



# The Legal Framework for Child Rights in Kosovo

**A study of the compatibility of existing  
legislation with the Convention on the  
Rights of the Child**



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## Foreword

This year, 2014, marks the 25th anniversary of the Convention on the Rights of the Child (CRC), a landmark convention that constitutes one of the six core human rights treaties. With near universal ratification, the Convention establishes the fundamental rights of children and young people, the roles and responsibilities of rights-holders and duty-bearers aiming at promoting, protecting and realizing children's rights. With the youngest population in Europe, it is particularly significant for UNICEF to be working in Kosovo with the various stakeholders on the realization of the rights children and youth as enshrined in the Convention, its Optional Protocols, and a number of other international and regional human rights instruments. The Constitution of Kosovo recognizes the CRC, and the legislative framework of Kosovo draws on various international and regional standards, reflecting a commitment to the realization of the rights of children and young people.

The current study constitutes a significant and comprehensive review of the Kosovo legislative framework – covering forty-five laws – in terms of harmonization with the Convention on the Rights of the Child. Through a collaborative and participatory process, the study presents recommendations for the review of Kosovo legislation to harmonize it with the principles and provisions of the Convention. On the one hand, the study highlights important recommendations regarding the four principles of the convention: non-discrimination; the best interest of the child; the right to life, survival and development; and the views of the child. On the other hand, the study also addresses measures needed to make children's rights a reality.

UNICEF in Kosovo will continue to work with various stakeholders to ensure full realization of the rights of children and youth in Kosovo, through strengthening systems and mechanisms to monitor the implementation of children rights, and in support to the decision- and policy-making processes to ensure adequate allocation of resources to translate the commitment to children rights a reality. The recommendations hereby presented in this study will serve to guide stakeholders to make Kosovo truly fit for Children.



Laila Omar Gad  
UNICEF Kosovo\* Head of Office  
Prishtina, April 2014

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\* For UNICEF: All references to Kosovo are made in the context of UN Security Council Resolution 1244(1999). In publishing this report, UNICEF provides information relevant to the implementation of the provisions of the Convention on the Rights of the Child in Kosovo, without prejudice to the legal status of Kosovo under United Nations Security Council resolution 1244 (1999).



## Foreword

In a society like Kosovo where children and youth make over 60 percent of the population it is of crucial importance to invest in protection and promotion of their rights, no matter if they are in contact or in conflict with the law. Investing in children and youth means investing also in future. Children that are subject of the justice system for any reason should have access to appropriate care and services. This principle, based on the Convention on the Rights of the Child, is universal and also forms part of the Constitutions of Kosovo through which it has been made directly applicable.

This study is aimed at assessing the current legislative structure in Kosovo and its fulfilment of international standards of child protection and justice for children. It also provides concrete recommendations for the way forward. The European Union has noted the progress made in the field of justice for children by Kosovo institutions. Yet, much remains to be done. Our office is convinced that relevant Kosovo institutions will undertake immediate and longer term actions in order to implement those recommendations and act in highest respect for children and their rights.

The EU Office in Kosovo will continue to support Kosovo institutions, through its financial and political assistance, in striving for a democratic society and good governance. A significant place in this endeavour is reserved for children and youth, which needs to include an appropriate justice system that is fitted for children and their rights.



Christof Stock  
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Pristina, May 2014

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## List of Acronyms

<b>CEDAW</b>	Convention for the Elimination of All Forms of Discrimination against Women
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CSW</b>	Centre for Social Work
<b>ECHR</b>	European Convention on Human Rights (formally the 'Convention for the Protection of Human Rights and Fundamental Freedoms')
<b>EU</b>	European Union
<b>ILO</b>	International Labour Organisation
<b>NGO</b>	Non-Governmental Organisation
<b>UN</b>	United Nations
<b>UNICEF</b>	United Nations Children's Fund
<b>UNMIK</b>	UN Interim Administration Mission in Kosovo
<b>WHO</b>	World Health Organisation



## Executive Summary

The report consists of an analysis of the legislation in force in Kosovo that affects the rights of children, from the perspective of the Convention on the Rights of the Child (“the CRC” or “the Convention”) and related regional and international norms. The report was prepared by an international consultant, who had primary responsibility for the legal analysis, and two national consultants, who had primary responsibility for fact checking as well as for research and analysis of the factors that affect implementation of the law in force.

Other norms taken into account in the analysis of the legislation of Kosovo include the two Protocols to the CRC, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, and 18 other UN instruments. European norms taken into account include the European Convention on Human Rights, the European Social Charter, European Convention on Nationality, the Lanzarote Convention on the Protection of Children Against Sexual Exploitation and Abuse, the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, and the European Guidelines on Child Friendly Justice (see Appendix II for the full list).

Forty-five laws, including the Constitution, were reviewed. The legislation on many issues is largely in harmony with international standards. No recommendations are made regarding the legislation on the right to life, the right to a name, the right to know one’s parents, freedom of thought, conscience and religion, freedom of expression, the protection of children from harmful images and media, the rights of children belonging to minorities, support to families to prevent child abuse and neglect, criminal sanctions for child abuse and neglect, foster care, child labour, abduction, child refugees and asylum seekers, and the right to legal assistance in non-criminal matters. This does not mean that these rights are adequately protected and enjoyed in practice; it simply means that the legal framework for protecting them is largely in harmony with international requirements.

This part of the report makes over 120 recommendations, concerning some 25 laws. They include some 25 recommendations concerning the Family Law and Law on Social and Family Services, some 15 concerning legislation on health, some 17 concerning the Juvenile Justice Code, some 17 concerning the Criminal Procedure Code and some 13 concerning the Criminal Code.

Most of the recommendations made are intended to bring the national law into greater compliance with international standards; a small number draw attention to inconsistencies between national laws. Some of the recommendations that aim to bring the national law into full harmony with international standards are more important than others, and deserve higher priority. The following are examples of recommendations that are more important, either because they concern basic principles, or because of their practical consequences for children.<sup>1</sup>

<sup>1</sup> The reasons for these recommendations can be found in Part 1 of the report and, in summary form, in Part II.

## Legislation Concerning the Family

### *The Family Law should be amended to:*

- recognise expressly the principle that parents and guardians have a responsibility to allow children to exercise their own rights, with appropriate direction and guidance, in a manner consistent with the evolving capacities of the child. (CRC Art.5)
- recognise the right of children to be heard in broad, general terms, not only with regard to specific decisions. (CRC Art.12)
- include an article recognising the best interests principle in terms similar to the Law on Social and Family Services. (CRC Art.3.1)
- bring into compliance with international standards, the conditions in which the Guardianship Authority may consent to adoption of a child on behalf of one of that child's parents.
- require that, when the parents of a child wish to allow the child to be adopted, the views of any child old enough to have an opinion should be heard and taken into account, after he or she has been provided with appropriate information regarding the proposed adoption.
- eliminate restrictions on the right to adopt that may be discriminatory, for example, those regarding unmarried couples.

### *The Law on Social and Family Services should be amended to:*

- recognise expressly the circumstances in which children removed from parental custody may be placed in residential care, as well as the rights of children in residential care.
- expressly require that the consent of children to placement, when needed, be informed and freely given.
- require that, when the authorities seek a court order to remove a child from parental custody, the child be provided with sufficient information about the reasons and context, and with assistance in presenting their views to the court.
- recognise the right of children to make requests and proposals to the Guardianship Authority, and to require the review of cases every six months.
- recognise the right of any child in informal care to express any concerns he or she has to the competent authorities, and to have his or her views taken into account if the arrangement is challenged by any other person.
- reformulate the reasons which justify the release of confidential information, in order to provide greater protection for the right to privacy.

Both the Family Law and the Law on Social and Family Services should be amended to expressly recognise the principle that removal of a child from his or her family should be a last resort. (Art.9.1)

## Legislation Concerning Health

### *Legislation should be amended or adopted to:*

- recognise the fundamental right of children with disabilities to receive appropriate health care and rehabilitative services in a child-sensitive environment.
- require that the treatment of children placed in institutions for purposes of health care or rehabilitation be reviewed periodically.
- recognise an obligation on the part of health care providers to provide the appropriate authorities with evidence of the physical, psychological or sexual abuse of children.
- recognise certain basic principles concerning the treatment of children with drug addiction or substance abuse, including the right to treatment specifically designed for persons their age, and the principle that treatment shall be provided in a closed setting only as a last resort and only with the consent of those concerned or a court order.
- recognise and regulate the right of children to appropriate mental health care.

### *The Law for Termination of Pregnancy should be amended to:*

- recognise that termination of pregnancy should be allowed without parental consent in certain circumstances, taking into account the best interests principle and the principle that the views of the pregnant adolescent must be given due weight.
- regulate the conditions in which termination of pregnancy in girls under the age of 16 is allowed.

### *The Law on Rights and Responsibilities of Citizens in Health Care should be amended to:*

- expressly address the complex issue of the consent by children, in accordance with the best interests and evolving capacities principles.
- recognise the right of children and adolescents to have their views about treatment taken into account, and to make complaints about treatment received or decisions made.

The Law on Infant's Breastfeeding (and Law on Labour) should be amended to recognise the right of breastfeeding workers to breaks or reduced hours.

## Legislation Concerning Criminal Procedure

### *The Criminal Procedure Code should be amended to:*

- specify the circumstances in which a parent may consent to the suspension of prosecution for a crime, on behalf of a child who was the victim.
- provide that the prosecution of crimes against child victims be given priority.
- make measures for the protection of witnesses available for child witnesses without requiring a serious threat to their life or health.
- provide that a child psychologist should always be present during the questioning of a child victim of crime, before or during trial.
- bar the public from certain trials in which the victim is a child, in particular sexual offences and domestic violence.
- recognise the right of child victims to the services of specialised victim advocates, free of charge, when they participate in legal proceedings.
- indicate that the child's wishes and best interests must be taken into account in determining whether a child who wishes to testify or attend trial should be allowed to do so.
- require that forensic medical and psychological examinations of children be performed by experts having special training, in the presence of a support person whenever possible.
- require that guardians, when they have authority to consent to a forensic examination on behalf of a child, give due weight to the best interests of the child.
- specify the circumstances in which the child's own views should be taken into account in deciding whether to authorize to a forensic examination and the weight to be given to them, and recognise the child's right to the assistance of a support person in forming and expressing views on this issue.
- establish a procedure for closure of premises or businesses used for trafficking, child prostitution and the production of child pornography.

## Legislation Concerning Criminal Law

### *The Criminal Code should be amended to:*

- criminalise the use of the services of child prostitutes by clients.
- criminalise attendance at a pornographic performance involving children.
- increase the sentence for producing child pornography, which is presently one year in prison.
- delete the provisions of article 243 on sexual offences within the family that overlap with other articles of the Code, in order to eliminate the preferential treatment (lower sentences) of perpetrators of sexual abuse who are adult relatives of the victims;
- make the sentence for persuading, inducing or facilitating the participation of children in illegal sexual activity heavier when the victim is under 14 years of age.
- ensure that the recruitment of children under 15 years of age is an offence at all times, whether or not there is an armed conflict.
- increase the minimum sentences for torture of a child (3 years) and ill-treatment of a child (6 months) to make them proportionate to the gravity of the offence.
- prohibit the sale of children, regardless of the purpose of a sale.
- criminalise arranging an extra-legal adoption and placing undue pressure on parents to obtain their consent to adoption.
- criminalise the publication of information that allows the identification of children who are victims of crimes.
- criminalise the publication of images of children without the consent of the child and/or his parents or guardians.

## Legislation Concerning Juvenile Justice

### *The Juvenile Justice Code should be amended to:*

- specify that registering evidence of ill-treatment is one of the purposes of medical screening of juveniles admitted to detention facilities.
- specify the nature of the “educational institution for juveniles” in which juvenile offenders could be placed as an alternative to sentencing, according to articles 110-113.
- delete paragraph 4 of article 43, which provides that that defence counsel is to be appointed only at the request of the juvenile or his or her representative.
- limit the maximum duration of proceedings to six months, as recommended by the Committee on the Rights of the Child.
- require judges to decide whether or not to divert juvenile cases when the case is referred for trial, before the main trial begins.
- require individual treatment programmes to be developed in juvenile correctional facilities, as well as educational facilities for younger juveniles.

The chapter of the Juvenile Justice Code on procedures in cases where adults are charged with certain offences against children should be amended to apply to all cases in which a child is a victim, regardless of whether the accused is a juvenile or an adult, and to recognise the following rights and principles:

- the best interests of the child victim are to be a primary consideration in all decisions taken.
- interference in the private life of the child should be limited to the minimum necessary.
- all interventions should take place in an environment that accommodates the special needs of the child.
- all professionals intervening in cases involving child victims should be specialised and should coordinate their activities to ensure continuity.
- child victims should have access to assistance and support services.
- all contact between the child and alleged perpetrator shall be prevented as far as possible, not only during the child’s testimony.
- child victims and witnesses should be helped to prepare for legal proceedings and, during proceedings, be informed of the progress of the case, significant decisions taken, and available procedures for seeking a review of decisions.
- child victims and witnesses should be enabled to express freely their views and concerns regarding their involvement in the justice process, due regard shall be given to their views and concerns and, to the extent it is not possible to accommodate them, the reasons shall be explained to the child.
- guardians shall be appointed to safeguard the rights and interests of the child during legal proceedings when necessary.

Consideration also should be given to the development, either in the Juvenile Justice Code or elsewhere, of a coherent legal framework on the prevention of offending by juveniles, including the question of interventions with children under 14 years of age involved in criminal activities.

## Other laws

The Law on the Social Assistance Scheme should be amended to ensure that all children living in poverty have an equal right to assistance, regardless of whether there is a child under the age of 5 in the household.

The Law on Citizenship should be amended to require that the views of the child be taken into account when his or her parents acquire or renounce nationality and the child is old enough to understand and appreciate the significance of nationality.

The Law on Travel Documents should be amended to strengthen requirements designed to prevent the abduction of children by parents or other relatives, of the kind recommended by the Hague Conference on Private International Law.

Legislation also should be amended or adopted prevent parents from entering Kosovo with a child in violation of custody agreements or orders in force in the child's country of residence.

The Law on Protection against Domestic Violence should be amended to recognise the right of children to be heard in domestic violence cases, the right to the assistance of a support person, and the principle that the best interests of any child shall be a primary consideration in determining what action to take.

The Law on Witness Protection should be amended to clarify the criteria for inclusion in the programme of the minor children of protected persons, to require that children be consulted personally about possible entry into the programme and their views and best interests be given due weight, and to recognise the rights of children in the programme to education and to special social and psychological assistance.

The Law on Prevention and Combating Trafficking in Human Beings and Protection of Victims of Trafficking should be amended to bring the definition (elements) of trafficking into compliance with the Criminal Code, which is consistent with international standards.

### **General recommendations:**

- All laws that contain articles on discrimination should be reviewed to ensure that they prohibit discrimination on all the grounds mentioned by the Constitution.
- Legislation should be reviewed and amended to ensure that terms 'child' and 'minor' are used appropriately and consistently.

A legislative framework for children necessarily consists of laws and secondary legal norms. Fundamental rights, and basic principles concerning fundamental rights, should be recognised by laws; the function of secondary norms is to provide public officials with more detailed guidance on how to implement the laws.

Two other components of a legislative framework for children are optional: constitutional norms, and a comprehensive law on child rights. The Constitution of Kosovo recognises certain rights of children, and incorporates the Convention on the Rights of the Child in to the national legal order. This is positive, but it would not be realistic to expect all the rights of children to be expressly recognised by a constitution. Furthermore, ordinary legislation sometimes limits the extent to which children are entitled to exercise constitutional rights. The Constitution of Kosovo recognises the freedom of association in broad general terms, but the legislation regulates the exercise of this right only by persons over 15 years of age. This underlines the need to ensure that ordinary legislation recognises and regulates all the rights of children.



In Kosovo the legislative part of the legal framework is good, but it is difficult to recognise all the rights of children by the amendment of ordinary legislation. A number of rights and obligations recognised by the CRC are not expressly recognised by any law now in force in Kosovo. They include:

- the right of children with mental or physical disabilities to “a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community” (CRC Art.23.1)
- the right to rest, leisure, play, to appropriate recreational activities and to participate in cultural life and the arts (CRC Art.31)
- the obligation to encourage the production and dissemination of children’s books and the production and dissemination of programming beneficial for children by the media, including through international co-operation, and taking into account the needs of children of linguistic minorities (CRC Art.17)
- the obligation to provide parents and children with information about the whereabouts of family members, when an individual has been separated from his family by State action such as detention, expulsion or extradition (CRC Art.9.4)
- the obligation to ensure that working parents have access to child care (CRC Art.18.3)

Two obligations recognised by the Lanzarote Convention also are not expressly recognised by any law in force in Kosovo:

- to ban persons convicted of sexual abuse or exploitation of children from professions that involve regular contacts with children (Art.5.3)
- to establish a DNA database of convicted offenders (Art.37.1)

A comprehensive law on the rights of children is a practical way of ensuring that all the rights of children are appropriately recognised and defined.

The capacity of children to take legal action is another right that it would be useful to recognise by a law that has broad application. At present no law recognises the capacity of children to participate in legal proceedings in general terms.

