



Sentencing in cases of illegal possession of weapons

April 2024



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1. Introduction

Since 1999, the mandate of the trial monitoring section within the Organization for Security and Co-operation in Europe (OSCE) Mission in Kosovo has been to monitor 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 OSCE has previously reported on sentencing practices in Kosovo¹ and this remains a matter of high importance as it touches upon core fundamental rights, such as the right to a fair trial. This report more specifically focuses on systemic issues pertaining to sentencing practices in cases of illegal possession of weapons, which is known to be a widespread problem in Kosovo. To illustrate, the Kosovo Police registered the confiscation of 1473 illegally possessed weapons in 2022, while 636 weapons were seized in the first half of 2023 alone.²

The present report underlines shortcomings in terms of consistency and reasoning in sentencing decisions on illegal possession of weapons, which may be incompatible with international human rights standards and the relevant legal framework in Kosovo. In particular, the OSCE has monitored cases where courts conducted an inadequate assessment of the relevant mitigating or aggravating circumstances when sentencing defendants, and often failed to issue a reasoned decision. In addition, the OSCE has noted inconsistency in sentences imposed, which raises concerns about persons being treated differently under the law when factual situations are similar. Or, on the contrary, failure to account for specific circumstances among different cases.

The purpose of this report is to propose specific recommendations for remedial actions that can contribute to the increase in standards and consistency, thus streamlining sentencing practices.

1 OSCE, Kosovo review of the criminal justice system (April 2003 - October 2004) Crime, Detention, and Punishment (December 2004); OSCE, Inadequate Assessment of Mitigating and Aggravating Circumstances by the Courts (July 2010).

2 Kosovo Police, "Some statistics on carrying of weapons without permit and police activities in their detection and confiscation": <https://www.kosovopolice.com/en/some-statistics-on-carrying-of-weapons-without-permit-and-police-activities-in-their-detection-and-confiscation/> (accessed 15 Decembe 2023).

2. Methodology

The methodology of this report is based on:

- i. Qualitative analysis of data collected from hearings monitored by the OSCE³ from December 2020 to August 2023 (reporting period), and of related judgements; and
- ii. Desk research on international standards and Kosovo law.

For the purpose of the present report, the OSCE analysed a total of 33 cases.⁴

Through a combination of quantitative and qualitative analysis, the report presents disaggregated data on relevant aspects related to the cases included in this sample.

³ 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 (see *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 September 12, 2023).

⁴ 31 judgements were analysed, the OSCE did not have access to the written judgement in two of the monitored cases.

3. Legal Framework

A. International Standards

The right to a fair trial is guaranteed by Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR)⁵ and Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)⁶ and the right to a reasoned decision constitutes one of the core components of this fundamental guarantee.⁷

The European Court of Human Rights (ECtHR) has found that “courts and tribunals should adequately state the reasons on which [decisions] are based”,⁸ as a reasoned decision is essential to meaningfully exercise one’s right of appeal.⁹ Article 6 ECHR cannot be understood as a requirement to provide a detailed answer to every argument and the extent of the duty varies according to the nature of the decision. However, it is fundamental that submissions that go to the core of the case are addressed.¹⁰

Importantly, the protection of Article 6 ECHR extends to all stages of the criminal proceedings, including the sentencing process.¹¹ The Council of Europe (CoE) in its *Recommendation No. R(92)17 of the Committee of Ministers to the Member States Concerning Consistency in Sentencing*¹² also noted that “courts should, in general, state concrete reasons for imposing sentences”.¹³ As regards consistency in sentencing, the CoE recommends that “like cases should be treated alike and different cases differently, so long as the differences are carefully justified.”¹⁴

While there exists no general international legal framework applicable to Kosovo as regards the possession of weapons by private persons, it should be noted that the European Union has recently codified a framework laying down minimum

5 International Covenant on Civil and Political Rights, December 1966.

6 European Convention for the Protection of Human Rights and Fundamental Freedoms, November 1950.

7 Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), August 2022 (Guide on Article 6 ECHR), paras 185-190.

