detention on remand is necessary and proportionate.

The requirement to issue a clear and well substantiated ruling is equally applicable in cases where the prosecution request is rejected and lesser measures or liberty are imposed. Lesser measures also represent a restriction on liberty and it is important that rulings provide sufficient justification to establish that they are necessary and proportionate to the circumstances of the case and defendant.

However, the OSCE observed cases where judges failed to properly reason the pre-trial detention decision or individualize decisions for each defendant.

> For example, in a case before Pejë/Peć Basic Court, involving a defendant suspected of the offence of light bodily injury,[87] the pre-trial judge rejected the request for detention on remand and imposed the measure of prohibition on approaching a specific person or place together with the measure of attendance at a police station. This decision was based on the grounds that these two measures would prevent the defendant from influencing the witnesses and repeating the offence. However, the OSCE observed that although the court rejected the prosecution's proposal, the pre-trial judge failed to properly justify his decision. In addition, the OSCE observed that the ruling was not referencing the ground of the risk of flight of the defendant, and therefore the CPC requirement for imposing the measure of attendance at a police station, had not been met.[88]
>
> In a case alleging usury (also mentioned above) involving five defendants before the Gjakovë/Đakovica Basic Court, the Basic Court failed to individualize the justification for imposing detention on remand against each defendant. Instead, the same reasoning was provided for each defendant without distinction. Risk of flight was justified only on the basis of the maximum sentence for the alleged offence (10 years' imprisonment). The pre-trial judge also found that there was a risk of interfering with witnesses/evidence because of the proximity among the defendants and the witnesses but failed to explain why "lesser measures" could not meet this concern. Finally, all the defendants were found to pose a risk of reoffending because some (but not all) had previous convictions. The ruling raised serious concerns because of its generic and abstract nature that rendered it difficult to ascertain why detention on remand had been ordered against each individual defendant as oppose to the group.
>
> In a case before the Prishtinë/Priština Basic Court, involving alleged charges of unauthorised ownership, control or possession of weapons and use of weapon or dangerous instrument,[89] the pre-trial judge found that all three conditions were met for ordering detention on remand, but failed to provide sufficient reasoning for two of the conditions. The pre-trial judge did, however, provide well-reasoned arguments related to the risk of reoffending.

87 Article 185(1), Criminal Code of Kosovo, 14 January 2019.
88 See Article 176(1.2), Criminal Procedure Code, 17 August 2022.
89 Articles 366(1) and 367(1), Criminal Code of Kosovo, 14 January 2019.

Overly general and insufficient reasoning in court decisions undermines legal certainty and hinders the ability of the parties to effectively challenge rulings through available legal remedies. The court has a duty to apply the legal provisions to the circumstances of the case and the defendant and to provide sufficient justification for its decisions. Abstract or general reasoning in pre-trial detention decisions could amount to a violation of the right to liberty.[90]

However, the OSCE observed cases where the pre-trial judge provided adequate reasoning when imposing detention on remand:

> In a case in Mitrovicë/Mitrovica Basic Court, the prosecution alleged that there was a grounded suspicion that the defendant committed the offences of attacking official persons[91]; smuggling of goods[92] and attempted murder.[93] The pre-trial judge did not accept the proposal of the prosecutor that the defendant committed the crime of attempted murder. Instead, the ruling states that there is a grounded suspicion that defendant has committed the criminal offence of attacking official persons and smuggling of goods, based on the evidence provided in the case file. Moreover, the judge refused the ground related to the risk of interference with the evidences because the prosecutor did not prove that the defendant could do so. Here, the pre-trial judge analysed the detention requests thoroughly and based on the specific facts and circumstances of the case.

4.2.6 Failure of Court of Appeals to Meet Procedural Deadlines

The 2016 OSCE report "Review of the Implementation of the New Criminal Procedure Code of Kosovo" found that defence counsel and prosecutors reported that the Court of Appeals often did not meet the 48-hour time limit for deciding appeals against decisions on detention on remand.[94]

With the new CPC (effective February 2023), the deadline for the Court of Appeals has been extended to 72 hours from the filing of the reply to the appeal.[95] This new provision also extends the time available to the parties to file an appeal from 24 to 48 hours. Thereafter, the respondent has 24 hours within which to file a reply. After the reply has been filed, or after expiration of the 24-hour time limit, the Court of Appeals has 72 hours to determine the appeal and issue a decision. This amounts to a maximum period of six days (144 hours) within which an appeal must take place.