Several laws contain different standards on this, and there also are gaps where the capacity of children to take legal action is not recognised. There is a need to adopt a general norm that recognises the capacity of children to take legal action, regulates who may represent them when they are unable to do so personally, and when this capacity should be vested in some person especially designated for this person.

It is particularly important to recognize basic legal principles such as the best interests principle, the right to development, the evolving capacities principle and the right of children to be heard. These principles are already recognised in the most important legislation concerning children, but it may not be practical to be expressly incorporated them into all laws that affect children. A child rights law also offers an opportunity to clarify how these principles are to be interpreted and applied. It could include, for example, a list of factors to be taken into account in determining the best interests of a child.

Law also has an educational function. Full recognition of the rights of children requires a cultural change, which is also the case in Kosovo, in terms of a change in the values of adults and children, of public institutions and communities. Adoption of a law on the rights of children can be a valuable tool for promoting this kind of cultural transformation, in addition to its legal consequences.

However, a law of this kind must be carefully drafted to ensure that it fills gaps and complements other legislation, rather than creating conflicting norms and causing confusion amongst those who apply the law. If a comprehensive law on child rights is developed, it should be done as part of a broader process of law reform, that includes revision and amendment of other legislation concerning children.

# 1. Background, objectives and methodology

## Background

In 1999, after the conflict, Kosovo was placed under the United Nations Interim Administration Mission in Kosovo (UNMIK), which was mandated to administer Kosovo until a political solution to its status was reached, and to support the development of institutions of self-government.<sup>2</sup> The first regulation adopted by the United Nations Interim Administration Mission in Kosovo provided that “All legislative and executive authority with respect to Kosovo... is vested in the United Nations Interim Administration Mission in Kosovo and is exercised by the Special Representative of the Secretary-General.”<sup>3</sup>

In 2001 the United Nations Interim Administration Mission in Kosovo adopted a Constitutional Framework for Provisional Self-Government, which envisaged the election of an Assembly having authority *inter alia* to adopt laws and resolutions concerning issues within the areas of responsibility of the provisional government.<sup>4</sup> The first Assembly was elected in 2001.<sup>5</sup> The laws adopted by it were promulgated by the United Nations Interim Administration Mission in Kosovo resolutions; the United Nations Interim Administration Mission in Kosovo approval was required for them to come into force.<sup>6</sup>

In June 2013, the Legal Office of the Prime Minister convened a meeting to discuss a draft law on child protection. The United Nations Interim Administration Mission in Kosovo, asked to support this initiative, decided that a law on child protection should not be drafted without a prior comprehensive review of existing legislation that has an impact on children and their rights. An international consultant and two national consultants therefore were contracted to undertake this review of all legislation in force in Kosovo, from the perspective of compatibility with the Convention on the Rights of the Child and related international standards related to the rights of children.

<sup>2</sup> UNGA Resolution 1244 (1999)

<sup>3</sup> UNMIK/REG/1999/1, Art.1.1 1.1

<sup>4</sup> UNMIK/REG/2001/9 Art.9.1.26; see also Art.9.1.27 and 9.1.32-45.

<sup>5</sup> Report of the Secretary General on the UN Interim Administration Mission in Kosovo, S/2002/62, para. 3-9; see also Report of the Secretary General on the UN Interim Administration Mission in Kosovo, S/2002/436, para.7-8

<sup>6</sup> UNMIK/REG/2001/9 Art.9.1.44.

## Objectives

The objectives of the report to be prepared by the team of consultants were described thus by their terms of reference:

The aim of this study is to promote the realization of children's rights in Kosovo by identifying gaps in the legal and policy frameworks in order to help guide required legislative and policy reforms and the implementation of policies for children rights. This will be achieved through a comprehensive and holistic review of primary and secondary legislation on children rights to ensure critical components of a human rights based approach are identified; to assess the compliance of national legislation with international human rights norms and standards and the harmonization between different laws and policies; and assessing mechanisms and institutions in place to implement children's rights.

Primary legislation related to children's rights will be subject to an in depth analysis, in order to identify the CRC articles that are reflected insufficiently or inappropriately. Furthermore, the review will also refer to relevant articles in the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of People with Disabilities (CRPD). In addition, relevant legislation will be compared with EU standards where relevant.

The findings of the review will inform the required changes in the legal and policy framework and whether or not the drafting of new laws or revision of the existing primary legislation is required. Furthermore, the review will be coordinated with other on-going legislative reforms related to child rights, especially the Law on the Protection of Children's Rights, which the government is currently drafting. The review will result in a detailed gap analysis that will identify inconsistencies between different Kosovo legislation and between Kosovo legislation and international standards. It will also provide specific recommendations to ensure a legal framework that supports the overall promotion and protection of the rights of the child.

Perhaps inevitably, the aims were modified somewhat during the process of carrying out the research on which this report is based. Realization of the large number of laws that affect the rights of children, and the difficulty of obtaining reliable information about secondary legislation, led to a decision to focus mainly on 'primary' legislation i.e. laws adopted by the Assembly, as opposed to regulations, administrative instructions and other 'sub-legal acts'. In analysing the compatibility of national laws with international standards, it was decided to refer to several international instruments in addition to the three (CRC, CEDAW and CRPD) mentioned in the terms of reference (see the list of instruments in appendix II).

## Methodology

Main focus of the methodology was to identify provisions of the law in force that are not fully in harmony the CRC and other UN and European standards on the rights of children, as well as gaps in existing legislation that need to be filled to bring the law of Kosovo in to greater harmony with such standards.

The compatibility of laws with the Convention should not be seen in isolation from the issue of the implementation of laws in practice. The factors that can impede implementation of legislation are numerous and well-known: delays in the adoption of secondary norms, policies and protocols, inadequate resources, poor coordination between the services or agencies responsible for implementation lack of training of those responsible for implementation, ignorance of the law or hostility to the aims of the law, and others.

However, the time and resources available did not allow extensive research on the implementation of all legislation affecting the rights of children.

With regard to the first component, it was decided to structure the analysis according to the rights recognised by the CRC, rather than law-by-law. This approach quickly led to the realization that the initial list of 13 laws to be analysed was incomplete. The list grew until 45 laws were reviewed, and recommendations were made with regarding 25 of them. (Two broader recommendations concerning several laws also made.)

The analysis does not focus on individual articles of the CRC, but on small groups of closely related rights and/or principles. Chapter 4, for example, on "The right to life, development and personal integrity," covers articles 6 and 37(a) of the Convention.

It would be impossible to adequately analyse the compatibility of national law with the CRC alone, without referring to other international instruments that are complementary to the Convention. The Committee on the Rights of the Child itself refers to many other treaties and other international instruments (declarations, basic principles, guidelines, minimum rules, etc.) in assessing the compliance of States with their obligations under the CRC. The CRC, which has the unique status of been ratified and accepted by more States than any other treaty concerning human rights, is the main international legal framework on the rights of children; other UN and European instruments are complementary to it. This status underlines the importance of the recommendations of the Committee responsible for monitoring implementation of the CRC.

The instruments taken into account in this report, in addition to the CRC and the two others mentioned in the terms of reference, include:

- both Optional Protocols to the CRC
- the International Covenants on Civil and Political and on Economic, Social and Cultural Rights
- four International Labour Conventions
- two World Health Organisation Conventions
- UN conventions on refugees, statelessness and trafficking in persons
- the European Convention on Human Rights, European Social Charter and three other EU Conventions
- one of the Geneva Conventions on International Humanitarian Law and Protocols I and II to the Geneva Conventions
- two Conventions of the Hague Conference on Private International Law
- three UN and two European instruments on justice for children<sup>7</sup>

<sup>7</sup> The full list of instruments consulted is found in Appendix II

The analysis also takes into account most of the General Comments made by the Committee on the Rights of the Child with a view to helping States understand their obligations under the Convention, and a small number of recommendations made by the Committee on Economic, Social and Cultural Rights, the Committee Against Torture, CEDAW, the ILO, UNHCR, UNICEF and the WHO.

An effort was made to ensure that the recommendations made concerning law reform were in harmony with the views of the most relevant international organisations and agencies. This was done by reading relevant reports of organisations such as the OSCE, UNICEF and the ILO, by informal consultations during the missions of the international consultant, and by sharing the draft report with interested UN and European agencies. This process of consultation does not, however, imply that the views and recommendations contained in this report represent the position of any agency or organization other than UNICEF.



# Part I

**The compatibility of the  
Constitution and legislation of  
Kosovo with the Convention  
on the Rights of the Child**

## 2. The definition of child, the evolving capacity and the best interests principles, and the right to be heard

This chapter concerns the definition of child, two basic principles concerning the rights of children, namely, the best interests and evolving capacities principles, and the right to be heard, which the Committee on the Rights of the Child considers to be both right and principle.<sup>8</sup>

Article 1 of the CRC provides:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

The second part of this definition, which recognises the possibility that some persons under the age of 18 may be recognised as adults, was adopted in order to encourage the largest possible number of States to become Parties, including those whose legislation establishes the age of majority at an age less than 18 years.

The meaning of 'age of majority' in article 1 is not defined. In comparative law, majority is a status in which a person has full capacity to exercise his or her rights in various areas of law, independently of consent or representation by a parent or guardian, and full legal responsibility for his or her actions. A distinction sometimes is made between majority for purposes of criminal responsibility and civil majority, which includes the capacity to exercise civil rights.<sup>9</sup>

The Convention recognises that the capacity of children to exercise their rights evolves as they grow older and become more mature.<sup>10</sup> Several articles refer to age-based thresholds that are relevant to the rights children have, and the kind of protection to which they are entitled. Article 32 requires States to establish a minimum age or minimum ages for employment, article 38 prohibits the recruitment of children under the age of 15, and article 40 encourages States to adopt a minimum age of 'criminal responsibility'.

The fact that a person has reached the minimum age for employment, for prosecution as a juvenile offender, or for recruitment into the armed forces, does not mean that she or he has become an adult and the Convention no longer applies. This suggests that the purpose of the second part of article 1 is to accommodate countries that have a lower age of majority for general purposes, not to allow States to establish age limits lower than 18 years that restrict the right to enjoy specific rights recognised by the Convention.

It should be noted that some norms of international human rights law apply to all persons under the age of 18, regardless of the age of majority recognised by national law. The prohibition of application of the death sentence is one example.<sup>11</sup>

<sup>8</sup> General Comment No. 12, The Right of the Child to be Heard, 2009, para.2

<sup>9</sup> In comparative law the age at which one acquires the right to exercise political rights sometimes is the same as the age of civil majority, and sometimes higher.

<sup>10</sup> See commentary on article 5, below.

<sup>11</sup> CRC Art.37(a) and ICCPR Art.6.5



Legislation that establishes age limits for the enjoyment or exercise of rights recognised by the Convention may not discriminate on grounds of sex.<sup>12</sup>

The 'best interests' principle is central to the Convention on the Rights of the Child. Article 3 provides in part:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>13</sup>

In so far as the family is concerned, Article 18 provides that the best interests of children shall be the 'basic concern' of parents in raising their children, while articles 9 and 20 indicate that the best interests of a child can be a legitimate reason for separating children from their parents.<sup>14</sup> Article 21 provides that the best interests of a child shall be the paramount consideration in adoption.

This principle also is recognised by other human rights treaties. CEDAW also recognises that the best interests of children shall be the "primordial" or "paramount" consideration of parents in raising children, including when parents separate or divorce.<sup>15</sup> The Convention on the Rights of Persons with Disability provides that "In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration."<sup>16</sup>

The best interests of the child also can justify exceptions to some norms regarding the rights of children. Article 37 provides that the best interests of a child may be a legitimate reason for detaining a child with adults, and article 40 provides that it may be a legitimate reason for excluding parents from the trial of children accused of an offence.<sup>17</sup>

The Committee on the Rights of the Child has indicated that application of the best interests principle requires a holistic effort to ensure the "physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity," while taking into account the child's individual characteristics and social background.<sup>18</sup> It also has indicated that the interpretation of the best interests of children "must be consistent with the whole Convention"; no putative interpretation of what is in the best interests of children can justify the violation of any right recognised by it.<sup>19</sup> Furthermore, the views of the concerned child or children must be taken into account in determining what is in his, her or their best interests.<sup>20</sup>

The evolving capacities principle is recognised by Article 5 of the Convention, which provides:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the

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12 see e.g. General Comment No.4 on Adolescent Health and Development in the Context of the CRC, 2003, para.9

13 para.1 (The second and third paragraphs of article 3 concern the general obligations of the State vis-à-vis children and their families, and institutions that provide services to children, respectively.)

14 para.1 of all three articles

15 Arts.5(b) and 16(1)(d)

16 Art.7.2; see also Art.23.3 regarding the family

17 para. c and 2(b)(iii), respectively

18 General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration, 2013, para.5 and 48, see also para.55-56

19 General Comment No.13 on the Right of the Child to Freedom from all forms of Violence, 2001, para.61, and General Comment No.14, supra, para.4

20 General Comment No.12, supra, para.53 and 70; see also General Comment No.14, supra, para.43-44, and 53-54 (Of course, this applies when the child is old enough to form views on the issue to be decided.)

present Convention.<sup>21</sup>

This article recognizes several inter-related ideas:

- parents and other caretakers have a right and duty to provide children with guidance and direction relative to the exercise of their rights
- the guidance and direction provided must be 'appropriate'
- children's capacity to exercise their rights personally grows over time and, as it does, the need for guidance and direction decreases proportionately<sup>22</sup>
- the State must respect this dynamic between children and parents

The Committee has indicated that guidance and direction should be part of an 'enabling process' that balances the child's autonomy and right to have their views taken into account, with their need for a 'safe and supportive environment'.<sup>23</sup> Parents "should be encouraged to offer 'direction and guidance' in a childcentred way... that enhance[s] young children's capacities to exercise their rights, including their right to participation and their ... freedom of thought."<sup>24</sup> In particular, laws and policy should be adopted to encourage parents and guardians to listen to children and give due weight to their views.<sup>25</sup>

The term 'evolving capacities principle' is most closely associated to the third idea listed above; the others can be seen as corollaries. The obligation to respect the evolving capacities of children with disabilities is recognised by article 3 of the CRPD, without mention of the corresponding right and duty of the parents or other responsible adults to provide children with direction and guidance. The Committee on the Rights of the Child also recognizes the relevance of the evolving capacities principle outside the family context and, in particular, its link to the principle that the views of the concerned child or children must be taken into account and given due weight in decisions taken by judicial or administrative authorities.<sup>26</sup> It also recognizes its relevance to decisions regarding health care.<sup>27</sup>

Article 12 of the Convention recognises the right of every child capable of forming views "the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."<sup>28</sup> The Committee on the Rights of the Child has emphasized that children of all ages have this right, in principle, and that fixed age limits that limit the obligation to listen to children and take their views into account should be avoided.<sup>29</sup>

Article 6 of the Convention, as mentioned above, recognises the obligation of States to "ensure to the maximum extent possible the ... development of the child."<sup>30</sup> The right to development can be seen as a principle as well as a right, because of the implications it has for many of the other rights recognised by the Convention. Some of these linkages are recognised expressly by the Convention. Article 27 recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."<sup>31</sup> The Preamble states that being raised in a positive family environment fosters the full and harmonious development of the child's personality, and article 18 elaborates on the responsibility of parents for the upbringing and development of their children.

21 Similarly, Article 14.2 of the CRC provides "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."

22 General Comment No.7 on Implementing Child Rights in Early Childhood, 2005, para.17, General Comment No.12, supra, para.84 and General Comment No.14, supra, para.44

23 General Comment No.7, supra, para.17 and General Comment No.4, supra, para.7

24 General Comment No.7, supra, para.17

25 General Comment No.12, supra, para.91

26 See e.g. General Comment No.14, supra, para.44, 93, and General Comment No.12, supra, para.134(e), and para.100

27 General Comment No.12, supra, para.100

28 Art.12.1 (Art.12.2 confirms expressly the applicability of this right or principle to legal and administrative proceedings affecting a child.)

29 See e.g. General Comment No.12, supra, para.21

30 para.1 and 2, respectively

31 para.1

Article 29 indicates in part that “the education of the child shall be directed to ... the development of the child’s personality, talents and mental and physical abilities to their fullest potential,” and article 32 recognizes the right of children to protection from work that (inter alia) may be harmful to their physical, mental, spiritual, moral or social development.

Article 23 of the Convention recognises the right of children with disabilities to assistance in achieving “the fullest possible social integration and individual development”, and article 24 of the CRPD recognises the right of all persons with disabilities to education directed towards the “development of ... their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential.”

## a. legislative definitions of childhood

The Criminal Code, Criminal Procedure Code and Juvenile Justice Code define ‘child’ as any person under 18 years of age.<sup>32</sup> The Law on Citizenship and Law on Prevention and Combating Trafficking in Human Beings and Protection of Victims of Trafficking contain the same definition.<sup>33</sup>

Some social legislation, including the Law on Social and Family Services, also defines child to mean every person below the age of 18.<sup>34</sup> The Law on Pre-university Education contains the same definition of child.<sup>35</sup> An article of the Family Law on parental responsibility indicates that the term “children” means persons under the age of 18.<sup>36</sup> Although article also indicates that “Majority is obtained upon the completion of the eighteenth year of age,” it adds “Full capacity to act is obtained upon reaching majority or by entering into wedlock prior to this age.”<sup>37</sup> This implies that children who marry at 16 or 17 years of age (see below) lose the legal status of childhood.