8 See e.g. *Moreira Ferreira v. Portugal* (no. 2), July 2017.

9 See e.g. *Hadjianastassiou v. Greece*, December 1992.

10 See e.g. *Rita Hiro Balanie v. Splain*, 9 December 1994.

11 Guide on Article 6 ECHR, August 2022, para.50.

12 Council of Europe, Recommendation No.R(92)17 of the Committee of Ministers to the Member States Concerning Consistency in Sentencing, October 1992 (CoE Recommendation R(92)17).

13 CoE Recommendation R(92)17, p. 4.

14 Council of Europe, “Consistency in Sentencing: Recommendation to Member States and Explanatory Memorandum.” *Criminal law forum* 4.2 (1993): 355–392, p. 366. See also CoE Recommendation R(92)17, p.1.

conditions for the possession of firearms and ammunition specifically, and setting out restrictions on certain categories of weapons.¹⁵ These provisions, which were adopted with a view to harmonizing regulations across Member States, could nonetheless serve as guiding principles for national legislation.

B. Kosovo Legal Framework

Fair trial rights are enshrined in Article 31 of the Constitution of Kosovo.¹⁶ Moreover, Article 22 of the Constitution dictates that the fundamental rights guaranteed by the ICCPR and the ECHR are directly applicable in Kosovo.

Chapter XXIX on “Weapon Offenses” of the 2019 Kosovo Criminal Code (CCK) and the 2015 Law On Weapons¹⁷ establish the local legal framework on weapons. More specifically, Article 366(1) CCK defines the offence of “unauthorized ownership, control or possession of weapons” (also referred to as “illegal possession of weapons”) and sets out the applicable sentences.

In 2018, prior to the entry into force of the 2019 CCK, the Supreme Court issued Sentencing Guidelines that, although not binding in nature, aim to offer clarification and address disparities in sentencing. In essence, the Sentencing Guidelines propose general guidance on sentencing and on the use of aggravating and mitigating factors applicable to all offences, including illegal possession of weapons.¹⁸ Although publication of the Sentencing Guidelines preceded the current (2019) CCK, hence referring to the previous (2013) Criminal Code, in substance the pertinent provisions also apply to the 2019 CCK.

¹⁵ Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2023 on Control of the Acquisition and Possession of Weapons.

¹⁶ Constitution of Kosovo, June 2008.

¹⁷ Law No. 05/L - 022 on Weapons, 19 August 2015.

¹⁸ Supreme Court of Kosovo, Sentencing Guidelines, 1st Edition (2018), pp. 139-163.

4. Case Analysis

During the reporting period, the OSCE monitored 33 cases concerning charges of “Unauthorised ownership, control or possession of weapons” as defined in Article 366(1) of the 2019 CCK.

In terms of gender and community representation for the above-mentioned 33 cases, all but one case concerned male defendants (i.e., one woman and 32 men) and only two cases involved defendants from a non-majority community (i.e., two Kosovo Serbs and 31 Kosovo Albanians).

Article 113(40) CCK and Article 3 of the 2015 Law On Weapons defines what is considered a weapon for the purpose of these laws:

Weapons as per Article 113(40) of 2019 CCK	Weapons as per Article 3 of the 2015 Law No. 05/L-022
<p>The following are weapons:</p> <p>40.1. firearms;</p> <p>40.2. collection arms;</p> <p>40.3. pneumatic (air) arms;</p> <p>40.4. arms for the use of dispersing irritating gas;</p> <p>40.5. explosive weapons;</p> <p>40.6. sinew backed weapons;</p> <p>40.7. cold weapons;</p> <p>40.8. weapons for light-acoustic signalization;</p> <p>40.9. electro shock weapons;</p> <p>40.10. directed-energy weapons.</p>	<p>1. According to this law a weapon is considered:</p> <p>1.1. firearms;</p> <p>1.2. collection weapon;</p> <p>1.3. pneumatic weapons;</p> <p>1.4. weapons for use of chemical agents;</p> <p>1.5. explosive (blasting) weapons;</p> <p>1.6. sinew backed weapons;</p> <p>1.7. cold weapons;</p> <p>1.8. weapons for light and acoustic signalization;</p> <p>1.9. electro shock weapons (electric paralyzers); and</p> <p>1.10. energy-directed weapons (EDW).</p>

Table 1. Types of weapons in line with the 2019 CCK and 2015 Law No 05/L-022

The diversity of weapons outlined in the 2019 CCK and 2015 Law on Weapons is reflected in the types of weapons encountered in the cases monitored by the OSCE. Notably, out of the total 33 cases of illegal possession of weapons, 28 cases involved firearms (e.g. handgun, semi-automatic firearm, hunting rifle); one case involved cold weapons only (e.g. knives, metal bars and/or sticks); one case involved weapons for the use of dispersing irritating gas only (pepper spray); and

three cases involved both cold weapons and arms for the use of dispersing irritating gas.