However, in seven cases monitored by the OSCE between February 2023 and May 2023, the average time taken to issue a decision on appeal was 17 days, eleven (11) days more than the time allowed under the aforementioned deadlines. It therefore appears that the concerns raised in the OSCE's 2016 report remain valid.

90 See *S., V. and A. v. Denmark*, ECtHR Judgment of 22 October 2018, para. 92.
91 Article 402(2) with (6), Criminal Code of Kosovo, 14 January 2019.
92 Article 311(1), *ibid.*
93 Article 172 in conjunction with Article 28, *ibid.*
94 Page 30, available at https://www.osce.org/kosovo/243976 (accessed July 18, 2023).
95 Article 186(3), Criminal Procedure Code, 17 August 2022.

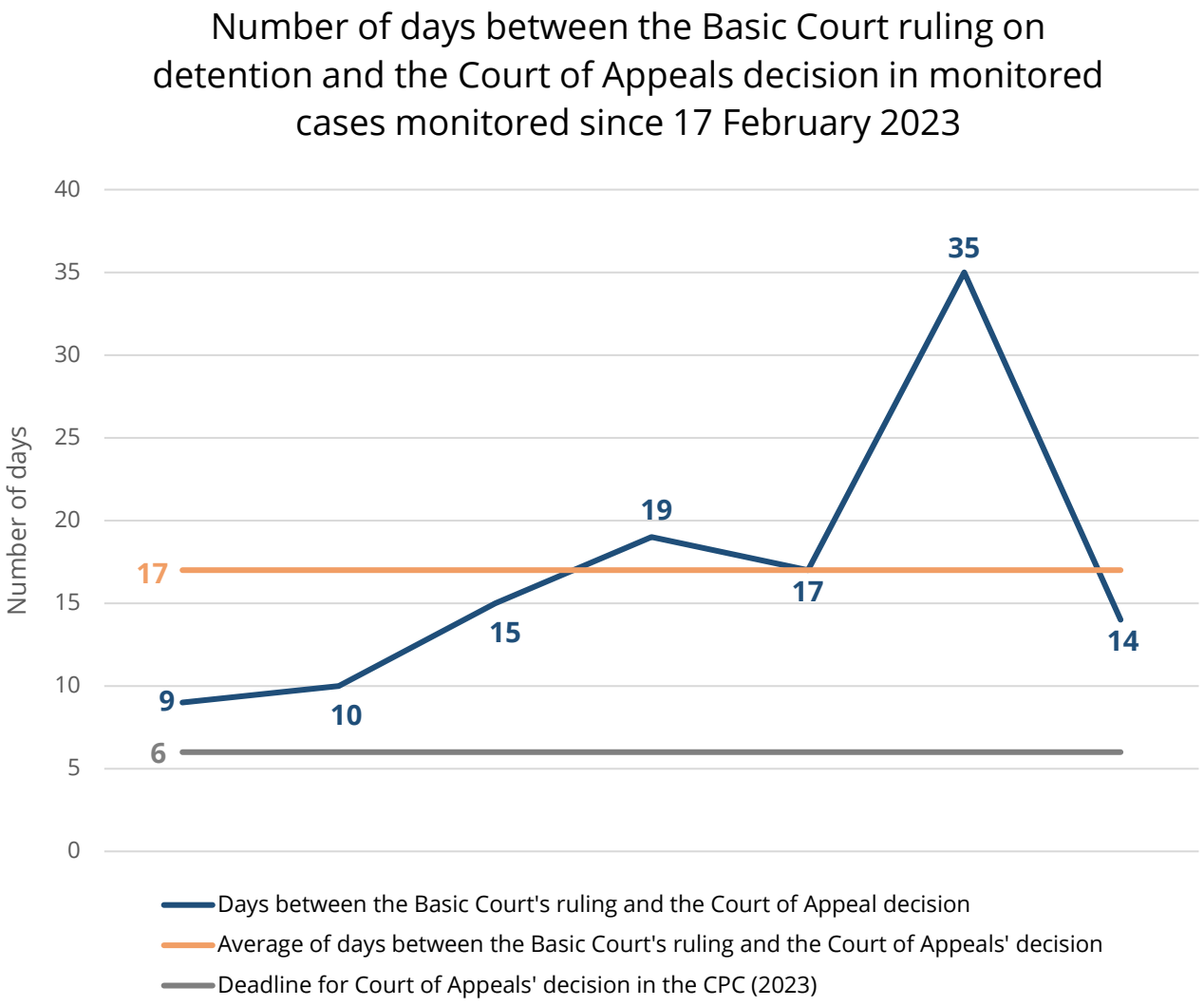

Figure 9. *Number of days between the Basic Court's ruling on detention and the Court of Appeals' decision in monitored cases monitored since 17 February 2023*

Regarding the substantive Court of Appeals decisions, the OSCE analysed nine decisions issued between December 2022 and May 2023 and noted that all the appeals were filed by the defence and rejected by the Court of Appeals. The Appellate Prosecution Office typically reiterated the reasons for detention on remand put forward in the original request and recommended dismissing the appeal as unfounded.

The OSCE observed that in just two cases the Court of Appeals provided more substantial reasons compared to the first instance courts.
In one case, the Court of Appeals found insufficient the justification on two grounds - the risk of flight and the risk of further offences. The court nonetheless upheld the pre-trial judge's ruling to impose detention on remand based on the risk of obstructing the course of proceedings.

However, in the other five cases, the Court of Appeals agreed with the Basic Court on the grounds for detention, even when the first instance decision provided rather general justifications for these decisions and/or failed to individualize the ruling as it applied to each defendant.

The Constitutional Court has recently considered two applications regarding the constitutionality of detention on remand decisions. The court approved in part both applications – in particular finding that the Basic Court had failed to adhere to the four-month time limit for detention during the investigation stage (pre-indictment) applicable to the offences under investigation in these cases. In Case No. KI55/22 of the applicant Saša Spasić, the ruling emphasised that,