Consideration should be given to amending the Family Law, or adopting another legal norm, to ensure that marriage does not deprive persons under the age of 18 of all the rights to which they are entitled as children. It is logical for persons who are 16 or 17 years of age and married to have certain legal rights to which children are not entitled, such as the right to enter into legal contracts or to represent themselves in legal proceedings. There also are some rights that may be inappropriate or irrelevant for a child 16 or 17 years of age who is married, such as those concerning parental custody over them, and alternative care. But there is no reason that marriage should end entitlement to other rights, such as the right to protection from work that is harmful or dangerous.

Consideration also could be given to extending such changes in the legal rights and responsibilities of children who are married before reaching the age of 18, to unmarried persons who become parents before reaching the age of 18. It would be logical to give the adolescent who becomes a mother or father the legal capacities needed in order to take on at least some of the rights and responsibilities inherent in parenthood.

The Law on Material Support for Families of Children with Permanent Disability defines child as “any persons under the age 18 years old except when the mature age [sic] is achieved earlier in accordance with the legislation he/she is subject to.”<sup>38</sup> The exception, whose wording is similar to article 1 of the Convention, covers children who attain majority due to marriage.

32 Art.120.2.20, Art.19.1.16 and Art.2.1.1, respectively (They also define children 14 to 18 years of age as minors, and the Juvenile Justice Code makes an additional distinction using confusing terminology. (See Ch.15)

33 Art.3.1.2 and Art.2.1.6, respectively

34 Art.1.3.g

35 Art.2.1.7

36 Art.3.2

37 Art.15 para. 2-3

38 Art.2

Terminating payments to the parents of children 16 or 17 years of age who are handicapped but married does not seem to be arbitrary. However, a disabled person under 18 who marries will not be able to apply for the pension for disabled adults until he or she reaches the age of 18.<sup>39</sup> This gap in entitlement should be remedied by amending one or both of these laws.

The Law on Rights and Responsibilities of Citizens in Health Care defines 'child' as a person under 12 years of age.<sup>40</sup> This has limited consequences, however: the only right that turns on this definition is to have a parent or other relative stay with the child during a hospital stay.<sup>41</sup> There is no reason to consider limiting this right to younger children to be arbitrary.

None of the other laws on health contains a definition of 'child', even though some of them recognise obligations regarding services for children. This gap should be eliminated by the addition of a definition to all legislation on health that contains operative provisions concerning children.

The Law on Civil Aspects of International Child Abduction defines 'child' as a person under 16 years of age. The reason is that this law is intended to incorporate a treaty that applies only to children under the age of 16. (see Ch. 5) The Law on Labour does not contain a definition of child, but none is needed since the provisions of the code concerning children do not concern all children, but only children of specific age groups that are identified by the articles in question.

It should be noted that the meaning of the term 'minor' is not necessarily identical to the term 'child', in the legislation of Kosovo. The Law on Social and Family Services, the Juvenile Justice Code and the Criminal Procedure Code define minor as a person 14 to 18 years of age. Other laws, such as the Family Code, use the term minor to mean all persons under the age of 18. It would be desirable to review all the legislation concerning children with a view to eliminating inconsistent uses of this key term.

## b. the minimum age for marriage

One issue related to the definition of childhood is the minimum age for marriage. No UN human rights instrument expressly prohibits the marriage of persons under 18 years of age, but the Committee on the Rights of the Child "strongly recommends that States parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys."<sup>42</sup> The Committee on the Elimination of Discrimination against Women has made a similar recommendation.<sup>43</sup>

The Family Law of Kosovo provides that the minimum age for marriage is 18 years.<sup>44</sup> Exceptionally, a court may allow persons 16 or 17 years of age to marry, if it concludes that the adolescent who wishes to marry has "sufficient physical and psychological maturity for exercising his [sic] marital rights and to fulfil his marital obligations."<sup>45</sup> Before making a decision, the court must hear the child requesting permission, his or her parents, the person the child wishes to marry, and the Guardianship authority.<sup>46</sup> The law makes no distinction on the basis of sex.

The law of most European countries establishes 18 as the minimum age for marriage but also allows exceptions, usually for children aged 16 or 17.<sup>47</sup> The procedure for allowing exceptions under the Family Law seems appropriate.

39 Law on Disability Pensions in Kosovo, Art.1.5

40 Art.2(k)

41 Art.7.4

42 General Comment No.4, supra, para.20

43 General Recommendation No.21, Equality in marriage and family relations, 1994, para.36

44 Art.16(1)

45 Art.16(2)

46 Art.16(3)

47 Child Marriage Factsheet, Equality Now, 2010, p.2

The Criminal Code of Kosovo makes it a crime for a public official to celebrate a marriage knowing that a legal impediment exists.<sup>48</sup> Compelling a child to marry also is a crime, punishable by a prison sentence of 2 to 10 years, or longer if the child is under 16 and the perpetrator is a parent or the offence is committed for financial benefit.<sup>49</sup> Living in an extramarital relationship with a child under 16 years of age also is a crime, punishable by a prison sentence of up to 20 years.<sup>50</sup>

### c. constitutional and legislative recognition of the best interests principle

The best interests principle is recognised by the Constitution of Kosovo, which provides that “All actions undertaken by public or private authorities concerning children shall be in the best interests of the children.”<sup>51</sup> The Constitution also provides that every child has the right to “regular relations and direct contact” with his or her parents, unless a competent body has determined that this would not be in the best interests of the child.<sup>52</sup>

The best interests principle also has been incorporated into the legislation of Kosovo. The Law on Social and Family Services provides:

In all matters concerning the provision of services to children and to families the best interests of child shall be the first and paramount consideration.<sup>53</sup>

The Family Law provides that “the institution of marriage shall be preserved”; but “a marriage which has irretrievably broken down should be brought to an end with a minimum of distress to the parties and the children concerned” and in a manner that promotes “as good a continuing relationship ... as possible” between the parties and any children affected.<sup>54</sup> A period of reconciliation is mandatory when a legal action for divorce has been filed.<sup>55</sup> If minor children are involved, the Custodian Body conducts the reconciliation process.<sup>56</sup> During this process, it also aims to bring the parties to an agreement that respects the best interests of their children.<sup>57</sup> In exceptional cases divorce may be denied even though the marriage has broken down, if the court determines that the continuation of the marriage is necessary in the interest of a child.<sup>58</sup>

The Family Law also provides the best interests – and views - of the child must be taken into account in cases concerning custody.<sup>59</sup>

Constitutional recognition of this principle, together with express recognition of the need to take the best interests of children into account in some of the most important laws regulating decisions that may be taken concerning children and their families, goes far towards satisfying the obligations of States in this regard. It would be desirable, however, to amend the Family Law with the addition of an article that recognises this principle in broad, general terms, similar to the above-cited article of the Law on Social and Family Services.

The Law on Prevention and Combating Trafficking in Human Beings and Protection of Victims of Trafficking (“Law on Trafficking”) contains a provision that recognises the best interests and evolving capacity principles, in conjunction with the right of child victims to be heard.<sup>60</sup>

48 Art.245

49 Art.246

50 Art.247

51 Art.50.4

52 Art.50.5

53 Art.9.1

54 Art.59.1 and 3

55 Art.76-79 (There are exceptions as, for example, when one of the spouses lives abroad or is incompetent.)

56 Art.80

57 Art.82

58 Art.70(3), 84

59 Art.140(2) and (5); see also Art.141(2)

60 Art.35.1.1.4

#### d. legislative recognition of the 'evolving capacities' principle

This principle is especially relevant to the relationship between children and their parents, guardians or other caregivers. It is not recognised by the Family Law, however. Article 128 provides that parents "shall consider [the] skills, inclinations and desires of their children" in the exercise of their parental responsibilities, but this falls short of recognition of a parental duty to gradually give children a larger role in the exercise of their rights. Article 216 recognises the duty of guardians to help the child develop "the ability to lead an independent life."<sup>61</sup> This also may be related to the evolving capacities principle, but stops short of recognition of a duty to gradually give children a larger role in the exercise of their rights.

Article 133 recognises the right and duty of parents to represent minor children in legal matters, but makes no reference to any obligation to take the views of children into account, or otherwise allow them participate in this process, regardless of their age and maturity. Article 136 recognises the capacity of children 14 years of age to "undertake legal transactions," but adds that, except for "actions of minor importance," such "transactions" are invalid without the consent of the child's parents or permission of the Guardianship Council.<sup>62</sup> The latter can be seen as a rough approximation of the 'evolving capacities' principle in the legal context, although the principle, properly applied, gives more weight to maturity than chronological age.<sup>63</sup>

Since the evolving capacity principle is a fundamental to the relationship between the child and his or her parents, guardian or caregiver, it is important to recognise this principle by an amendment the Family Law and/or by recognition in a law on the rights of children.

#### e. legislative recognition of the right to be heard

Many laws recognise the obligation to take children's views into account when certain issues concerning individual children are to be decided. The Law on Social and Family Services, for example, provides that "ascertainable wishes and feelings of the child concerned" shall be taken into account by courts when considering cases involving child protection.<sup>64</sup> The Family Law provides:

The opinion of the child who is capable of forming his/her views shall be taken into consideration by the court in all cases of parental custody. Such opinion shall be given due weight in accordance with the age and the ability of the child to understand.<sup>65</sup>

While express recognition of this principle in articles concerning the taking of specific kinds of decisions concerning children is very positive, given the fundamental nature and broad relevance of this right or principle, it would be desirable to also recognise it in general terms similar to those of article 12 of the Convention, either in every law that authorise decisions to be taken concerning children, or in a comprehensive law on the rights of children.

Additional recommendations concerning the right of children to be heard are made in Chapters 5, 11, 12 and 16.

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61 Art.216

62 see also Art.217 on children under guardianship

63 Committee on the Rights of the Child, General Comment No.12, (supra) para.21, 29-31, 84-85

64 Art.10.15.a; see also Art.11.4

65 Art.140(5)

### 3. The right to life, development and personal integrity

This chapter covers three rights recognised by two articles of the Convention: the right to life and to development, recognised by article 6, and the right not to be tortured, recognised by article 37. Other rights recognised by article 37 are analysed in Ch.15, on juvenile justice.

Article 6 of the Convention recognises that “every child has the inherent right to life” and the obligation of States to “ensure to the maximum extent possible the survival and development of the child.”<sup>66</sup>

The right to life imposes both negative and positive obligations on the State. The negative obligation is to not take the life of a child. This is not an absolute right: the Committee on the Rights of the Child has referred to it as the right not to be deprived of life arbitrarily.<sup>67</sup> This echoes the language used in article 7 of the International Covenant on Civil and Political Rights – the main UN treaty on civil rights. The European Convention on Human Rights (ECHR) takes a different approach, providing that loss of life does not violate the right to life if it results from a death sentence or from the use of force that is strictly necessary for certain lawful purposes, e.g. in defence of a person from unlawful violence or to effect a lawful arrest.

Some of the exceptions recognised by article 2 of the ECHR are not valid for children. The Convention on the Rights of the Child prohibits the application of the death penalty for crimes committed by persons under 18 years of age. The International Covenant also prohibits the execution of pregnant women.<sup>68</sup>

The positive obligation is to adopt measures that protect life from natural or social threats, such as illness, famine, accidents, armed conflict and homicide. This, in a sense, can be seen as the meaning of the right to survival. Several other rights recognised by the Convention, such as the right to health care, the right to protection from hazardous work, sexual exploitation and drug use, and the prohibition of recruitment and participation in armed conflict, also serve to protect the right to life.

The right to development is mentioned by several articles of the Convention in addition to article 6. Article 18.1 assigns primary responsibility for the upbringing and development of children to their parents, and links this principle with the best interests principle. Article 27.1 defines development as “physical, mental, spiritual, moral and social development,” and reaffirms the primary responsibility of parents, and recognizes the obligation of the State to aid them in meeting this responsibility. (see Ch.8) Article 29.1 recognises child development as an aim of education, article 23 recognises the right of children with disabilities to assistance that supports their development, and article 32.1 prohibits employment harmful to the development of children.

The Preamble of the Convention twice mentions the “harmonious development” of the child - further evidence of the importance of this principle.

<sup>66</sup> para.1 and 2, respectively

<sup>67</sup> General Comment No.3, HIV/AIDS and the rights of the child, 2003, para.11

<sup>68</sup> Art.6.5

Article 37(a) provides that “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” The most widely accepted definition of torture in international human rights law is that contained in article 1 of the Convention Against Torture:

... the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Cruel, inhuman or degrading treatment or punishment – often referred to as ‘ill-treatment’ - is not expressly defined by any international instrument. The Committee Against Torture has said that “In comparison to torture, ill-treatment differs in the severity of pain and suffering...”<sup>69</sup> It also considers that, unlike torture, ill-treatment does not require proof of any specific intent.<sup>70</sup> Practices that have been recognised as cruel, inhuman or degrading treatment include corporal punishment and the use of solitary confinement as a disciplinary measure.<sup>71</sup>

Article 37(c) of the Convention on the Right of the Child also recognizes this broader, positive obligation:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

## a. constitutional and legislative recognition of the right to life

Article 25 of the Constitution of Kosovo provides that “Every individual enjoys the right to life.” It also bans capital punishment.

The Criminal Code protects the right to life through articles that criminalise murder, inciting or assisting suicide and unlawful termination of pregnancy.<sup>72</sup> The offence of murder as such is punishable by a prison sentence of not less than 5 years. The minimum sentence is 10 years for aggravated murder, including the murder of a child or pregnant woman.<sup>73</sup> The sentence for assisting suicide also is greater when the victim is a child under 14 years of age, or a ‘minor’ 14 to 18 years of age.<sup>74</sup> The prison sentence for unlawful termination of pregnancy varies from a minimum of 6 months and maximum of 3 years to a minimum of 5 years and a maximum of 15 years, depending on the circumstances.<sup>75</sup> Only persons who perform an abortion can be prosecuted for this offence, not women whose pregnancy is terminated.

These provisions of the law seem to be in harmony with the relevant international standards.

69 Committee Against Torture, General Comment No.2, CAT/C/GC/CRP.1/Rev.4, para.10

70 Ibid

71 Havana Rule No.67

72 Arts.178-184

73 Art.179.1.1-2

74 Art.183.2-3 (From 1 to 5 years, the maximum is increased to 10 years when the victim is 14-18 years of age, and the minimum is increased to 5 years when the victim is under 14.)

75 Art.184



The sentence for murder is less in three circumstances: when committed by neglect, when committed in a state of severe mental distress caused by the victim, and when committed during or immediately after birth by a mother affected by a disorder caused by childbirth. The sentence for negligent murder is 6 months to 5 years, the sentence for murder caused by severe distress caused by the victim is 1 to 10 years, and the sentence for murder of a newborn by a disturbed mother is 3 months to 3 years.<sup>76</sup> The crime of murder committed in a state of severe mental distress applies only to distress resulting an attack, maltreatment or grave insult by the murder victim, which precludes the application of this article to so-called 'honour crimes'.

The imposition of shorter prison sentences for these forms of murder seems to have legitimate purposes, and there do not appear to be any compelling grounds to conclude that the reductions are disproportionate to the reasons for them. Consequently, they do not violate the relevant international standards.

## b. legislative recognition of the right to development

The Family Law contains numerous references to the development of children. Article 141 provides that "Both parents shall decide by agreement ... issues of essential importance for the development of the child," even when only one of the parents has custody. This is in harmony with article 18 of the Convention, which states that both parents have "common" responsibilities for the development of their children. Article 144 of the Law provides that, in legal proceedings that may result in the separation of a child from his or her parents, "all circumstances which are important for proper physical and mental development and education of the child" must be properly investigated.<sup>77</sup>

Article 159 and 203 recognise ensuring conditions for the development of children as the aim of alternative care. Article 171(4) identifies a serious risk to the development of a child as a ground for overriding the requirement of parental consent to adoption, and article 212 obliges the guardianship authority to supervise the development of children in alternative care. Articles 213, 214 and 216 also contain references to the aim of supporting the development of children.

In contrast to the Family Law, the Law on Social and Family Services focuses on the protection of children and makes no reference to helping parents or other caregivers support the development of children. As important as protection is, consideration should be given to introduction of some amendments that would give the law more balance, by referring in positive terms to what is to be sought, as well as what is to be prevented.

The Juvenile Justice Code contains many references the "rehabilitation and reintegration" of juvenile offenders, which could be considered a reference to healthy development. Nevertheless, mention of the aim of supporting the "physical, mental, spiritual, moral and social development" of juvenile offenders would enrich the law, and consideration should be given to adding one or more references to this key principle.

<sup>76</sup> Arts. 181, 180 and 182, respectively.

<sup>77</sup> Art. 144(1)

### c. constitutional and legislative norms on torture and the right to human treatment

Article 27 of the Constitution of Kosovo prohibits torture and cruel, inhuman and degrading treatment or punishment.