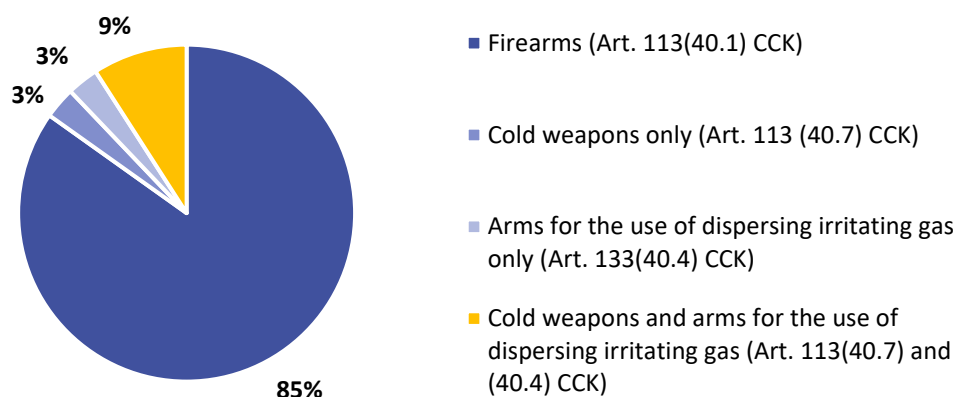


Chart 1. Types of weapons in the 33 cases of illegal possession of weapons

Of note, the Kosovo legal framework on weapons-related offences does not differentiate in sentencing based on the type of weapon possessed as part of an offence, the harm caused, or the degree of risk posed by said weapon. Moreover, the 2019 CCK only establishes the maximum punishment for “Unauthorised ownership, control or possession of weapons” (Article 366) in the form of a fine or imprisonment.¹⁹

In reaction to concerning disparities in sentencing noted in the past, the 2018 Supreme Court Sentencing Guidelines introduced a series of recommendations meant to streamline sentencing practices. They provide a guide for calculating sentences based on aggravating and mitigating circumstances, including through the use of significant mitigation as provided by the Criminal Code.²⁰ The Sentencing Guidelines further include a chart proposing a range of possible custodial sentences based on how mitigating and/or aggravating circumstances are applied in a given case. However, given that the Sentencing Guidelines are silent regarding sentences consisting of a fine, the courts have full discretion to establish the appropriate monetary penalty in a given case – as long as it is within the limits prescribed by Article 72(1.1.7) and (1.1.8) CCK:

¹⁹ Paragraph 2 of Article 366 contains an exception to this as it imposes a minimum sentence of two years imprisonment should the offence involve more than four (4) weapons, or more than four hundred (400) bullets.

²⁰ Article 71, 2019 CCK (Article 75, 2013 CCK).

“1.7. if there is no indication of the minimum term of imprisonment for a criminal offense, a punishment of a fine can be imposed instead of imprisonment;
1.8. if there is no indication of the minimum amount of a fine for a criminal offense, the fine can be mitigated to one hundred (100) EUR.”

Out of the 33 cases of illegal possession of weapons monitored by the OSCE, 31 cases resulted in a fine (ranging from 200 to 2,000 EUR), while in two cases the court sentenced the defendant with a suspended prison sentence (90 days and six months, respectively).²¹ In the 31 cases involving a fine, the most common penalty was 400 EUR (in nine cases), followed by 500 EUR (in eight cases). The lowest sentence was 200 EUR (in one case), while the most severe fine of 2,000 EUR was imposed in one case.