> *"the Court, by this Judgment, conveys in a clear and direct manner the request and the instruction that should serve to the regular courts, that in order to be in accordance with the constitutional requirements of Article 29 [Right to Liberty and Security] of the Constitution, and also with the requirements of Article 5 (Right to liberty and security) of the ECHR, as broadly interpreted by the ECtHR in its case law, their reasoning for extension of the detention pending trial must address and contain individualized reasoning and assessment of the defendants' essential allegations and that are related to the legality of imposition and extension of their detention."*[96]

96 Constitutional Court of Kosovo, *Judgment in Case No. KI55/22, Applicant Saša Spasić, Constitutional review of Decision [2022:19820] of the Basic Court in Ferizaj of 17 May 2022 and Decision [PN1 no. 704/2022] of the Court of Appeals of Kosovo of 31 May 2022*, paragraph 126. Available at: https://gjk-ks.org/wp-content/uploads/2023/07/ki_55_22_agj_ang.pdf (accessed August 3, 2023).

5. CONCLUSION

International human rights standards underline that detention on remand should be the exception rather than the rule. However, OSCE analysis shows that alternatives to detention are rarely considered. Prosecutors often apply for detention on remand and the vast majority of applications are granted by the court. When combined with concerns regarding the quality of reasoning and substantiation in both prosecution requests and judicial decisions, it was found that detention on remand is often not used only as a last resort and may be applied arbitrarily.

These concerns were particularly evident in cases with multiple defendants. While these cases are undoubtedly more challenging and time-consuming for judges and prosecutors, there is a duty to consider and review applications based on the individual circumstances of each defendant. Also, courts should remain cognisant that the application of detention on remand due to characteristics of the defendant (such as being from outside Kosovo) is potentially discriminatory.[97] Moreover, detention on remand should not be imposed routinely for certain categories of offences.

To address these concerns and avoid potential criticism, as well as provide greater legal certainty, prosecution requests and judicial decisions should clearly and comprehensively enunciate the applicable grounds and circumstances as they pertain to each individual defendant.