The Criminal Code recognises torture as a crime, punishable by a prison sentence of 1 to 15 years.<sup>78</sup> The minimum sentence is 3 years when the victim is a child.<sup>79</sup> Mistreatment by a public official also is a crime, punishable by a prison sentence of up to 3 years, or from 6 months to 5 years if the victim is a child.

The Criminal Code's definition of torture is almost identical to the definition contained in article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. However, the Convention requires States to make torture "punishable by appropriate penalties" proportionate to the gravity of this crime.<sup>80</sup> The observations of the Committee against Torture's on the legislation of States Parties to the Convention suggest that a minimum sentence of less than 3 years for the torture of any is not proportionate to the gravity of the offence.<sup>81</sup>

A minimum sentence of 3 years when the victim is a child may not be proportionate to the gravity of the crime, and consideration should be given to increasing the minimum sentence for the torture of children. Consideration also should be given to increasing the minimum sentence for the ill-treatment of children.<sup>82</sup>

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78 Art.199.1

79 Art.199.2

80 Art.4.2

81 Concluding Observations on reports by Albania (CAT/C/ALB/CO/2, 2012, para.8), Turkey (CAT/C/TUR/CO/3, 2011, para.5(b)(i)) and Mauritius (CAT/C/MUS/CO/3, 2011, para.8)

82 The Committee against Torture considers that the obligation to impose 'appropriate' sentences applies to ill-treatment or mistreatment as well as torture as such. In 2012, the Committee "welcomed" Article 86 of the Criminal Code of Albania, which provides for a minimum sentence of 5 years for torture and for ill-treatment, calling this article "in line with the Convention." CAT/C/ALB/CO/2, para.8

## 4. The right to identity and nationality

Article 8 of the Convention on the Rights of the Child recognises the right to identity, and defines it in these terms:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Article 7 adds:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

The present chapter analyses the right to nationality, to a name, the right of children to know their parents, and the right to birth registration. Other provisions of the Convention that have to do with the right of children to be cared for by his or her parents are considered below, in Ch. 5.

The obligations of the State with regard to the right to identity and the various components of this right are further defined in the second paragraphs of articles 7 and 8. Article 7.2 provides that States "shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless." Article 8.2 adds "Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

Nationality normally is acquired at birth on one of two grounds: the place of birth (*jus solis*) or the nationality of one's parents (*jus sanguinis*).<sup>83</sup> The Convention does not specifically oblige States to grant nationality on either of these grounds. Other treaties help to clarify the parameters of the obligation to give children the right to acquire a nationality.

The Convention on the Reduction of Statelessness provides that States shall grant nationality to persons born in their territory who would otherwise be stateless.<sup>84</sup> In practical terms, this means that if a State normally does not grant nationality to all children born in the national territory, but if the State (or States) that a child's parents are nationals of does not recognise the right of children born abroad to inherit the nationality of their parents, then the State where they were born must grant nationality on the grounds of place of birth.<sup>85</sup> The European Convention on Nationality recognizes the same rule.<sup>86</sup>

The Convention on the Reduction of Statelessness also requires States Parties to grant their nationality to persons not born in their territory who would otherwise be stateless, if one of the child's parents was a national of that State when the child was born.<sup>87</sup> This norm applies if the State where the child is born does not recognise the right to nationality on grounds of place of birth, and obliges the State that the child's parents are nationals to recognise the child as a national, even if it normally does not give nationality to persons not born in its territory.

<sup>83</sup> It also may be acquired later in life by naturalisation or, in some cases, by marriage.

<sup>84</sup> Art.1.1

<sup>85</sup> Art.1.1

<sup>86</sup> Art.6.2

<sup>87</sup> Art.4.1

The right of every child to acquire a nationality also is recognised by article 24.3 of the International Covenant on Civil and Political Rights, and article 9.2 of CEDAW provides that women must have the same rights as men regarding the nationality of their children.

The European Convention on Nationality also contains other rules of special relevance for children. One requires States to ensure that their legislation “facilitates” the acquisition of its nationality by children adopted by a national.<sup>88</sup> A similar obligation to “facilitate” the acquisition of nationality is recognised for children born abroad having one parent who is a national.<sup>89</sup> Yet another obligation of this kind applies to persons “lawfully and habitually” residing in the territory of a State before reaching the age of 18.<sup>90</sup>

The European Convention also contains some provisions specifically concerning newly independent States. Article 18 of the provides that, in case of State succession, decisions concerning nationality shall take into account the genuine and effective link of the person concerned with the State, habitual residence at the time of State succession, and the will and territorial origin of the person concerned. Article 20 provides that nationals of the predecessor State habitually resident in a newly independent State have the right to remain there, and to equal treatment with regard to social and economic rights, even if they have not acquired nationality.<sup>91</sup>

### a. legislative recognition of the right to nationality

The Constitution of Kosovo does not define entitlement to nationality, but merely provides that “The acquisition and termination of the right of citizenship of Kosovo are provided by law.”<sup>92</sup>

The Law on Citizenship provides that all persons registered by the UN Interim Administration Mission in Kosovo (UNMIK) as habitual residents of Kosovo are considered citizens.<sup>93</sup> Consequently, Serbian residents of Kosovo who do not wish to be citizens of Kosovo must request release from Kosovar citizenship. Nationality of another country is not an obstacle to Kosovar nationality.<sup>94</sup>

The Law on Citizenship provides that nationality [lit: citizenship] is based primarily on the nationality of a child’s parents. Every child whose parents are both citizens of Kosovo acquires nationality at birth.<sup>95</sup> Children who have only one parent who is a citizen of Kosovo are entitled to nationality in three circumstances: if born in Kosovo; if not born in Kosovo but the parent who is not a Kosovar is stateless or unknown; and if the child is born outside of Kosovo and the one parent is a foreign national, but both parents agree that the child shall be a citizen of Kosovo.<sup>96</sup>

A child born in Kosovo whose parents are permanent residents but not citizens also may acquire Kosovar nationality, if both parents consent.<sup>97</sup> A child born in Kosovo also acquires nationality regardless of the resident status and consent of his or her parents, if the child would otherwise be stateless.<sup>98</sup> A child born or found Kosovo whose parents are unknown also is entitled to nationality.<sup>99</sup> Children adopted by citizens of Kosovo automatically become nationals.<sup>100</sup> Children of persons who become citizens by naturalisation acquire

88 Art.6.4(d) (This norm also is recognised by article 11.1 of the European Convention on Adoption.)

89 Art.6.4(b)

90 Art.6.4(f)

91 Art.20 (An exception is made for employment in public service.)

92 Art. 14

93 Art. 31.1

94 Art.3

95 Art.6.1

96 Art.6.2 (In the third case, the parents must exercise this option before the child is 14 years of age.)

97 Art.73

98 Art.74

99 Art.71

100 Art.8

nationality at the same time as their parents, if they are included in the application.<sup>101</sup> Children 14 years of age or older must consent.

Citizens may be released from citizenship on request, provided that the citizen making the request has another nationality, or a “guarantee” that one will be acquired.<sup>102</sup> If the parents of a child renounce Kosovar nationality, the renunciation applies automatically to children under 14 years of age, provided that the child has another nationality, or a guarantee that one will be acquired.<sup>103</sup> If the citizenship of a person who is a naturalised citizen of Kosovo is revoked, the nationality of any children who were naturalised together with the parent also is revoked, unless this measure would make the child stateless.<sup>104</sup>

The provisions of the above-mentioned law concerning the acquisition of nationality by children are very largely in harmony with the relevant international norms.

The law contains no provision expressly concerning release from citizenship of persons 14 to 18 years of age. The law does not expressly require that persons requesting release from citizenship be over the age of 18, which implies that children 14 to 18 can make such a request themselves, with the approval of parents.<sup>105</sup>

One provision of the law, as indicated above, requires the consent of children 14 to 18 years old for the acquisition of nationality by naturalisation; others indicate that the nationality of children under 14 years of age may be changed by their parents, without the consent of the child.

The failure to consult children on proceedings that affect their identity is not in harmony with the right of children to be heard. In many cases, changes in the nationality of children will affect children too young to have an opinion on this matter. The law nevertheless should be brought into compliance with the Convention by the addition of a requirement that the views of children be taken into account when they are old enough, and mature enough, to understand and appreciate the significance of the concept of nationality.

## b. the right to birth registration in the legislation of Kosovo

Article 7 of the Convention recognises the obligation of the State to register the birth of a child “immediately.” The International Covenant on Civil and Political Rights likewise recognises the obligation to register the birth of a child “immediately.”

The Law on Civil Status, adopted in 2011, provides that the birth of a child shall be registered within 15 days of birth, or in exceptional cases within 30 days.<sup>106</sup> The birth should be reported by the child’s parents, legal representative or guardian, or a close family member, or in their absence, by persons authorized to certify the facts of birth, such as the medical personnel who assisted in delivery or the responsible official of the local government.<sup>107</sup>

Failure to register a birth is punishable by a fine of 20 to 50 Euros.<sup>108</sup> Since those most likely to not register births are the members of ethnic minorities living in poverty, the primary consequence of this fine may well be to discourage late birth registration, rather

101 Art.12

102 Art.20.1 (Certain restrictions apply, e.g. the person may not be in arrears in the payment of taxes, under investigation or trial or serving a sentence for a crime, or a civil servant.)

103 Art.21.a

104 Art.18.2

105 Article 136 of the Family Law allows children 14 to 18 to take legal action with the consent of their parents.

106 Art.34.4

107 Art.34.1 and 32.1

108 Art.63.1.1

than to encourage timely birth registration. The Committee on the Rights of the Child has recommended that late birth registration be facilitated, not punished, and consideration should be given to amending the law to eliminate this fine.<sup>109</sup>

The Law on Civil Registers, adopted in 2004, also contains an article on birth registration. It indicates that births are to be reported within 30 days by a representative of the health facility in which the birth took place, the person in whose home the child was born, the child's mother or father, or any other person who assisted in the birth.<sup>110</sup> This law also contains provisions on the birth registration of foundlings and children whose paternity is unknown, and on the acknowledgement of paternity and maternity. (see below)

There are some discrepancies between the provisions of the Law on Civil Status and the earlier Law on Civil Registers, for example, in the time limit for birth registration and provisions on those who have an obligation to report birth. Although the discrepancies are minor, it would be preferable to amend one of these laws to bring them into harmony with each other.

The Committee on the Rights of the Child has not indicated how the obligation to register birth "immediately" is to be interpreted, but it has commented that "An effective [birth registration] system must be flexible."<sup>111</sup> In the absence of clear guidelines on this point, there is no reason to conclude that obligation to report birth within 15 or 30 days does not satisfy the obligation under article 7 of the Convention.

### c. legislative recognition of the right to a name

Article 7 of the Convention on the Rights of the Child recognises the right of the child to have a name "from birth". The right of every child to have a name also is recognised by article 24 the International Covenant on Civil and Political Rights.

The Law on Personal Names, adopted in 2008, recognises the right of every citizen to a name, and adds that a person's name shall guarantee and protect his or her identity, personality and dignity.<sup>112</sup> A personal name, consisting of name and surname, is acquired by its registration of the civil registry.<sup>113</sup> A name is normally registered in a person's native language, although any official language may be used.<sup>114</sup>

A child is named by both parents jointly, by one parent if the other is unknown, dead or incompetent, or by the child's guardian if the child has been abandoned, or neither parent is alive and competent.<sup>115</sup> If parents are unable to agree on a name, the guardianship authority (Centre for Social Work) names the child.<sup>116</sup> The local Centre for Social Work also gives a name to foundlings.<sup>117</sup>

109 General Comment No.7, supra, para.25

110 Art.16.3-5

111 General Comment No.7, supra, para.25 (The comment does not address the question of what deadline would be compatible with this right.)

112 Art.3.1-2

113 Art. 3.3 and 5

114 Art.6 (Art.5 of the Constitution recognises Albanian and Serbian as official national languages, and Bosnian, Turkish and Roma as official languages on the local level.)

115 Ibid, Art.7

116 Art.8

117 Law on Civil Status, Art.33.3

The Family Law of Kosovo, adopted in 2012, provides that every child shall have the surname of one or both of his or her parents, as determined jointly by the parents.<sup>118</sup> Children having the same two parents should have the same surname.<sup>119</sup>

A child's surname may be changed after the marriage of his or her parents, recognition of paternity or adjudication of paternity, but the consent of the child over the age of 10 years is required.<sup>120</sup> The consent of a child over 10 years of age also is required for a change of name or surname after adoption.<sup>121</sup> When parents are separated, if the parent having custody [lit: guardianship] wishes to change the child's surname, the agreement of the other parent must be sought.<sup>122</sup> Any request to change the name of a child must be made by his or her parent or legal guardian.<sup>123</sup>

The legislation concerning the right to a name is largely in harmony with international standards on the rights of children.

#### d. constitutional and legislative recognition of the right to know one's parents

Article 50 of the Constitution of Kosovo recognised the right of every child to "regular personal relations and direct contact with parents, unless a competent institution determines that this is in contradiction with the best interests of the child."<sup>124</sup>

The Law on Social and Family Services recognises that "The best interests of a child are met when their physical and psychological developmental needs are met within the context of his [sic] natural family."<sup>125</sup>

The law most relevant to the right to know one's parents is the Family Law. It contains some provisions designed to encourage recognition of the paternity of children born outside of marriage. For example, the registrar is required to tell the mother about her right to identify the father, if she does not do so of her own initiative.<sup>126</sup> If the mother identifies a man who is not present when birth is registered, the registrar must contact the putative father and request him to confirm paternity.<sup>127</sup> If he denies paternity or does not respond, the mother may take legal action.<sup>128</sup> If the mother does not take legal action to confirm paternity, the Custodian Body may do so in the name of the child.<sup>129</sup>

Children are parties in legal proceedings concerning paternity.<sup>130</sup> They also have the right to take legal action, through a legal representative if necessary, in cases where maternity is disputed.<sup>131</sup>

118 Art. 130.1-2

119 Ibid, Art. 130.3

120 Ibid, Art. 132

121 Art. 193(4)

122 Law on Personal Names, Art. 19.3-5

123 Ibid, Art. 19.1

124 Ibid, para.5

125 Art. 10.1 (as amended in 2012)

126 Art. 104(2); see also Law on Civil Registers, Art. 19.7

127 Art. 104(3); see also Article 19.6 of the Law on Civil Registers

128 Law on Civil Register, Art. 19.9-10

129 Family Law, Art. 111

130 Family Law, Art. 339

131 Family Law, Art. 337

Only boys 16 years of age or older may recognise paternity.<sup>132</sup> Recognition of paternity has no legal effect without the consent of the mother, and the consent of the child, if he or she is 16 years of age.<sup>133</sup> A man whose recognition of paternity is not accepted by the mother or the child may take legal action to confirm paternity.<sup>134</sup>

It is a crime to substitute one child for another, or to illegally alter the 'family status' of a child.<sup>135</sup>

Information about adoption is confidential, but adopted children have the right to information about their adoption and their birth parents when they reach the age of majority.<sup>136</sup>

These provisions of the legislation of Kosovo appear to be in harmony with the international standards.

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132 Art.102

133 Art.106 and 107 (The consent of the child may be given by the child's custodian if the child's mother is missing or dead, or if the child lacks capacity to act.)

134 Art.108(1)

135 Criminal Code, Art.248

136 Family Law, Art.194(2)



## 5. Family unity

This chapter covers the rights recognised in articles 9, 10 and 11, as well as the provision of article 7 that recognises the right of children to be “cared for” by their parents “as far as possible.” Article 9 of the Convention provides:

... “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”

It also provides that children who are separated from one or both parents have the right to maintain personal relations and direct contact with both parents, unless such contact would be contrary to the child’s best interests, and that all interested parties shall be given an opportunity to participate in the proceedings on separation of children from their parents and related matters (e.g. custody, visitation rights).

When parents and children live in different States, article 10 of the Convention recognises the right of the children to maintain personal relations and direct contact with their parents on a regular basis.<sup>137</sup> Accordingly, applications by a child or his or her parents to enter or leave a State for the purpose of family reunification must be dealt with “in a positive, humane and expeditious manner.”<sup>138</sup>

Article 9.4 concerns the special situation of children and parents separated by a State action, such as detention, imprisonment, deportation or death. In these circumstances the State has an obligation to provide any concerned family member with information on the whereabouts of absent members of his or her family, unless that information would be harmful to a child.

Article 11 concerns another special issue, the illicit transfer or non-return of children who have been taken to a different country than the county of a parent. This article is intended primarily to cover the taking or retention of a child by a parent, in violation of the applicable law concerning custody of the child. (The taking of children for purposes of sale or exploitation is covered by article 35 of the Convention, and Ch. 13 of this report.)

The lack of any restriction on parental abandonment of children by placement in care is a gap in article 9 of the Convention, which applies only to removal of children from parental care “without their [i.e. parental] consent.” The UN Guidelines for the Alternative Care of Children help to fill this gap: Guideline 43 states that, when parents indicate that they wish to abandon a child, they should give “counselling and social support to encourage and enable them to continue to care for the child.”<sup>139</sup> (Legislation concerning alternative care is analysed in Ch.11, below.)