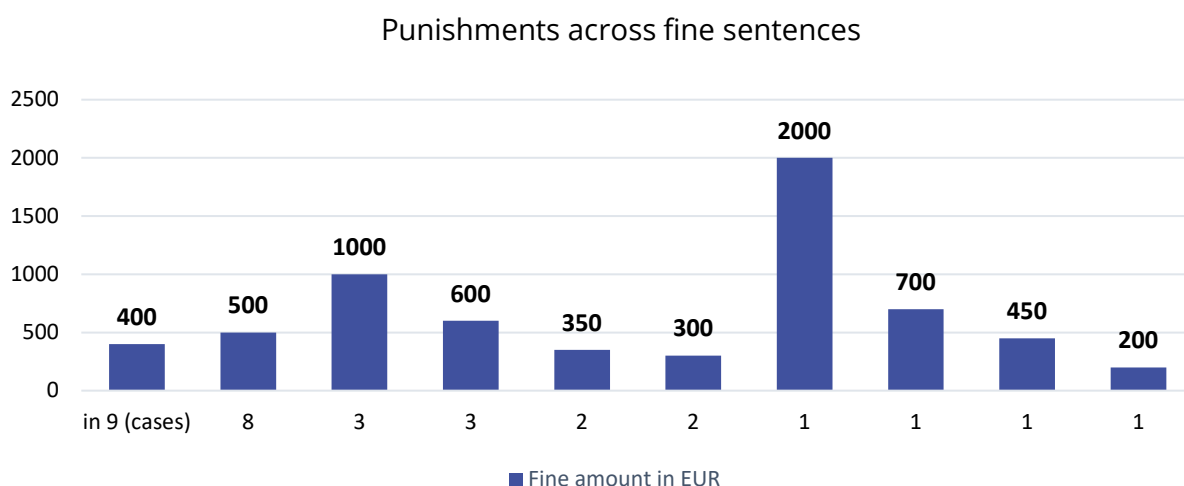


Chart 2. Frequency and quantum of punishment across the 31 cases consisting in a fine

Of interest, in all 33 cases monitored by the OSCE, the defendant pleaded guilty to the charge of illegal possession of weapons. In comparison, in its 2016 report on *Implementation of the New Criminal Procedure Code of Kosovo*, the OSCE observed that guilty pleas had been recorded in 25 per cent of the the hearings monitored for the purpose of the report – encompassing all types of crimes.²² This high use of guilty pleas may be explained by a variety of factors, including the type of offence (i.e. where the evidence stems from a search and seizure) or the high incentive of a more lenient sentence given that an admission of guilt has been

²¹ These calculations are solely based on sentences imposed for illegal possession of weapons (Art. 366 CCK) and do not include the sentence imposed for a concurrent offence in the same case.

²² OSCE, *Implementation of the New Criminal Procedure Code of Kosovo* (June 2016), p. 25.

considered as a core mitigating factor in every case monitored. However, this could also be symptomatic of a wider issue and could raise concerns as regards *inter alia* inefficient representation, plea bargaining in cases involving a non-represented accused, inadequate assessment by judges of the statutory conditions of a guilty plea,²³ all of which would necessitate a deeper analysis.

Of the 33 cases of illegal possession of weapons monitored by the OSCE, 15 also involved sentences for concurrent offences. More specifically, nine for use of weapon or dangerous instrument;²⁴ one for causing general danger;²⁵ one for unlawful hunting;²⁶ two for unauthorized possession of narcotic drugs, psychotropic substances or analogues;²⁷ one for attempted murder;²⁸ and one for attempt to participate in a crowd committing a criminal offense and hooliganism.²⁹