At a policy level and in line with the recent EU Council recommendation,[98] consideration should be given to expanding the list of available "lesser measures" that a court can use as an alternative to detention. For example, "electronic monitoring" or diversion programmes can provide effective and enforceable alternatives to detention in some cases. However, this would first require an assessment of whether such systems would be workable and affordable in Kosovo.

While there have been improvements in providing defence representation to the accused, there remain concerns regarding the quality of representation. Defence counsel should proactively advance their client's case for release pending trial and are uniquely placed to explain the personal circumstances of the defendant, which could be decisive in persuading a court not to order detention on remand.

97 EU Commission Recommendation of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para

As regards the appeals, it appears that in most cases the Court of Appeals upholds first instance decisions on detention. Also, previously reported concerns regarding regular violations of time limits for appeal proceedings persist.

Of note, while the CPC creates a general duty to expedite cases in which the defendant is in detention, there are no time limits on detention on remand after an indictment has been filed. This means that there is an onus on pre-trial judges who review detention to continuously assess the necessity and proportionality of ongoing detention.

Data shows that 38 per cent of detainees in Kosovo have not been convicted, and this percentage appears to be increasing. Thus, defence attorneys, prosecutors and the judiciary should remain cognisant that detention on remand is a measure of last resort and should not be imposed routinely. As the final arbiter on the appropriateness of detention, judges should scrutinise and determine prosecution requests in line with international human rights standards.

6. RECOMMENDATIONS

To the Ministry of Justice:

- Investigate the possibility of electronic monitoring systems that could be used to monitor the whereabouts of those released subject to lesser measures. This would enable more restrictive alternatives to detention on remand such as curfew requirements, as well as enabling better enforcement of existing measures; e.g. house detention.[99]
- Consider introducing diversion programmes, especially for first time offenders, and for drug, non-violent and mental-health related offenses as an alternative to detention.

To the Office of the Chief Prosecutor, Kosovo Judicial and Prosecutorial Councils:

- Ensure that mechanisms exist to expedite and prioritise cases where a defendant is in detention, in accordance with the requirements of the CPC.[100]

To the Kosovo Judicial Council:

- Ensure that data is collected and, if possible, published on the use of detention on remand and lesser measures including the number/percentage of defendants remanded in detention by different courts and periods for which they are detained.
- Consider conducting a review of cases where the defendant has been remanded in detention but, on conviction, received a non-custodial sentence.

To the Kosovo Bar Association:

- Offer training to defence counsel to ensure that they can effectively challenge prosecution requests for detention on remand and defend their clients' right to liberty. Such trainings should include consideration of international standards and the jurisprudence of the European Court of Human Rights.[101]

To the Kosovo Academy of Justice:

- Continue to work with the Kosovo Judicial Council and Office of the Chief Prosecutor to ensure that training needs of jurists related to detention on remand applications are met.
- Provide practical trainings on detention on remand applications that educate participants about relevant international standards, including sufficiently reasoned and individualized requests and decisions.
- Provide training on alternative measures to detention, including related to reasoning whether or not such alternatives to detention on remand are used.

99 As curfews are not currently foreseen as a lesser measure, amendment to the CPC would also be required if this were to be taken forward.

100 Article 182, Criminal Procedure Code, 17 August 2022, states that cases where the defendant is in detention on remand should be treated with 'special urgency'.

101 The Council of Europe has HELP courses are a useful resource in this respect. See Council of Europe, "Human Rights Education for Legal Professionals (HELP)", https://help.elearning.ext.coe.int/ (accessed July 18, 2023).

ANNEX A

Key Changes in 2022 Criminal Procedure Codes (effective February 2023) related to detention on remand

Article 162 - Arrest and Detention During Investigative Stage

Paragraph (5): The prosecutor can issue the written decision on detention even without the name of the arrested person, as long as they provide any information to adequately identify the person.[102] Moreover, the arrested person or their defence counsel can file an appeal against the prosecutor's written decision on detention on remand within six hours from the receipt of the decision. The pre-trial judge is the competent person to decide regarding the appeal, within 12 hours from the receipt of the appeal. In the previous version of this article, the arrested did not have the possibility to file an appeal against the decision of the prosecutor.