137 Art.10.2

138 Art.10.1

139 Guideline 43

## a. constitutional and legislative recognition of the right of children not to be separated from their parents unless separation is necessary in the best interests of the child

The Constitution of Kosovo recognises that “Every child enjoys the right to regular personal relations and direct contact with parents, unless a competent institution determines that this is in contradiction with the best interest of the child.”<sup>140</sup>

Issues concerning family unity are regulated mainly by the Family Law and the Law on Social and Family Services. The Family Law recognises the principle that “Children have the right to grow up in a family with parents.”<sup>141</sup> One article of this law provides that no child may be removed from the care of his or her parents or legal guardian without their permission, or a court order; another states “Minor children may live separately from their parents only if the common interests of children and parents require so.”<sup>142</sup>

The placement of children with parental permission is regulated by the Law on Social and Family Services:

In exceptional circumstances, when a professional assessment of a child’s ... needs indicates that he or she would benefit from being provided with social care or counselling away from home, and the parent or parents or caretaker make[s] and application for this, and the child has been consulted in the matter and his wishes taken into consideration, then the child may be placed by the CSW in a place other than his home.<sup>143</sup>

The parents may take the child back home at any time.<sup>144</sup> If the child does not consent, a court order is required for placement.<sup>145</sup> The requirement of a professional assessment and for taking the child’s views into account, as well as recognition that this measure should be exceptional, are positive requirements that make this procedure compatible with international standards. Nevertheless, given the vulnerability of a child in this situation, it would be advisable to establish standards to ensure that consent is informed and freely given.

The Family Code provides that parents are to be deprived of custody if they “abuse the exercise of parental rights or seriously neglect the exercise of parental obligations.”<sup>146</sup> The core definition of parental rights and obligations is “to ensure emotional, social and material welfare of the child, by looking after the child, preserving personal relations, providing proper growth, education, vocational training and administration of property.”<sup>147</sup> In so doing, the “inclinations and desires” of their children must be taken into account.<sup>148</sup>

Parents also have obligations to represent their children legally, to facilitate the active participation of children with disabilities in social life, and to protect children from the illegal drug use, sexual abuse and exploitation, economic exploitation, trafficking, and any activity that could be hazardous to their education or health.<sup>149</sup> Neglect of these obligations thus also could also lead to loss of custody.

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140 Art.50.5

141 Arts.125 (1); see also Art.126 (1) (“Minor children have the right to life with their parents.”)

142 Arts. 148(1) and Art.126, respectively. Art.10.3 of the Law on Social and Family Welfare provides that “Except in the case of short term emergency measures, a child shall not be removed from this care of his parent or parents or care giver without their permission or an Order of the court.”

143 Art.11.4

144 Ibid

145 Ibid

146 Family Law, Art.149.1

147 Art.128(4)

148 Art.128(5)

149 Art.125, 128(3) and 133

The Family Law expressly provides that children may not be placed because of the financial situation of parents, but rather “The family shall first be supported by all means of social welfare.”<sup>150</sup> Responsibility for providing social services to families with children is governed mainly by the Law on Social and Family Services, which mandates Centres for Social Work are mandated to provide social care and counselling to “children in need.”<sup>151</sup>

The grounds for removal of children from parental care recognised by the Law on Social and Family Services are different:

Only in circumstances where there are grounds to suspect that a child is experiencing serious harm to his physical or mental health, or is at the risk of such within his family can consideration be given to removing him or her from the care of his parents or parent or other care giver.<sup>152</sup>

Their scope of application is not identical, however. Article 10.2 of the Law on Social and Family Services applies to the action of CSWs, including urgent interventions, while article 149 of the Family Law indicates the criteria to be applied by legal proceedings. Although these provisions are largely in harmony with international standards on the separation of children from their parents, it would be desirable to amend both laws to recognise that removal from the family should be a last resort. Even if the danger to a child is serious, it may be possible to protect the child by other measures, such as issuing a protective order, or even placing criminal charges and detaining an accused perpetrator.

## b. legislative recognition of the right of children to be heard in proceedings concerning the separation from parents

The views of the concerned child must be taken into account in placement proceedings based on a parental request, as indicated above. Indeed, placement on parental application must be approved by a court, if the child does not consent.<sup>153</sup> When the CSW seeks a court order approving removal of a child from his or her home to protect the child, the court must “pay particular regard to the ascertainable wishes and feelings of the child concerned.”<sup>154</sup>

These provisions of the law in force are in harmony with articles 9.2 and 12.2 of the Convention.

## c. legislative recognition of the right of children to contact with their parents

Article 9 of the Convention, as mentioned above, recognises the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, unless contact would be contrary to the child’s best interests.

The Family Law recognises the right of children not living with both of their parents to regularly meet the parent with whom they are not living.<sup>155</sup>

When children are in alternative care, their parents should agree on how to maintain

150 Art.203(4)

151 Art.9.3

152 Art.10.2

153 Law on Social and Family Services, Art.11.4

154 Ibid, Art.10.15a)

155 Art.125(2)

personal contact with the child; if they cannot reach agreement, the competent court will decide.<sup>156</sup> Foster parents have an obligation to facilitate visits by the parents of the child in foster care, unless the guardianship authority has decided otherwise in order to safeguard the child's welfare.<sup>157</sup>

These provisions of the law are largely in harmony with the right recognised by article 9 of the Convention, but it would be desirable to expressly recognise the right of children in institutional care to maintain contact with their parents and other relatives. This could be done by an amendment to the Family Law, by the adoption of a law on children in institutional care, or a comprehensive law on child rights.

#### d. the right of children and parents separated by State action to information on the whereabouts of family members

No law expressly recognises this right, although legislation on the right of persons arrested or detained to contact a lawyer in effect provides family members with information on parents or children separated from their family for that reason.

This is a right that it would be appropriate to recognise in a comprehensive law on the right of children.

#### e. legislative recognition of the right of children and parents living in different States to have contact

The Hague Convention on Civil Aspects of International Child Abduction contains, in addition to provisions concerning the return of children held by persons not having legal custody, an article concerning arrangements concerning the enforcement of a parent's right of access to a child in the custody of another State.<sup>158</sup> Article 17 of the Kosovar Law on Civil Aspects of International Child Abduction is substantially identical to the relevant article of the Hague Convention. Neither The Hague Convention nor the Law apply to children 16 or 17 years of age.<sup>159</sup> However, although the Law is obviously based on the Convention and one article provides that it should be interpreted and applied "in accordance with" it, the operative provisions of the Law do not refer to it. In principle, then, the operative provisions of the law could be applied to children 16 or 17 years of age, provided that other concerned States agrees to cooperate, when necessary. Consideration consequently should be given to amending the law to expand its coverage to all children under 18 years of age.

Legislation also should be adopted recognising and regulating the right of children 16 and 17 years of living in Kosovo to maintain personal contacts with parents living abroad.

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<sup>156</sup> Art.145 (This does not apply to contact between adopted children and their birth parents. Art.201)

<sup>157</sup> Art.208(2)

<sup>158</sup> Art.21

<sup>159</sup> Art.4 and Art.2.1.1, respectively

## f. the duty to take measures to prevent the illicit transfer or non-return of children abroad

Article 249 of the Criminal Code of Kosovo makes it a crime to “unlawfully take, keep or abduct a child from a parent, an adoptive parent, a guardian or another person who exercises parental rights over the child or take, keep or abduct a child from an institution to which the child has been entrusted or prevent the execution of a binding decision by a competent authority for entrusting the child to another person or institution...” Although this article makes no reference to taking or retaining children in another country, it is an appropriate measure for preventing any illicit transfer or non-return of a child, through deterrence.<sup>160</sup>

The Hague Convention on the Civil Aspects of International Child Abduction does not establish any obligations regarding prevention. However, recommendations on prevention have been adopted by the Hague Conference on Private International Law, which coordinates implementation of the Convention. They include the promotion of voluntary agreements and facilitation of mediation concerning custody and contact.<sup>161</sup> The legislation in force provides for measures of this kind, as indicated in Ch. 1.

Measures related to international travel also are recommended, including the adoption of legislation or regulations that establish conditions for removal of children from the national territory and the entry of children into the national territory that require them to have their own identification or travel document and the consent of both parents unless, due to special circumstances, the consent of a single parent or guardian is legally sufficient.<sup>162</sup> Competent authorities also should be authorized to take urgent preventive measures when there are reasons to believe that a child may be removed from or brought into the territory illegally.<sup>163</sup>

The Law on Travel Documents provides that a child under 14 years of age may travel abroad with “his parents, legal representative or with their permission any other person.”<sup>164</sup> Permission also may be given by the CSW, if the child is in foster care or the child’s legal representative is unavailable.<sup>165</sup> The Law also provides that children who have reached the minimum age for employment – 15 years – may request a passport, and that passports for children who have not reached that age may be requested on behalf of the child by his or her legal representative.<sup>166</sup> These provisions fall short of the kind of preventive measures recommended by the Hague Conference.

The law should be amended to bring it into greater harmony with them, in particular by adding an express requiring the permission of both parents for a child to travel abroad – even when accompanied by one parent – and to require that parental permission be required for children 15 to 18 to travel abroad unaccompanied.

There does not appear to be any legislation that would prevent the entry into Kosovo of a parent with a child, in violation of custody agreements or orders in force in the child’s country of residence. This gap in the legislation should be filled.

160 Guide to Good Practice under the Hague Convention on the Civil Aspects of International Child Abduction, Part III, Preventive Measures, Jordan Publishing Ltd, Bristol, 2005, pp.13-14

161 Ibid, p.15-16; see also the Council of Europe Convention on Contact concerning Children (2003), Art.7

162 Ibid, pp.8-10

163 Ibid, pp.21-31

164 Art.9.1

165 Art.9.1

166 Art.22.2-22.3

## g. the return of children abducted or illegally retained

The Hague Convention on Civil Aspects of International Child Abduction and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children both set forth procedures to be followed by States Parties when a child has been taken from a person having legal custody and transported to another State, or has been transported to another State legally but retained there in violation of the rights of parent or guardian having legal custody over the child. Both Conventions apply only to children under the age of 16.<sup>167</sup>

The authorities of a State where a child has been taken or is being retained wrongfully must, on request, cooperate in locating and returning the child.<sup>168</sup> The child need not be returned, however, if there is a grave risk that return would expose the child to physical or psychological harm, or if the child objects to being returned and the authorities find that she or he has "attained an age and degree of maturity at which it is appropriate to take account of its views."<sup>169</sup>

Kosovo has adopted a Law on the Civil Aspects of International Child Abduction intended to bring the national law into compliance with the Hague Convention of the same name. Like the Hague Convention, the Law applies only to children under 16 years of age. It provides that, if a request for return of a child taken or retained unlawfully in Kosovo is received, the Ministry of Justice shall attempt to bring about the voluntary return of the child, and if this effort does not succeed, it shall take legal action, and the court is obliged to priority to the case.<sup>170</sup> Article 12 recognises an exception to the obligation to return a child to the person having lawful custody, if there is a grave risk that doing so would expose the child to physical or psychological harm, would "place the child in an intolerable situation," or if the child objects to return and the court finds he or she has a degree of maturity that makes it appropriate to take his or her views into account.<sup>171</sup>

These provisions of the law of Kosovo are in harmony with the requirements of the Hague Convention, and consideration should be given to depositing a declaration of accession or succession to the Hague Convention, in order to establish a legal framework for cooperation with the Contracting States. The Law on Civil Aspects of International Child Abduction also should be amended to cover children 16 and 17 years of age.

<sup>167</sup> Hague Convention Art.4; European Convention Art.1.1 and 1.4

<sup>168</sup> Hague Convention Art.7 a), c), f) and h) and Art.10; European Convention Art.5.1.a

<sup>169</sup> Art.13

<sup>170</sup> Art.7-8

<sup>171</sup> Art.12.2-3

## 6. The right to health

Article 24 of the Convention recognises the right of children to health and health care. The corresponding obligations of States include:

- to ensure appropriate pre-natal and post-natal health care for mothers;<sup>172</sup>
- to develop preventive health care and family planning services, and take steps to diminish infant and child mortality;<sup>173</sup>
- to ensure the provision of necessary medical assistance and health care to all children through the development of primary health care;<sup>174</sup>
- to combat disease and malnutrition and ensuring access to nutritious food and clean drinking-water;<sup>175</sup>
- to ensure access to education including knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation, the prevention of accidents and family planning.<sup>176</sup>
- to take measures against traditional practices prejudicial to the health of children.<sup>177</sup>

The Committee on the Rights of the Child has indicated that the promotion and protection of breastfeeding is one of measures that should be taken to reduce infant mortality.<sup>178</sup> It also recommends the provision of health care within schools, and urges States to make investments in measures for early detection and treatment of psychosocial, emotional and mental problems in children.<sup>179</sup>

The Committee's recommendation concerning legislation on health is worth citing at some length:

National laws should place a statutory obligation on the State to provide the services, programmes, human resources and infrastructure needed to realize children's right to health and provide a statutory entitlement to essential, child sensitive, quality health and related services for pregnant women and children irrespective of their ability to pay. ...

Legislation should fulfil a number of additional functions in the realization of children's right to health by defining the scope of the right and recognizing children as rights-holders; clarifying the roles and responsibilities of all duty bearers; clarifying what services children, pregnant women and mothers are entitled to claim; and regulating services and medications to ensure that they are of good quality and cause no harm. ...<sup>180</sup>

The Committee also recommends that States "Legislate for a specific proportion of public expenditure to be allocated to children's health..."<sup>181</sup>

172 para.2(d); see also Art.12.2 of CEDAW

173 para.2(a) and (f)

174 para.2(b)

175 para.2(c)

176 para.2(e) and (f); see also Art.12.1 of CEDAW

177 para.3 (There is no definitive list of traditional practices prejudicial to the health of children. Examples include child marriage and "honour killings." UN General Assembly Resolution 55/66 (2000) and report of the Secretary General on Traditional Practices affecting the Health of Women and Girls, A/5/316, 2001, para.12

178 General Comment No.15 On the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, 2013, para.35 and 44

179 Ibid, para.36 and 38

180 para.94-95

181 para.106(a)

A list of factors that make health care services 'child-friendly' was published by the UN Population Fund in 2003. It includes:

- staff are specially trained
- convenient hours and location
- adequate space and comfortable surroundings
- separate space or times set aside for children and adolescents
- respect for privacy and confidentiality
- adequate time for interaction with clients
- short waiting time, drop-in clients accepted
- low fees
- wide range of services, including referrals, are available
- publicity and outreach is addressed to children and adolescents
- peer counsellors are available<sup>182</sup>

Article 23 of the Convention provides that children with disabilities have the right (among others) to the health care and rehabilitation services they need, adding that, when possible, such care shall be provided free of charge.<sup>183</sup>

Article 25 of the Convention provides that children who have been placed by the authorities in a facility for the treatment of physical or mental health have the right to periodic review of the treatment received and "other circumstances relevant to his or her placement."

Article 33 of the Convention requires States to "take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties..."

Article 39 of the Convention provides that victims of neglect, exploitation, abuse, torture or ill-treatment and armed conflicts have the right to assistance that promotes their physical and psychological recovery (as well as social integration), and specifies that assistance must be provided in an environment that fosters the child's dignity and self-respect, as well as health.

## a. constitutional and legislative recognition of the right to health

The Constitution of Kosovo does not recognise a right to health or to health care, although it does provide that "Healthcare and social insurance are regulated by law." It does recognize the right of every person to physical and psychological integrity, which is defined to include:

- the right to make decisions regarding reproduction
- the right to control his/her body
- the right not to undergo medical treatment without consent
- the right to not participate in medical or scientific experimentation without consent<sup>184</sup>

A right to health care is recognised by the legislation. Article 4 of the Law on Health provides that "All the citizens and residents have the right to equal access in [sic] healthcare."<sup>185</sup> It

<sup>182</sup> State of World Population 2003, p.42

<sup>183</sup> see also Art.25(a) of the Convention on the Rights of Persons with Disabilities

<sup>184</sup> Art.26(1)-(4), respectively

<sup>185</sup> Art.4.2



also provides that the Law shall be implemented in “full compliance” with the rights recognised by international treaties in force in Kosovo by virtue of the Constitution, which include the Convention on the Rights of the Child.<sup>186</sup> Similarly, the Law on Rights and Responsibilities of Citizens in Health Care provides:

Every citizen is entitled to the health care that is conditioned by [sic] his state of health. The health care should be adequate and continuously accessible to all without discrimination.<sup>187</sup>

‘Citizen’, for purposes of this law, is defined to include lawful residents, refugees and foreign victims of trafficking.<sup>188</sup>

Patients are entitled to consult and be treated by the physician of their choice.<sup>189</sup> In principle, they also are entitled to health care abroad, if the treatment they need is not available in Kosovo.<sup>190</sup> The Law on Health provides that the poor and ‘socially-vulnerable’ are exempt from co-payment for health care.<sup>191</sup> Children under 12 years of age have the right to be accompanied by a parent or other person during a hospital stay.<sup>192</sup>

These provisions of the law are in harmony with international standards on the right to health.