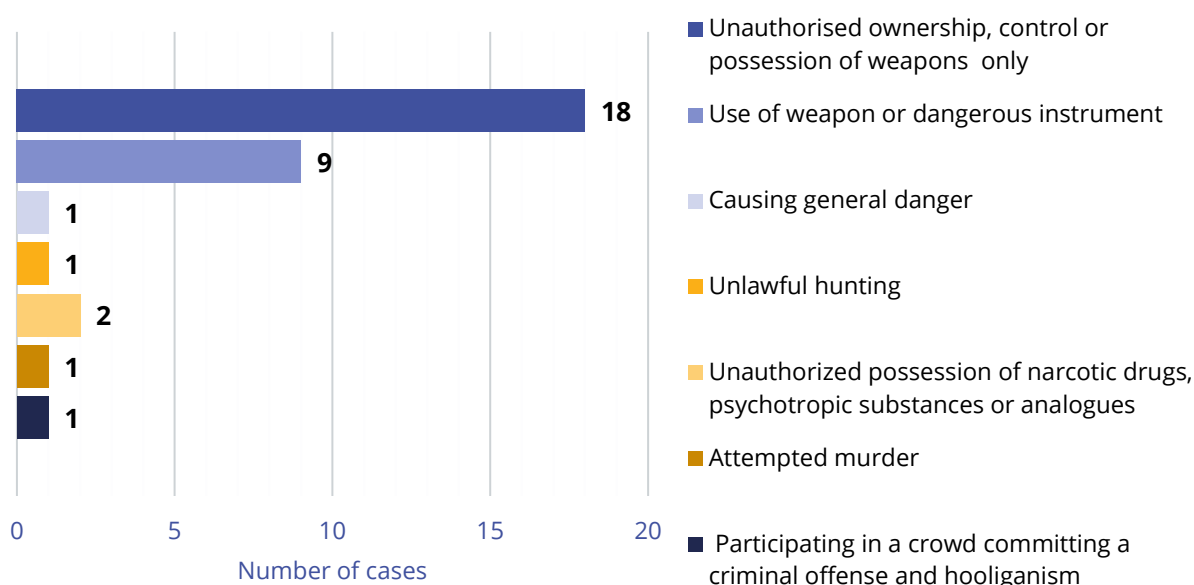


Chart 3. Concurrent offences in cases of illegal possession of weapons (Art. 366(1) CCK)

Based on the cases and related written judgments consulted for this analysis, the OSCE has identified two main shortcomings in relation to sentencing practices in

²³ See Article 242 of the Criminal Procedure Code. In particular, judges' assessment of whether the accused understands the nature and consequences of pleading guilty.

²⁴ Article 367(1) CCK.

²⁵ Article 356(1) CCK.

²⁶ Article 350(2) CCK.

²⁷ Article 269(1) CCK.

²⁸ Article 172 in combination with Article 28 CCK.

²⁹ Article 404(1-3) in combination with Article 28 CCK.

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cases of illegal possession of weapons: a) inadequate use/assessment of aggravating and mitigating circumstances; and b) inconsistency in sentencing.

A. Inadequate use/ assessment of aggravating and mitigating circumstances

The OSCE notes that in some cases, judges did not demonstrate a proper understanding of how different circumstances should affect the decision on punishment, did not individualize their assessment of the circumstances surrounding a given case or offence, and overall failed to provide intelligible and reasoned decisions.

For example, in a case in Gjilan/Gnjilane region, a man was convicted in March 2022 for illegal possession of weapons (a metal rod, knives and a matchlock pistol) and for unauthorized possession of narcotics (Art. 269(1) CCK). The defendant was sentenced to 90 days imprisonment suspended for a period of one year (weapons possession) and to 100 days imprisonment replaced by a fine of 700 EUR (narcotics possession). In the written judgment, the court did not differentiate between the two offences when providing its reasoning on aggravating and mitigating circumstances.

In a case in Mitrovicë/Mitrovica region, a man was convicted in June 2022 for illegal possession of weapons (pepper spray) and sentenced to a fine of 400 EUR. In this case, the court applied elements of the criminal intent as aggravating factors for determining the appropriate sentence, i.e. that the defendant was aware that his action (to be in possession of a weapon) was prohibited while he had the intent to undertake the action. This shows a manifest misunderstanding of the concept of aggravating circumstances, and a confusion between the elements of the *mens rea* necessary to establish the guilt of the defendant, and aggravating factors (such as the degree of criminal responsibility)³⁰ to be considered in determining the sentence.

In February 2023, in another case in Mitrovicë/Mitrovica region, a man was convicted for a second time for the offence of illegal possession of a weapon (one handgun and nine bullets). Here, the court sentenced the defendant to a fine of 600 EUR. In the past (in

³⁰ See Supreme Court of Kosovo, Sentencing Guidelines, 1st Edition (2018), pp. 38-39.