Paragraph (6): the deadline for the prosecutor's request for detention on remand to be filed is 36 hours, whereas in the previous version, it was 24 hours. (former Article 164(7))

Article 165 - Informing the Arrested Person of his Rights

Subparagraphs (1.3), (1.6) and (1.7): these new sub-paragraphs add to the arrested person's rights, the rights, respectively, to: access the case file; be informed of the maximum number of hours they may be deprived of liberty before being brought before a judge; and challenge the lawfulness of his arrest or make a request for release.

Article 171 - Authorized Measures to Ensure Presence of Defendant

Paragraph (6): this new paragraph adds the possibility for the court to impose simultaneously one or more measures (summons; order for arrest; promise of the defendant not to leave his place of current residence; prohibition on approaching a specific place or person; attendance at a police station; bail; house detention; and detention on remand).

Article 172 – Summons

Paragraphs (5) and (6): these introduce the electronic summons. The new provisions allow the court to request from the parties and the defence counsel to provide their email addresses for summons to be sent by email and make it mandatory for the parties to notify the court if there are changes in their electronic contact information as well as their addresses or place of residence.

102 This is added also to Article 163(2.1) regarding the prosecutor's request for measures to ensure the presence of the defendant.

Article 177 - Bail

Bail is made easier to apply by the courts, by removing additional conditions that were present in former Article 179(2) and only providing as condition the grounded suspicion, the risk of flight and the promise that the defendant will not go into hiding or leave the place of residence without permission. Therefore, it is in the discretion of the court, based on the facts of the case, to decide whether bail is a sufficient measure or not.

Article 178 and 180 – Ruling on bail and Cancellation of bail

Article 178(3) adds the possibility that the ruling cancelling bail is rendered after a hearing, thus allowing the parties to be heard. Article 180(1) adds the condition that, if after being duly summoned, the defendant fails to appear and to justify their non-appearance or if the defendant is preparing to flee, the amount given as bail will be assigned to the Crime Victim Compensation Program as per Article 179(3).

Diversion was removed as a measure to ensure the presence of the defendant.

Article 186 - The Content of the Ruling Ordering Detention on Remand and Appeal

Paragraph (3): the deadline for appealing the ruling of the court imposing detention on remand has been extended to 48 hours (it was 24 hours in the previous version of the Article – former Article 189(3)). Moreover, the deadline for the Court of Appeals to decide on the appeals has also been extended to 72 hours of the filing of the reply (previously, it was 48 hours since the filing of the appeal).

Article 188 - Extension of Detention on Remand

Paragraph (1): the paragraph clarifies the deadline for the prosecutor to file the request for extension of the detention on remand in the investigation stage: the prosecutor has to request the extension no later than five days prior to the expiry of the ruling on detention on remand.

ANNEX B

European Court of Human Rights Jurisprudence on Grounds for Detention

Jurisprudence on Article 5(1)(c) of ECHR in relation to legitimacy and necessity for detention:

In a case handled by the ECtHR, the Court noted that the reasoning of the detention decision is a relevant factor in determining whether the detention is to be deemed arbitrary,[103] and therefore, the ECtHR takes into account the lack of reasoning as a component of the lawfulness of the detention under Article 5(1).[104] In fact, in cases of pre-trial detention, the judicial authorities have the duty to respect the principle of the presumption of innocence, examining all the facts justifying a departure from the rule of respect for individual liberty, and must set them out in their decisions on applications.[105]

Secondly, it interpreted Article 5(1)(c), which stipulates pre-trial detention in particular, stating that it allows for detention "*for the purpose of bringing a person before the competent legal authority on reasonable suspicion of him having committed the offence*".[106]

Jurisprudence on Article 5(3) of ECHR in relation to sufficiently reasoned decisions on detention:

As regards to Article 5(3), the ECtHR clearly stated that it "*cannot be seen as authorising pre-trial detention unconditionally"* even if such detention may be of a short period of time.[107] In fact, any period of detention, even if short, should be justified and demonstrated by the judicial authorities.[108] On the requirement to justify pre-trial detention, the ECtHR has emphasized that "*there must be relevant and sufficient reasons*"[109] and the reasoning for and against the release of a person, under Article 5(3), cannot be abstract and general but instead should comprise of the specific facts and personal circumstances.[110]