## b. primary health care

Primary health care is essential health care that is available to all persons, at every stage in their development, at a price that they can afford.<sup>193</sup> It covers preventive, curative and rehabilitative services for the main health problems that affect a given society or community, including immunization against the major infectious diseases, prevention of other common diseases, appropriate treatment of common diseases and injuries, and access to essential drugs.<sup>194</sup> In a recent comment on the right to health, the Committee on the Rights of the Child has commented that “This approach emphasizes the need to eliminate exclusion and reduce social disparities in health; organize health services around people’s needs and expectations; integrate health into related sectors; pursue collaborative models of policy dialogue; and increase stakeholder participation, including the demand for and appropriate use of services.”<sup>195</sup>

The provisions of the Law on Health concerning primary health care are largely in harmony with international standards. The Law indicates that primary health care includes prevention and early detection and diagnosis, including systematic check-ups of children in primary and secondary schools, and vaccinations.<sup>196</sup> It is to be provided by family doctors, family health centres and family medicine teams.<sup>197</sup> Responsibility for developing operational plans concerning primary health care and delivery of primary health services lies mainly with the municipalities.<sup>198</sup> Primary health care facilities are to cooperate with

<sup>186</sup> Art.4.1

<sup>187</sup> Art.4.1

<sup>188</sup> Art.2.1.a

<sup>189</sup> Art.5.1; see also Law on Health, Art.18.8-9

<sup>190</sup> Art.4.14

<sup>191</sup> Art.61.1; Art. 61.2 specifically exempts victims of trafficking, repatriated persons during the first year of repatriation, prisoners serving sentences, victims of domestic violence not living at home and blood donors. See also Art.65.6.1 and Art.68.2.1

<sup>192</sup> Art.74-5

<sup>193</sup> Declaration of the Alma-Ata International Conference on Primary Health Care, 1978, para.VI

<sup>194</sup> Ibid, para.VII.2

<sup>195</sup> General Comment No.15, supra, para.4

<sup>196</sup> Art.18.2.1-3 Legislation on education also contains provisions on health services. e.g. Law on Pre-university Education, Art.7.3.3,

<sup>197</sup> Art.17.2, Art.18.3-5

<sup>198</sup> Art.10.6, Art.18.4

the social welfare and education sectors, as well as non-governmental organisations.<sup>199</sup> Prescriptions for most medications must use the generic name of the drug.<sup>200</sup>

Although the legislation framework concerning primary health care is largely in harmony with the relevant international standards, it does not establish any mechanisms that would allow patients and other clients of the health system to express their needs, expectations or concerns about the services available. Consideration should be given to the adoption of norms that would give stakeholders, including children and adolescents, the opportunity to express their views and participate in development of health care policies, and in the delivery of services.<sup>201</sup>

### c. pre- and post-natal care and infant mortality

The Law on Health recognises the right of “any female” to “safe motherhood.”<sup>202</sup> This includes the right of women to free advice regarding conception, and to free health care during pregnancy, childbirth and the first six weeks after giving birth.<sup>203</sup> The newborn child also has the right to free medical care “at the highest possible level.”<sup>204</sup>

After delivery, mothers have a right to be hospitalised in the same room as their newborn child.<sup>205</sup> This measure is recommended internationally as a means of encouraging breastfeeding.<sup>206</sup>

The Committee on the Rights of the Child considers that States have an obligation to incorporate the International Code of Marketing of Breast-milk Substitutes into their national law.<sup>207</sup> In Kosovo, the Law on Infant’s Breastfeeding Incitement and Protection is based and in harmony with the International Code adopted by the World Health Assembly in 1981.

The International Labour Convention No.183 on Maternity Protection provides that States should ensure that pregnant and breastfeeding workers are not obliged to do work that involves a significant risk to the health of the mother or child, and that mothers have the right to breaks or reduced hours to enable them to breastfeed, with no reduction in pay.<sup>208</sup> Articles 12 and 13 of the Law on Infant’s Breastfeeding, as well as article 47 of the Law on Labour, protect breast-feeding women from employment in conditions that are dangerous for the health of her child. Women who are employed and who are breastfeeding during maternity leave also may not be dismissed by their employer, and if their employment is terminated they are entitled to 6 months salary or wages.<sup>209</sup> Neither law, however, recognises the right of nursing mothers to breaks or reduced hours, nor should consideration be given to amending the law to recognise this right.

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199 Art.18.11

200 Art.26.1

201 e.g. through peer counselling/public awareness on issues such as violence, substance abuse or reproductive health

202 Art.7

203 Art.8.1.1-4; see also Art.10-11

204 Art.8.1.5 and 10; see also Art.11

205 Art.7.5

206 See e.g. the Baby-Friendly Hospital Initiative, UNICEF-WHO, 1991

207 General Comment No.15, *supra*, para.44

208 Art.3 and 9, respectively

209 Law on Infant’s Breastfeeding, Art.14

## d. family planning and reproductive health

The Committee on the Rights of the Child recommends that health systems “meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services.”<sup>210</sup> The Law on Reproductive Health recognizes the right of every individual, regardless of sex, to “information and education for sexual and reproductive health during all his/her life cycle.”<sup>211</sup> Another provision of the law indicates that “teenage and young people” should have access to “the highest possible level of sexual and reproductive health care.”<sup>212</sup> Recognising the special needs of adolescent children to sexual and reproductive health care services is in harmony with international standards on the right to health, provided that information and education is made available to pre-adolescent children as well. Pre-adolescent children are not excluded from the provisions of the law concerning HIV/AIDS and reproductive health services in an emergency.<sup>213</sup>

This Law also recognizes the right of each individual to make decisions on reproductive rights freely, without any discrimination or violence, and the right to request medical advice, examination, treatment and rehabilitation concerning sexual and reproductive health.<sup>214</sup> These provisions of the Law on Reproductive Health are in harmony with international standards.

This Law recognizes the right to assisted reproduction, as a right of couples.<sup>215</sup> Failure to recognise the right of single women to assisted reproduction may be considered to discriminate on grounds of social status, when there is evidence that a single women would be able to care for a child. Consideration therefore should be given to amending the relevant provisions of this law.

The law on termination of pregnancy provides that “Each female has the right to decide freely on the termination of pregnancy according to the criteria defined by this law.” There are no restrictions on abortions during the first 10 weeks of pregnancy.

Women wishing to terminate a pregnancy are obliged to consult a medical doctor 3 days before the intervention, and the doctor is obliged to provide her with information about the medical and emotional risks, and about the rights and support to which mothers, children and families are entitled.<sup>216</sup>

Termination of pregnancy can be carried out beyond 10 weeks for medical or ‘criminological’ reasons. It may be performed at any time if a medical commission determines that continued pregnancy endangers the life or health of the pregnant woman, or that the foetus has serious disabilities.<sup>217</sup> It may be performed within 22 weeks if the competent authorities determine that the pregnancy is the result of rape, incest, sexual relations between juveniles, trafficking, or forced sexual exploitation.<sup>218</sup> Selective abortion based on the sex of the embryo is prohibited.<sup>219</sup>

International norms on the circumstances in which legislation should allow abortion, either in terms of the stage of pregnancy or the reasons for termination, are not clear. Two things are clear, however: that selective abortion based on the sex of the foetus constitutes discrimination, and that the law should allow abortion when continued pregnancy endangers the life of the pregnant woman or the foetus has serious disabilities.<sup>220</sup> The

210 para.56; see also para.69-70

211 Art.4.1

212 Art.31.1; see also Art.29.3

213 Art.29.10-11

214 Art.4.3, Art.6.1

215 Art.18-19

216 Art.5.3 and 8.1.1-2; see also Art.11.2

217 Art.15

218 Art.16

219 Art.14; see also Law on Reproductive Health, Art.23.9

220 Report of the Special Rapporteur on Violence Against Women, its causes and consequences, A/HRC/20/16 (2012),

provisions of the Law on these two points are in harmony with international standards.

Article 5.2 of the Law provides that pregnant persons between 16 and 18 years of age have the right to request termination of pregnancy only with the consent of their parents or legal guardian. The Committee on the Rights of the Child has recently indicated:

States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services. States should work to ensure that girls can make autonomous and informed decisions on their reproductive health.<sup>221</sup>

States should ... consider allowing children to consent to certain medical treatments and interventions without the permission of a parent ... including ... safe abortion.<sup>222</sup>

The Committee's recommendation does not necessarily mean that girls 16 or 17 years of age should be able to request an abortion without parental consent. However, the law would be more compatible with the rights of the child if it provided more guidance on how decisions should be made in the event an adolescent girl wishes to request an abortion, and her parents do not agree. The principle that the views of a child must be given due weight, that the best interests of the child should be a prevailing consideration in all decisions taken that affect a child, and the potential for conflicts of interest between a child and her parents, all suggest the parental consent should not always be required but rather, in certain circumstances, parental non-consent should lead to the intervention of an independent authority competent to take the final decision as to whether the child's request should be respected.

Similarly, the law should be amended to address the sensitive issue of requests for an abortion concerning girls under 16 years of age. The lack of legal capacity to consent to sexual relations does not prevent pregnancies, whether based on un-coerced relations with peers, incest, or sexual abuse or exploitation.<sup>223</sup> The law cannot ignore the problem of pregnancies of younger girls, especially since younger a girl is the greater the health risks of child-bearing to both mother and child.

## e. children with disabilities

The Law on Health recognises the importance of ensuring easy access to health facilities for persons with disabilities. It also recognises the principle that "treatment, psychosocial rehabilitation and re-socialisation" of persons with special needs shall take place in the community.<sup>224</sup> The Law on Social and Family Services Persons contains some provisions on persons (of any age) with physical or mental disabilities who are "in need of social services," but there is no other legislation or secondary legislation on health care of children with disabilities.

In addition to the important rights recognised by the Law on Health, legislation should recognise the fundamental right of all children with disabilities to receive appropriate health care and rehabilitative services, in a child-sensitive environment. The obligation of the competent authorities to review periodically the treatment of all children placed in institutions for purposes of treatment or rehabilitation also should be recognised law.

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para.78-79; Human Rights Committee, Views on Communication No.1153/2003 (2005)

221 General Comment No.15, supra, para.56; see also para.31, which contains a

222 Ibid, para.31

223 Only persons 16 years of age may consent to sexual acts under Art.228.2 of the Criminal Code.

224 Art.12.1.9

## f. nutrition

Article 24 of the Convention on the Rights of the Child, as indicated above, indicates that the right to health includes access to nutritious foods.

Iron deficiency is one of the most pervasive nutritional problems in the world. It is particularly dangerous in pregnant women, where it increases the risk of birth defects and maternal death. Where foods rich in iron are not readily available to the whole population, fortification of flour is the preferred way of preventing iron deficiencies. In 2012, a Law on Flour Fortification requiring flour to be fortified was promulgated by presidential decree in Kosovo. This law is in harmony with international standards on the right to health.

Obesity and excess weight is a growing public health issue, and the fifth cause of death globally. In 2010 the World Health Assembly approved Recommendations on the Marketing of Food and non-Alcoholic Beverages to Children, which aims to reduce the consumption by children of foods high in saturated fats, trans-fatty acids, and free sugars and salt. The recommendations call on governments to adopt and implement policies to reduce the marketing and importation of such foods. Consideration should be given to adopting legislation and policy based on these recommendations.

The Criminal Code of Kosovo makes it a crime to sell or distribute food products or drinks that are harmful to health, and to pollute drinking water or food products.<sup>225</sup> This provision of the Code is in harmony with international standards on the right to health.

## g. alcohol, tobacco and drug consumption

The Committee on the Rights of the Child recommends that “States should protect children from solvents, alcohol, tobacco and illicit substances... take appropriate measures to reduce the use of such substances among children [including] regulation of the advertising and sale of substances harmful to children’s health.” It has not, however, expressly recommended the prohibition of the sale of alcohol to children below any specific age.

The Criminal Code of Kosovo makes it a crime for commercial establishments to serve alcohol to persons under 16 years of age. This is a positive response to this recommendation designed to protect children’s right to health. Consideration nevertheless should be given to amending this article to cover the sale of alcohol as well as serving alcohol.

The Committee on the Rights of the Child considers that States have an obligation to incorporate the WHO Framework Convention on Tobacco Control into their national law.<sup>226</sup> Although the Preamble to the Convention makes several references to children, the operative provisions contain no standards applicable specifically to them.

Article 10 of the 2013 Law on Tobacco Control provides in part:

1. No person is allowed to sell tobacco to minors.
2. No minor person is allowed to sell tobacco.
3. No person is allowed to employ a minor child to sell tobacco products.
4. The retailers of tobacco products are obliged to place on their sales points the signed for the prohibition of sale of tobacco products to persons younger than 18 years of age.
5. No person is allowed to sell:

<sup>225</sup> Art.267, 270-271

<sup>226</sup> General Comment No.15, supra, para.44

- candy, toys and other products dedicated to children, which have the form of any tobacco product;
- products that are not tobacco products but have the name of the tobacco manufacturer, or the name of any type of tobacco product or trademark, logo or similar signs which associate [sic] to the tobacco product.

Article 13 of the Law requires the Ministry of Education to prepare a curriculum that informs and warns children of the dangers of tobacco consumption.<sup>227</sup> The Law also provides that, amongst the warnings that may be printed on packages or tobacco products are “Smoking by pregnant women damages the growth of the child” and “Let’s protect our children: don’t let them inhale the smoke of your cigarette.”<sup>228</sup>

Thanks to these provisions, the Law on Tobacco Control provides children with more protection against tobacco use than is required by international standards.

This law does not define the term ‘minor’, however, which some other laws define to mean children between 14 and 18 years of age.<sup>229</sup> It would be advisable to amend the Law on Tobacco Control to clarify that the article 10 applies to all persons under 18 years of age.

Article 33 of the Convention, as indicated above, requires States to “take all appropriate measures... to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties...” The relevant treaties include the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances.<sup>230</sup> The numerous drugs covered by these treaties include cannabis, cocaine, opiates, LSD, mescaline, amphetamines and barbiturates.

The Criminal Code of Kosovo prohibits the sale, purchase, importation, production, cultivation, transportation, distribution, possession and administration of narcotic and psychotropic drugs, as well as the financing, management and organisation of such activities.<sup>231</sup> The sentences for these crimes are increased if the victim is a child, or if the crime takes place in proximity to a school or other locality used by children.<sup>232</sup>

The Committee on the Rights of the Child “underscores the importance of adopting a rights-based approach to substance use...”<sup>233</sup> The Law on Health recognises the prevention, detection and treatment of “drug addiction” as part of the health care system.<sup>234</sup> No legislation regulates the treatment of addiction or substance abuse, however.

Legislation should be amended or adopted to recognise certain basic principles concerning the treatment of children with drug addiction or other substance abuse syndromes, including the right to treatment specifically designed for persons their age, and the principle that treatment shall be provided in a closed setting only as a last resort and only with the consent of those concerned or a court order.

## h. health education

The Law on Health recognises the development and participation in information campaigns and other projects to increase public awareness and compliance with health standards as one of the functions of the Ministry of Health.<sup>235</sup> This and other functions are to be carried out in accordance with strategic, mid-term and operational plans.<sup>236</sup> Operational plans for

227 Art.13.4.3

228 Art.6.3.2, which lists 11 warnings, one of which must be printed on packages of tobacco products.

229 Code of Criminal Procedure, Art.19.1.17; Criminal Code, Art.120.21

230 Committee on the Rights of the Child, General Comment No.15, supra, note 17

231 Art.273-279

232 Art.281.1.4, 281.2.7

233 General Comment No.15, supra, para.66

234 Art.12.1.6

235 Art.9.1.9; see also Art.12.1.1

236 Art.10.2

the development of primary health care are to be developed by the municipalities.<sup>237</sup> No recommendations on health education are needed, other than the one made above regarding reproductive health education for children.

## i. mental health

Article 18 of the Law on Health indicates that mental health services form part of primary health care.

The Law on Social and Family Services covers persons with mental illness or disability, as well as persons addicted to drugs or alcohol, who are “in need of social services.”<sup>238</sup> Centres for Social Work have an obligation to provide “social care and/or counselling” to children with mental or physical disability or illness” and “behavioural difficulties”<sup>239</sup> However, responsibility for funding CSW lies with municipalities, and the Law also indicates that the provision of “specialist counselling services for people with addiction or other psycho-social problems” is a discretionary “additional” service.<sup>240</sup>

This Law has a strong child protection orientation, and mental health problems are seen primarily from the perspective of child abuse.<sup>241</sup> Article 11.4 provides that children may be placed by the CSW “in a place other than his home” at the request of his or her parents, if the CSW concludes that the child “would benefit from being provided with social care or counselling away from home.” The views of the child must be heard, and if the child is 14 years of age or older and does not consent, a court order is required for removal from parental care. The only provisions of this law that refer expressly to placement in a mental health facility apply to adults.<sup>242</sup>

The Law also is oriented, to a lesser extent, to the prevention of offending by children. Article 10.4 provides that the CSW must undertake without delay a comprehensive professional assessment of a child’s need for social services when the child is “beyond the control of his parents ... to the extent that their behaviour or lifestyle poses a serious risk to their own welfare, health or safety, or that of others.”<sup>243</sup> This is nothing wrong with this requirement as such, but children with behavioural problems should have access to psycho-social assistance long before they reach the point where their behaviour represents a serious threat to themselves or others.