October 2022), for a similar (and separate) offence, he had been sentenced to a fine of 450 EUR. Although the court listed both mitigating and aggravating factors, it did not assess how those factors affected the punishment. Of note, the aggravating circumstance that the defendant was a recidivist in a similar case was simply referenced as “previously convicted of a criminal offense.” The court did not analyse that the “the perpetrator [had] previously committed a criminal offense of the same type as the new criminal offense”.³¹

In May 2023, in a case in Peja/Peć region, a man was convicted and sentenced to a fine of 1000 EUR for illegal possession of a weapon (a pistol) and four years imprisonment for attempted murder (Art. 172 (with Art. 28) CCK). In the written judgement, the court provided insufficient reasoning as regards their assessment of the mitigating/aggravating circumstances, only listing the factors taken into account without any explanation as to how each factor affected the sentence. Further, from the judgement, it appears that the court did not entertain all mitigating/aggravating factors proposed by the parties or, in any case, did not provide sufficient reasoning, failing to offer any explanation on whether they considered that those factors were irrelevant or that they were relevant but did not bear any weight.

Furthermore, in at least eight cases of illegal possession of weapons, the OSCE noted that the written judgments construed illegal possession of a weapon either as “recent type of offense” or as being “more frequent in Kosovo” and improperly used this as an aggravating circumstance – going against the principle that a sentencing decision should be based on “the individual circumstances of the case and the personal situation of the offender”.³² Interestingly, in those cases where these factors were considered as an aggravating circumstance, the average sentence was not more severe than the average sentence in corresponding cases which did not.

Conversely, as positive examples, in two distinct cases from Gjakovë/Đakovica and Ferizaj/Uroševac regions, the defendants were respectively convicted in February and on 8 August 2022 for illegal

³¹ As prescribed by Article 69(4) CCK.

³² CoE Recommendation R(92)17, p. 1.

possession of a weapon. In contrast to the previous example, the written judgments rightfully considered as an aggravating circumstance that both defendants were previously convicted of a similar offence in a different case.

Of note, the 2018 Sentencing Guidelines propose a roadmap detailing each step in the court's evaluation of mitigating and aggravating circumstances and indicating all relevant information that should be included in the courts' reasoned decisions. It is evident from the case studies above that some courts regrettably do not apply the Supreme Court's suggested approach which would favour more consistency in sentencing practices and ensure that fair trial rights standards are met.

B. Inconsistency in sentencing³³

The second main shortcoming observed by the OSCE was the apparent inconsistency in sentences imposed. Just as consistency in sentencing in similar cases is a fundamental principle of justice, so is the need to consider specific circumstances in different cases to avoid "disproportionality between the seriousness of the offence and sentence".³⁴ The OSCE notes that failing to account for specific circumstances based on the type of weapon and degree of harm posed can result in similar sentencing despite disparities in particular situations.

For example, in August 2022, a court from Ferizaj/Uroševac region found the defendant guilty of illegal possession of a weapon (one handgun, one magazine and three cartridges) in violation of Law No. 5/L-022 and was sentenced to a fine of 1,000 EUR. While in September 2022, a court in Mitrovicë/Mitrovica region found a defendant guilty of illegal possession of a weapon (one automatic firearm and three magazines as well as one semi-automatic firearm) and sentenced him to a fine of 1,000 EUR. The two defendants above received identical sentences (1000 EUR), although the latter case was arguably more serious as it involved significantly more dangerous weapons.

³³ For accuracy purposes, this section is based on a comparative analysis of cases involving only a conviction for illegal possession of weapons, i.e. not including cases with concurrent offences.

³⁴ CoE Recommendation R(92)17, p.2.

Below are more examples of similar sentencing for offences of arguably different seriousness (based on the level of danger posed by the weapon).

In 2022 and 2023, a court in Mitrovicë/Mitrovica region sentenced four defendants in distinct cases to a fine of 400 EUR each for illegal possession of the following items:

- One defendant for possession of one weapon for the use of dispersing irritating gas (one pepper spray) and one cold weapon (one metal stick);
- One defendant for possession of one weapon for the use of dispersing irritating gas (pepper spray) and four cold weapons (three wooden sticks and one baseball bat);
- One defendant for possession of one handgun and a magazine with four bullets; and
- One defendant for possession of one gas pistol and a magazine with five bullets.