On this point, the ECtHR established the acceptable grounds for refusing bail, which are the following:

a) the risk that the accused will not appear for trial/risk of absconding;
b) the risk that the accused, if released, would take action to prejudice the administration of justice; or
c) the risk that the accused, if released, would commit further offences; or
d) the risk that the accused, if released, would cause public disorder.[111]

103 *S., V. and A. v. Denmark*, ECtHR Judgment of 22 October 2018, para. 92.
104 ECtHR, *Guide on Article 5 of the European Convention on Human Rights*, para. 45.
105 *Buzadji v. the Republic of Moldova*, ECtHR Judgment of 5 July 2016, para. 91.
106 *Kurt v. Austria*, ECtHR Judgment of 15 June 2021, para. 187.
107 ECtHR, *Guide on Article 5 of the European Convention on Human Rights*, para. 210.
108 *Tase v. Romania,* ECtHR Judgment of 10 June 2008, para. 40.
109 *S., v. and A. v. Denmark,* ECtHR Judgement of 22 October 2018, para. 77.
110 *Aleksanyan v. Russia,* ECtHR Judgment of 22 December 2008, para. 179.
111 *Becciev v. Moldova*, ECtHR Judgment of 4 October 2005, para. 57.

a. Risk of failure to appear at trial

On this ground, the Court ruled that the severity of the sentence risked by the accused cannot be the only basis to assert that there is such a risk. The existence of this risk needs to be assessed together with other relevant circumstances, such as "*person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted*".[112] The lack of the accused's fixed residence also cannot be considered on its own,[113] nor can the risk of flight arise simply from the ease of crossing a border, as in these cases, it can be requested to surrender the passport.[114] It is the whole set of circumstances that needs to be taken into account, including also prior cases in which the defendant had tried to avoid criminal proceedings by fleeing the country and specific indications of plans to flee.[115]

b. Risk of obstructing the proceedings

The ECtHR ruled that such ground cannot be determined "*in abstracto*" but needs to be sustained by factual evidence and not based on the likelihood of a severe penalty.[116] For instance, it can be justified in some complex cases, such as those of organised criminal activities and gangs or in cases where the defendant may have personal connections with many of the witnesses.[117]

c. Risk of repetition of offences

The ECtHR stressed that for serious charges detention on remand may be ordered to prevent attempts to commit further offences, but it is necessary that such a risk is *"a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned*".[118] Therefore, this can only be addressed on a case-by-case basis. Past history could include previous convictions that could give ground to a reasonable fear of repetition, unless they are not of a comparable nature or seriousness.[119] Furthermore, under the circumstances of the person concerned, the lack of a job or a family cannot presuppose that the person is inclined to commit new offences.[120]

d. Preservation of public order

Certain offences, due to their gravity, may rise to a social disturbance to public order. The Court ruled that it has to be "*based on facts capable of showing that the accused's release would actually disturb public order*".[121]

112 *Becciev v. Moldova*, ECtHR Judgment of 4 October 2005, para. 58.
113 *Sulaoja v. Estonia*, ECtHR Judgment of 15 February 2005, para. 64.
114 See *Stögmüller v. Austria*, ECtHR Judgment of 10 November 1969, para. 15.
115 *Cesky v. the Czech Republic*, ECtHR Judgment of 6 June 2000, para. 79.
116 *Becciev v. Moldova*, ECtHR Judgment of 4 October 2005, para. 59; *Merabishvili v. Georgia*, ECtHR Judgment of 28 November 2017, para. 224.
117 *Gładczak v. Poland*, ECtHR Judgment of 31 May 2007, para. 55; *Contrada v. Italy*, ECtHR Judgment of 24 August 1998, para. 60.
118 *Clooth v. Belgium*, ECtHR Judgment of 12 December 1991, para. 40; see also *Kurt v. Austria*, ECtHR Judgment of 15 June 2021, para. 187.
119 *Clooth v. Belgium*, ECtHR Judgment of 12 December 1991, para. 40.
120 *Sulaoja v. Estonia*, ECtHR Judgment of 15 February 2005, para. 64.
121 ECtHR, *Guide on Article 5 of the European Convention on Human Rights*, para. 226-227.

Organization for Security and
Co-operation in Europe
Mission in Kosovo