These provisions of the Law on Social and Family Services are not in harmony with the right of children to receive mental health services. One gap is the failure to recognise the right of children with mental disorders to appropriate treatment. While children who are victims of child abuse or other forms of violence have a right to “physical and psychological recovery and social reintegration”, a concept that includes social services, the right of children with mental disorders to treatment is broader. The lack of norms and criteria specifically on the placement of children in residential facilities that provide mental health care is another gap.

These gaps and related issues should be addressed by the amendment of existing legislation, or the adoption of new legislation specifically on the issue of mental health of children.

237 Art.10.6

238 Art. 1.3.7, 1.3.8 and 1.3.12

239 Art.9.3.c-e

240 Art.6.7d

241 See Art.10, esp. para.2, 7 and 10-20

242 Art.13

243 Art.10.8

## j. consent and confidentiality

Although the Constitution provides that, in principle, health care must be based on consent, the Law on Rights and Responsibilities in Health Care provides that interventions “necessary for the health care of the citizen may be performed... without ... consent.”<sup>244</sup> Another broad exception allows personal freedom to be restricted during medical treatment in order to protection of the life, safety and health of the patient or others.<sup>245</sup> Article 10 and 11 of the Law contains standards on how decisions on medical treatment may be made, but the Law does not contain any provisions specifically concerning the consent of children, or their right to express their views about treatment and to have them taken into account.<sup>246</sup>

The law recognises the right of patients to be informed, and contains a relatively detailed list of information to which they are entitled.<sup>247</sup> Information must be provided in a way that is understandable by the patient, taking into account his or her age and other factors.<sup>248</sup> The law also recognises the right of patients to make administrative complaints about treatment or decisions made, and to request compensation for damages.<sup>249</sup> However, there are no specific provisions on how these rights are to be exercised when the interested party is a child. Consideration should be given to filling this gap.

The detailed provisions of the law on confidentiality of information obtained in the course of treatment do not contain a specific exception for information about the physical, psychological or sexual abuse of children. The law should be amended to expressly recognise this exception.

## k. environment

The Law on Health recognises that health care includes taking measures for protection against harmful physical, chemical and biological factors in the environment.<sup>250</sup> The Criminal Code makes it a crime to pollute or degrade the air, water or soil, or to excessively use or exploit natural resources.<sup>251</sup> These provisions of the law are in harmony with international standards on the right to health.

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244 Art.6.2

245 Art.6.4; see also Art.12-13 (Art12.2.a suspends the right to refuse consent to medical treatment if non-treatment would seriously endanger a foetus beyond the 10th week of pregnancy.)

246 Some provisions of the law concern persons with no or limited legal capacity, but they appear to be intended to cover adults.

247 Art.9

248 Art.9.5; see also Art.9.4

249 Art.25-28, 30, 33

250 Art.12.1.16

251 Art.347



## 7. The right to education

Article 28 of the Convention on the Rights of the Child recognizes the right of the child to education, and the following obligations of the State:

- to make primary education compulsory and free<sup>252</sup>
- to make secondary education, including general and vocational education accessible to every child<sup>253</sup>
- to make financial assistance for secondary education available to students who need it<sup>254</sup>
- to make educational and vocational information and guidance accessible to all children<sup>255</sup>
- to encourage school attendance and to reduce drop-out rates<sup>256</sup>
- to make higher education accessible to all on the basis of ability;<sup>257</sup>

Article 28 of the Convention also requires that school discipline be administered with respect for the rights and dignity of students. Corporal punishment should not be used.<sup>258</sup>

Article 17.2 of the European Social Charter recognizes the right to free primary and secondary education.

Article 29 of the Convention on the Rights of the Child provides the education of children shall be directed to certain aims, namely:

- the development of the child's personality, talents and mental and physical abilities to their fullest potential<sup>259</sup>
- the development of respect for human rights and freedoms<sup>260</sup>
- the development of respect for the natural environment<sup>261</sup>
- the development of respect for the child's parents, cultural identity, language and values, as well as the national values of the country in which the child lives, the child's country of origin and other civilizations<sup>262</sup>
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups<sup>263</sup>

Article 29 also recognizes the liberty of individuals and bodies to establish and direct schools, provided that they serve the aims mentioned above and meet any minimum standards laid down by the relevant authorities.

Article 23 of the Convention on the Rights of the Child provides that, when possible and needed, children with disabilities should be given free assistance to ensure effective access to education that will help them achieve the fullest possible personal development and social integration.

252 para.1(a)

253 para.1(b)

254 Ibid

255 para.1(d)

256 para.1(e)

257 para.1(c)

258 General Comment No.1, The aims of education, 2001, para.8; General Comment No.8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, 2006, para.32

259 (a); see also Art.24.1(b) of the CRPD

260 (b); see also Art.24.1(a) of the CRPD

261 (e)

262 (c); see also Art.24.1(a) of the CRPD

263 (d); see also Art.24.1(c) of the CRPD

The Convention on the Rights of People with Disabilities describes this right in more detail in its article 24, which provides that

- children with disabilities should not be excluded from primary or secondary education on the basis of disability<sup>264</sup>
- children with disabilities must be provided with access to inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live<sup>265</sup>
- reasonable accommodation of the child's individual requirements must be provided<sup>266</sup>
- children with disabilities have a right to the support needed to facilitate their education, and individualized support measures should be provided in environments that maximize academic and social development, consistent with the goal of full inclusion<sup>267</sup>

Article 10 of CEDAW requires States to take measures to eliminate discrimination against girls in education, including the organization of remedial education for girls who have left school prematurely.

## a. Constitutional recognition of the right to education and overview of the relevant legislation

The Constitution of Kosovo recognises the right to education.<sup>268</sup> The most relevant legislation is the 2008 Law on Education in the Municipalities of the Republic of Kosovo ("Law on Education in the Municipalities"), the 2006 Law on Preschool Education and the 2011 Law on Pre-university Education.<sup>269</sup> Responsibility for primary, pre-primary and secondary education lies mainly with municipal governments.<sup>270</sup> Their responsibilities include the construction of schools, employment and payment of teachers, admission of students and development of Codes of Conduct for teachers and staff.<sup>271</sup> The role of the Ministry of Education, Science and Technology ("Ministry of Education") includes the development of policies and guidelines, the management of teacher certification, supervision of school management and educational administration, facilitation of the qualitative improvement and efficient delivery of educational services, the promotion of parental and community participation, and monitoring compliance with national norms, policies and standards ("inspection").<sup>272</sup>

## b. pre-primary education

Neither the Convention on the Rights of the Child nor other any other major UN human rights instrument recognises a right to pre-primary education. The Committee on the Rights of the Child has emphasised the responsibility of parents to provide education at home during the first years of a child's life.<sup>273</sup> However, the Committee also observed that "Research evidence demonstrates the potential for quality education programmes to have a positive impact on young children's successful transition to primary school, their educational progress and their longterm social adjustment." Hence, although pre-

264 para.2(a)

265 para.2(b)

266 para.2(c)

267 para.2(d) and (e)

268 Art.47 (see below)

269 The Law on Pre-university Education covers all non-university education, including pre-school, primary and secondary education. Art.1.1

270 Law on Education in the Municipalities, Art.4 Art.4.3 expressly authorised municipalities to cooperate with government agencies in the Republic of Serbia.

271 Art.5(a)-(c), (f) and (i); see also Art.8, 10

272 Art.3(a), (c), (e), (g), (k) and (l); see also Law on Pre-university Education, Art.8

273 General Comment No.7, supra, para.29

primary education is not recognised as a basic right *per se*, it can be a valuable means for supporting the child's right to development.

In Kosovo, the Law on Pre-school Education recognises access to such education as the right of all children, although attendance is not compulsory.<sup>274</sup> Pre-school education is intended for children 5 to 6 years of age, and programmes vary from 3 to 10 hours per day.<sup>275</sup> Enrolment in pre-school programmes is not free, but in principle the only fees cover food and materials, and families receiving social assistance are exempt.<sup>276</sup>

In conclusion, the legislation on pre-school education recognises a right not recognised by the international law, and is in harmony with the right to development of children in Kosovo.

### c. constitutional and legislative norms on the right to primary and secondary education

The Constitution of Kosovo recognises that "Every person has the right to free basic education," adding that "Mandatory education is regulated by law and funded by public funds."<sup>277</sup>

There are five years of primary education, which begins at 6 years of age.<sup>278</sup> Secondary education normally begins at 12 years of age.<sup>279</sup> There are 4 years of lower secondary education.<sup>280</sup> Primary and lower secondary education are compulsory and free.<sup>281</sup> Each municipality is required by law to establish at least one primary and lower secondary school.<sup>282</sup> Textbooks are to be provided free of charge.<sup>283</sup> Lower secondary education is followed by three years of upper secondary education, which is available in three different kinds of schools: vocational, academic, and music/art.<sup>284</sup>

The provision of the Law on Pre-university Education which provides that primary school education begins at age 6 is sometimes interpreted or misinterpreted as a reason to deny enrolment of children older than 6 years of age whose parents wish to enrol them for the first time. The law should be amended to ensure that children are not denied access to primary education for this reason, especially since exclusion on this ground disproportionately affects children belonging to the Roma, Ashkali and Egyptian minorities.

The authorities and the community have an obligation to make schools "attractive and safe" for students, teachers and parents, *inter alia* by dealing with behavioural and disciplinary issues.<sup>285</sup> Corporal punishment and any other form of humiliating punishment are prohibited, in public and private schools alike.<sup>286</sup> The license of a teacher convicted of an offence of violence or indecency involving children is to be withdrawn immediately.<sup>287</sup>

It is an offence for parents to not enrol a child subject to compulsory education, or to fail to ensure that such a child attends school regularly.<sup>288</sup> An Administrative Instruction calls

274 Art.6.1 and 2.4; see also Art.3.1 of

275 Law on Pre-university Education, Art.9.1.1, and Law on Education in the Municipalities, Art.21.1

276 Art.22 and 24

277 Art.47.1

278 Law on Pre-university Education, Art.9.1.2

279 *Ibid*, Art.9.13

280 *Ibid*

281 Art.9.1.3-4, Art.9.2-4; (Art.125.3 of the Family Law also recognises the right to free primary education.)

282 *Ibid*, Art.13.1

283 *Ibid*, Art.26.4

284 Art.9.1.4

285 Law on Pre-university Education, Art.3.8; see also Art.73.4

286 *Ibid*, Art.4.2

287 Art.33.11 (Persons convicted of such an offence also may not be hired to any position in a school, Art.35.7, 37.4; nor may they be involved in establishing or financing a private school. Art.44.3)

288 Art.15.2 (There is no criminal liability if a child is receiving an education out-of-school and the arrangements made by the parents are approved by the Ministry. Art.47)

for the establishment of teams for the prevention and response to school-leaving and non-enrolment in each school, and also on the municipal level.<sup>289</sup>

Teams are composed of students, parents and teachers, and are independent of the school administration. On the school level they are responsible for casework, as well as general prevention.<sup>290</sup> The Law recognises the importance of parental participation in matters concerning education.<sup>291</sup> Each public school has a governing board composed of parents, teachers, and representatives of the community and, in the case of secondary schools, an elected representative of the students.<sup>292</sup> Secondary schools also are to have an elected Student Council.<sup>293</sup> The provisions of the legislation on primary and secondary education summarized above are in harmony with international standards on the right to education.

#### d. constitutional and legislative recognition of the right of children with disabilities to inclusive education

The second paragraph of article 47 of the Constitution provides:

Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs.

The Law on Education in the Municipalities requires the Ministry to “promote a non-discriminatory educational system in which each person’s right to education is respected and quality learning opportunities are available to all.”<sup>294</sup> It also requires the Ministry to “promote an inclusive policy for the integration of impaired and disabled persons into the education system.”<sup>295</sup> The Law for Vocational Education and Training also recognises the principle of inclusion.<sup>296</sup>

The Law on Pre-university Education obliges of the authorities to “deliver an efficient, effective, flexible, inclusive and professional service designed to provide all pupils with equal opportunities to access education in accordance with their specific abilities and needs...”, and specifically prohibits discrimination on grounds of “physical, intellectual or other disability.”<sup>297</sup> Article 40 indicates that the principle of inclusive education has three components:

- schools should “accommodate all children regardless of their physical, intellectual, social, linguistic or other conditions” and “promote integration and contact” between them
- support based on individual needs should be provided
- special schools or separate educational settings are justified only if an expert assessment indicates that enrolment in an ordinary school is “impractical”<sup>298</sup>

The Law is to be applied in accordance with the relevant norms of the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.<sup>299</sup>

289 Establishment and Enforcement [sic] of Teams for Prevention and Response toward Abandonment and Non-Enrolment in Compulsory Education, No.19/2012, Art.3.1, 5.1, 6

290 Art.4

291 See e.g. Ibid, Art.5.1.13, 16, 19

292 Art.17.1-2 (Student members do not participate in the consideration of issues concerning the employment or personal affairs of staff members or the personal affairs of individual students. Art.17.14)

293 Art.18

294 Art.3(b)

295 Art.3(j)

296 Art.3.1.1

297 Art.3.3 and 3.6

298 Art.40.2

299 Art.40.3

Interdisciplinary expert assessment and support teams are to be available in each municipality, to determine what methods, equipment and placement is appropriate for each student with special educational needs.<sup>300</sup> If the municipality does not accept or agree to the expert's assessment, the child's parents may appeal to the Ministry of Education.<sup>301</sup> The teams, as their name suggests, also support schools attended by students with special needs, and provide guidance to parents and teachers.<sup>302</sup> An administrative instruction provides that teams shall prepare individual education plans for each student with special needs.<sup>303</sup>

Students having severe or multiple disabilities who attend special schools or resource centres are entitled to free transportation.<sup>304</sup>

In conclusion, the legislation of Kosovo is in harmony with international norms regarding the education of children with disabilities.

## e. the aims of education

The Convention on the Rights of the Child, as mentioned above, provides that the aims of education should include the development of the child's:

- personality, talents and mental and physical abilities<sup>305</sup>
- respect for human rights and freedoms<sup>306</sup>
- respect for the natural environment<sup>307</sup>
- respect for the child's parents, cultural identity, language and values, as well as the national values of the country in which the child lives and for other civilizations<sup>308</sup>

The Law on Pre-school Education indicates that the main aim of such education is to the develop of the child's personality, talents and abilities, including the ability to understand and accept one's self, to converse and take part in groups, to accept change, to identify and express emotions, to develop language skills, intuition, imagination, artistic expression and critical thinking.<sup>309</sup> Respect for the environment also is a recognised aim of pre-school education.<sup>310</sup>

The Law on Pre-university Education defines the purposes of education, at all levels, in language similar to that of article 29 of the Convention.<sup>311</sup> One difference is that, while article 29(d) calls for promotion of "friendship among all peoples, ethnic, national and religious groups..."; article 1.2.5 refers to friendship with members of all communities in Kosovo.<sup>312</sup> The Law also calls for the development of respect for the child's teachers, as well as their parents. A provision not based on the Convention recognizes the aim of promoting "the formation of basic scientific knowledge, communication, observation and analytical skills, creativity, autonomy and related learning competencies."

In conclusion, in Kosovo legislation on the aims of education is very compatible with international standards.

300 Art.41.1, 41.3

301 Art.41.5

302 Art.41.1

303 Professional assessment of children with special instructive-educational needs, No.07/2012, Art.7

304 Art.42.4

305 (a); see also Art.24.1(b) of the CRPD

306 (b); see also Art.24.1(a) of the CRPD

307 (e)

308 (c); see also Art.24.1(a) of the CRPD

309 Law on Pre-school Education, Art.3

310 *Ibid*, Art.3(j)

311 Art.1.2

312 Similarly, Art.24.5.4 recognises the duty of the Ministry, municipalities, school directors and governing boards to "foster the spirit of respect, understanding and tolerance among all communities."

## 8. The right to an adequate standard of living and to social security

Article 27 of the Convention recognises the right of every child to a standard of living adequate for his or her physical, mental, spiritual, moral and social development.<sup>313</sup> This chapter analyses the legal framework in Kosovo concerning that right and related rights, including the right to social security.

Primary responsibility for providing adequate living conditions lies with the child's parents, to the extent they have the resources and ability to do so.<sup>314</sup> The State has a duty to assist and support them in meeting this obligation and, when necessary, to provide them with material assistance, especially with regard to nutrition, clothing and housing.<sup>315</sup> The right to adequate living conditions also is recognised by CEDAW, and defined in more comprehensive terms that include sanitation, electricity and water supply, transport and communications.<sup>316</sup>

The Convention on the Rights of the Child recognises the right of children with disabilities to "special care," and a corresponding obligation of the State to provide children with disabilities and their parents or caretakers with appropriate assistance, which shall be provided free of charge when possible and when the parents lack sufficient resources.<sup>317</sup> The assistance to be provided is that which supports the child's access to "education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development ..."<sup>318</sup>

The Convention on the Rights of Persons with Disabilities provides that States shall take steps to "ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care."<sup>319</sup>

Article 27 of the Convention also recognises the duty of the State to take steps to ensure that persons having a legal obligation to provide for children do so.<sup>320</sup> In particular, article 27.4 provides that States shall take measures "to secure the recovery of maintenance" from parents or other persons having financial responsibility for the child, whether they are living in the State or abroad. It also indicates that States should enter into international agreements and other arrangements to enable children to receive support from parents living abroad.