The mitigating and aggravating factors taken into account for establishing the sentence were similar across all of these four cases – including no prior convictions, admission of guilt, regrets and promise not to repeat offence as mitigating circumstances or, for aggravating circumstances, criminal intent and accountability. Simply put, from the judgements, it appears that there were no manifest differences in the circumstances considered that would explain this homogeneity in sentencing in cases involving weapons that present such different risk levels.

Of interest, in relation to preventing such inconsistency in sentencing in cases of weapons possession, other jurisdictions have created distinct offences or categories based on the type of weapon.

For example, in the United Kingdom the Sentencing Council makes a distinction between “firearms” and “knives and offensive weapons”. In relation to the former, it puts forward a sentencing guideline for cases of possession of firearms without certificate. This establishes the initial culpability based on the type of firearm, namely Type 1 (firearms or shotguns which have been shortened or converted, respectively, within the meaning of section 4(4) of Firearms Act 1968), Type 2 (all other firearms or shotguns and/or ammunition), and Type 3 (very small quantity

of ammunition). This is distinct from the sentence calculating system in connection to the latter weapons.

Furthermore, in France the Code of Internal Security establishes four distinct categories of firearms, Type A (war materials and weapons), Type B (handguns, rifles, semi-automatic rifles), Type C (hunting rifles), and Type D (cold weapons, pepper spray, replicas). Illegal ownership of weapons is punished according to the category to which the weapon pertains: for Types A and B (five years imprisonment and a 75,000 EUR fine under Article 222-52 of 2016 Criminal Code); for Type C (two years imprisonment and a 30,000 EUR fine under Article L317-4-1 of 2019 Code of Internal Security); for Type D (one year imprisonment and a fine of 15,000 EUR under Article L317-8 of 2019 Code of Internal Security).

In summary, weapons are classified in categories or types based on the nature of the weapon and degree of risk posed. Consequently, the corresponding sentence accounts for the specific circumstances related to the type of weapon involved in the offence.

5. Conclusion

The OSCE has previously raised concerns about sentencing practices in Kosovo and recent monitoring shows that issues remain with regard to sentencing in unauthorized weapons possession cases (Article 366(1) CCK).

The 2018 Sentencing Guidelines introduced relevant recommendations intended to harmonize sentencing practices, provide specific guidance on sentencing based on the punishment limits provided by the CCK, and stress the need for adequate reasoning. Nonetheless, in practice, the OSCE still observed a number of instances where the courts did not conduct a proper assessment of aggravating and mitigating circumstances and/or did not provide adequately reasoned decisions. Sentencing practices are further complicated by a lack of distinction in the offence (and corresponding sentence) based on the type of weapon and degree of harm presented by the same, resulting in clear discrepancies in sentencing throughout Kosovo courts.

6. Recommendations

In light of the abovementioned findings, the OSCE proposes the following recommendations to increase standards and consistency in sentencing of illegal possession of weapons cases in Kosovo:

To the Kosovo Academy of Justice:

- Consider offering tailored training for judges and prosecutors on legal reasoning and writing, especially related to assessing mitigating and aggravating circumstances in sentencing of weapons-related offences.

To the Kosovo Judicial Council:

- Consider establishing a forum of discussion among judges from Basic Courts, the Court of Appeals and the Supreme Court to promote unifying case decisions that can guide lower courts.

To Judges in Kosovo:

- Individualize the assessment of aggravating and/or mitigating factors in a given case, with particular attention to relevant circumstances that are specific to weapons-related offences.
- Provide proper justification and detailed reasoning with regard to the determination of sentence, incorporating all relevant information as proposed in the 2018 Sentencing Guidelines.

To the Kosovo Supreme Court:

- Consider supplementing the 2018 Sentencing Guidelines as regards offences punishable by fines. For sentencing in cases of illegal possession of weapons, provide additional clarification on differentiating sentences focused on the type of weapon and degree of risk posed.

To the Ministry of Justice:

- Consider enacting legislative changes (e.g. amending the criminal code) to provide more discrete and specific sentences for the different types of weapons – focusing sentence on danger posed by a particular weapon.