Article 18 of the Convention provides that the State must ensure that the children of working parents have access to child-care services or facilities. Similarly, CEDAW recognizes the duty of the State to support "social services to enable parents to combine family obligations with work... in particular through ... child-care facilities."<sup>321</sup>

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313 para.1

314 Art.27.2

315 para.3

316 Art.14.2(h)

317 Art.23.2 (This obligation is conditioned by the resources available to the State.)

318 Art.23.3

319 Art.28.2(c)

320 para.4

321 Art.11.2(c)

Article 26 of the Convention recognizes the right of children to social security, including social insurance.<sup>322</sup> Social security in the classic sense refers to the provision of financial benefits to economically active persons who are unable to work for reasons such as illness, disability or unemployment.<sup>323</sup> It also includes 'survivors benefits' paid to the spouse and dependent children of an economically active person who has died.<sup>324</sup>

The right to social security also is recognised by the International Covenant on Economic, Social and Cultural Rights.<sup>325</sup> The Committee on Economic, Social and Cultural Rights defines it more broadly, to include programmes that provide benefits for children whose families are unable to provide them with sufficient support.<sup>326</sup> Benefits of this kind should suffice to cover needs such as food, clothing, housing, water and sanitation.<sup>327</sup> Similarly, the European Social Charter recognises the duty of States to "promote the economic, legal and social protection of family life by means such as social and family benefits..."<sup>328</sup>

The Committee on Economic, Social and Cultural Rights recognises that both legislation and, given the financial costs, longer-term strategies, may be needed to fully realise the right to social security.<sup>329</sup> Whatever benefits the States is able to provide, must be available without discrimination.<sup>330</sup> CEDAW underlines that women have the same right as men to family benefits, and the right of rural women to benefit from social security benefits.<sup>331</sup> The CRPD recognizes the right of persons with disabilities to access to poverty-reduction and public-housing programmes.<sup>332</sup>

## a. legislative recognition of the right to an adequate standard of living

Public assistance for families living in poverty is regulated by the Law on the Social Assistance Scheme in Kosovo. Families, for purpose of this law, include parents and their children, including adopted and foster children, regardless of whether the parents are married.<sup>333</sup>

Eligibility for financial assistance is determined by two criteria: a means test, and criteria having to do with ability to work. Families who meet the means test are eligible for financial assistance if all members are 'dependent' and unemployed, or there is one family member who is not a 'dependent' but there also is a child under 5 years of age or an orphan under the age of 15.<sup>334</sup>

Dependents include:

- adults with permanent, severe disabilities
- persons over the age of 65

322 Social insurance is a programme similar to social security, which is financed at least in part by contributions from insured persons and/or their employers. Committee on Economic, Social and Cultural Rights, General Comment No.19, The right to social security, 2007, para.4(a)

323 International Labour Convention No.102 on Minimum Standards of Social Security (The concept of social security, as covered by this treaty, also includes benefits that are less relevant to children, such as old-age pensions, or covered by other articles of the CRC, such as maternity benefits and medical insurance.)

324 Ibid

325 Art.9

326 General Comment No.19, The right to social security, 2007, para.2; the duty to provide such assistance to families also is recognised by Art.27.3 of the CRC

327 Ibid, para.18

328 Art.16

329 Ibid, para.40-41

330 Ibid, para.22-23, 29-31, 35-36, 38, 62

331 Article 13(a) and 14.2(c)

332 Art.28.2(b) and (d)

333 Art.2.1 (Grandparents living in the same home also are included.)

334 Art.4.5 (as amended in 2012)

- children “up to” 14 years of age
- persons 15 to 19 years of age attending secondary school full time
- single parents with a child under 15 years of age
- full-time caretakers of a child under 5 years of age, a person with permanent disability or a person over 65<sup>335</sup>

Certain kinds of property and income not considered when calculating eligibility, including the family home, home-grown produce, payments for families with disabled children, and disability and old-age pensions.<sup>336</sup> Eligibility must be reassessed every 6 to 12 months.<sup>337</sup> Decisions may be appealed, first to the director of the office that made the decision, and later to an Appeals Commission.<sup>338</sup>

Under the law as adopted in 2003, the amount of support was €50 per month for the first two persons, and €5 per month for each additional person.<sup>339</sup> In 2012 the law was amended to indicate that the amount of payments is determined by the Ministry of Labour and Social Welfare and Ministry of Finance, on the basis of the cost of the basket of essential foods.<sup>340</sup> In practice, neither the basic amount nor the additional amount for children has been modified in function the increasing price of essential products.

International standards regarding financial assistance to poor families are not detailed. However, most of the eligibility criteria appear to be in harmony with principles recognised by the Convention on the Rights of the Child.

The eligibility criteria recognise that children under the age of 14 should not be seen as a potential a source of income for the family, and that older children also are unemployable if they attend school full-time. Special recognition of families caring for an orphan may be an acceptable incentive to reduce the need for institutional placement. The exclusion of the family home from the means test seems calculated to help prevent families from falling into extreme poverty permanently, and the exclusion of disability pensions acknowledges the additional expenses needed to meet the special needs of children or parents with disabilities.

There is, however, one requirement that may well be considered arbitrary, namely, that families where one person is able to work are not entitled to any assistance unless the household includes one child under 5 years of age (or an orphan under 15 years of age).<sup>341</sup> This provision may be intended to give priority to families having one or more young children, to enable a potential wage-earner to remain at home and care for children during this important stage in their life cycle. However, the State has an obligation to support, within the limits of its ability to do so, each child who needs support.<sup>342</sup> If a child over the age of 5 does not enjoy living conditions adequate for healthy development, and his parent, parents or other relatives are unable to provide adequate living conditions, then that child has the right to such assistance as the State is able to provide, whether or not he or she has a younger brother or sister. Consideration should be given to amending to law to eliminate or modify this requirement, so that entitlement to assistance is based more directly on need.

The definition of children under 14 and students 15 to 18 as “dependents” leaves a gap for children who have reached the age of 14, but are not yet 15 years of age. This appears to be unintentional, and it may be ignored in practice, but consideration should be given to amending the article to change the former to 15 years of age.

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335 Art.2.7

336 Art.5.5 and 5.7

337 Art.7 as amended in 2012 (6 months where there is a family member capable of working but unemployed)

338 Art.11

339 Art.9.1

340 Art.9.1 as amended

341 Art.4.1(a)

342 Art.27.1-27.3



## b. financial support for children with disabilities

A Law on Material Support for Families of Children with Permanent Disability was adopted in 2008. The law contains a general definition of disability that requires “complete and permanent” inability “to carry out daily life activities without the other person’s help.”<sup>343</sup> Another article lists three kinds of disability: children incapable of mobility, children totally blind, and those who, even with appropriate medical or other devices, are unable to feed, dress, relieve, bathe and groom themselves.<sup>344</sup> Any family having a totally disabled child is entitled to receive assistance, regardless of their economic position.<sup>345</sup> The amount of the assistance provided is determined by a ‘sub-legal act’ of the Ministry of Labour and Social Welfare.<sup>346</sup>

The definition of disability contained in this law is much narrower than the definition found in the Convention on Rights of Persons with Disabilities: “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder ... full and effective participation in society on an equal basis with others.” It is understandable for a country with limited recourses to give priority to assisting families with the most severely disabled children. However, this should be seen as a step towards providing assistance for other categories of children with disabilities, when circumstances allow. To this end, consideration should be given to amending the definition of disability contained in the law to bring it into harmony with the internationally accepted definition, and recognising that the ultimate goal is to provide assistance to all families having a disabled child, whether the disability is ‘complete’ or partial.

A separate law recognises the right of blind persons of any age to a monthly payment, but the amount has not yet been established.<sup>347</sup>

## c. legislation concerning child maintenance

Article 290 of the Family Law of Kosovo recognizes the obligation of parents to provide financial maintenance for minor children.<sup>348</sup> Loss of custody does not affect this obligation.<sup>349</sup> Parents openly living as a couple without marriage have the same rights and responsibilities as spouses, unless certain impediments to marriage exist.<sup>350</sup> Both spouses have an obligation determine the family budget and to contribute to it in proportion to their capacity to do so.<sup>351</sup>

The Law contains a separate article on unmarried fathers, which obliges them to provide financial maintenance for six weeks before birth and eight weeks after, in addition to covering “the costs of pregnancy and delivery.”<sup>352</sup> This obligation may be extended if the mother is unable to work after delivery due to an illness or injury resulting from pregnancy or delivery.<sup>353</sup> An unmarried father is entitled to maintenance from the mother if he is in charge of raising the child and this responsibility prevents him from working.<sup>354</sup> Consideration should be given to amending the Law to clarify that the special obligations of unmarried fathers are additional to any longer term obligation to support that may be ordered by a court.

343 Art.2

344 Art.6

345 Art.18.1

346 Art.22.4

347 Law for Blind Persons, Art.72 and 74

348 Arts. 290(2) and 291 also recognise an obligation to maintain adult children in certain circumstances.

349 Art.293

350 Art.39 (The impediments include a blood or legal relationship that precludes marriage, a non-dissolved marriage to another person, and mental incapacity.)

351 Art.44(2) and (4)

352 Art.317(1) and (2)

353 Art.317(3) and 318

354 Art.320

Competence to order maintenance payments lies with the courts.<sup>355</sup> The CSW has competence to initiate legal action on behalf of children.<sup>356</sup> Whenever possible, a court considering a marital dispute shall take a decision on maintenance *ex officio*, without a motion by any party.<sup>357</sup> A court may make a temporary orders for maintenance while a case is pending, if the parents do not voluntarily provide sufficient support for their children.<sup>358</sup>

The legislative provisions concerning married couples are in harmony with international standards on the right to maintenance. However, the distinction between unmarried couples based on the existence or absence of a legal impediment to marriage is an arbitrary restriction of the right to maintenance. Both parents should have a legal obligation to support their common children, if they are able to. Even if there are valid reasons they should not have had a child, non-recognition of the duty to maintain a child who has been born in effect punishes an innocent victim of the parents' illicit relation.

There is a contradiction between Art.317 (1), which indicates the father must give maintenance 6 weeks before birth, and Art.318(1), which indicates the obligation begins at the earliest 4 weeks before delivery. The law should be amended to eliminate this contradiction.

The Law contains elaborate provisions on the duty of other relatives to provide support, which seem to be in harmony with international standards.<sup>359</sup>

If a parent having an obligation to make maintenance payments does not do so, the Guardianship Authority has an obligation to "provide the child with temporary financial maintenance according to the provisions on social protection of children," with or without a request by the other parent.<sup>360</sup>

Employers have an obligation to deduce maintenance payments from the earnings of an employee, if so ordered or requested by the competent authorities.<sup>361</sup> If maintenance payments are insufficient, either the child or the Guardianship Authority may request the court to increase the amount.<sup>362</sup> The Criminal Code makes it a crime, punishable by a prison sentence of up to 3 years, to fail to comply with a court order concerning maintenance.<sup>363</sup> These provisions of the legislation in force are in harmony with the relevant provisions of international law on the rights of parents and duties of parents.

#### d. child care

No legislation encourages the establishment of childcare services or centres for the children of working parents, and consideration should be given to the adoption legislation on this subject.

355 Arts.323-325, 327, 333

356 Art.326(1)

357 Art.325(1)

358 Art.327(1)

359 Art.278-295

360 Art.327(2) (NB: The English translation of the Family Law mistakenly refers to the Guardianship Authority – a function of the Centers for Social Work - as "Custodian body.")

361 Art.334

362 Art.333(1)

363 Art.252.1, 252.3 (The sentence is 1 to 8 years if the person deprived of maintenance suffers serious damage to health or dies. Art.252.2.)

## e. the right to social security

The Constitution of Kosovo does not recognise a right to social security as such, although it provides that legislation shall be adopted concerning social insurance related to unemployment, disease, disability and old age.<sup>364</sup>

The Law on Social and Family Services provides that the State has an obligation to provide social and family services to individuals having no family support, or when family support is insufficient to guarantee their welfare.<sup>365</sup> In general, however, services are limited to social care and counselling; material assistance may only be provided under this law on a temporary and urgent basis when no other source is available.<sup>366</sup> Services are to be provided in a community setting, as a rule, and may be provided in an institutional setting only when the need for care or protection is “overriding”.<sup>367</sup> Standards and policies are determined by the Ministry of Labour and Social Welfare, but primary responsibility for providing services lies with municipalities.<sup>368</sup>

The Law on Labour requires employers to provide insurance against work-related injury or illness to all employees, regardless of age.<sup>369</sup> The Law on Health calls for the adoption of a law on health insurance. At this writing, a law has been drafted but not adopted.

Failure to comply with legislation regarding health, retirement or disability insurance is a crime under article 226 of the Criminal Code.

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364 Art.51.2

365 Art.1.2

366 Art.1.3

367 Art.1.2

368 Art.6.1 and 7.1; see also Art.2.2, Art. 2.7, Art.3.3 and Art.5.2-5.4

369 Art.60

## 9. Other civil and cultural rights

Articles 13, 14, 15 and 16 of the Convention on the Rights of the Child recognise other civil rights, including freedom of expression, freedom of thought, conscience and religion, freedom of association, freedom of assembly, and the right to privacy. The Convention also contains three articles on cultural rights: article 17, on access to beneficial information, article 30, on the cultural rights of ethnic, linguistic and religious minorities, and article 31, on the right to play and to participate in cultural life. The present chapter covers these rights.

Article 14 of the Convention on the Rights of the Child provides that children, like adults, enjoy freedom of thought, conscience and religion. Their exercise of these rights is subject to the general principle recognised by article 5 of the Convention, namely, the right and duty of parents (and guardians) to provide the child with direction in the exercise of this right, in a manner consistent with the evolving capacities of the child.<sup>370</sup> The right to practice a religion may be subject to restrictions, provided that they are established by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.<sup>371</sup>

Article 13 recognises the right of children to freedom of expression, and provides that this right includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.” This right is not absolute, but may be restricted, provided that any restriction is provided by law and necessary to protect national security, public order, health or morals, or the rights or reputations of others.<sup>372</sup>

Freedom of association and assembly are recognised by article 15 of the Convention. Like freedom of expression they may be restricted, provided that any restrictions are lawful and necessary to protect national security, public safety, order, health or morals, or the rights and freedoms of others, in a democratic society.

Article 16 of the Convention recognises the right of children to be free from arbitrary or unlawful interference with their privacy, family, home and correspondence, as well as the right to be free from unlawful attacks on their honour or reputation. One important corollary of the right of privacy, where children are concerned, is that legal proceedings concerning matters that affect their honour, reputation and relations with family members should be confidential.

This norm is recognised by various UN and European instruments, including:

- Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography, Art.8.1(e)
- the Lanzarote Convention, Art.31.1(e)
- UN Guidelines on Justice in matters involving Child Victims and Witness of Crime, Guidelines 26-28
- European Guidelines on Child Friendly Justice, IV.A.2, Guidelines 6 and 9
- Beijing Rules, Rule 8
- European Rules on Juvenile Offenders, Rule 16

<sup>370</sup> Art.14.2 (The language of this paragraph differs somewhat from the text of Art.5, in that it mentions only parental direction, not direction and guidance.)

<sup>371</sup> Art.13.2

<sup>372</sup> Art.13.2

Article 17 of the Convention provides that the State has an obligation to ensure that children have access to “information and material from a diversity of national and international sources”, especially materials designed to promote their “social, spiritual and moral well-being and physical and mental health.” To this end, the State should encourage:

- the production and dissemination of children’s books
- dissemination by the media of information and material of social and cultural benefit to children, which promotes the values mentioned by article 29 of the Convention (see Ch.8, above)
- the development of guidelines for the protection of the child from harmful information and material

Article 17 also calls on the State to encourage the mass media to have regard to the linguistic needs children who belongs to minorities.

Article 30 of the Convention provides:

In those States in which ethnic, religious or linguistic minorities ... exist, a child belonging to such a minority ... shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31 of the Convention recognizes “the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.”<sup>373</sup> The State has an obligation not only to “respect and promote the right of the child to participate fully in cultural and artistic life” but also to “encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”<sup>374</sup>

## a. constitutional recognition of freedom of thought, conscience and religion

Article 38 of the Constitution of Kosovo guarantees freedom of belief, conscience and religion, and further provides:

2. Freedom of belief, conscience and religion includes the right to accept and manifest religion, the right to express personal beliefs and the right to accept or refuse membership in a religious community or group.
3. No one shall be required to practice or be prevented from practicing religion nor shall anyone be required to make his/her opinions and beliefs public.
4. Freedom of manifesting religion, beliefs and conscience may be limited by law if it is necessary to protect public safety and order or the health or rights of other persons

This provision is in harmony with international standards.

Article 39 of the Constitution recognises the right of religious denominations “to independently regulate their internal organization, religious activities and religious ceremonies”, and to establish religious schools and charitable institutions, in accordance with the relevant legislation. This article also complies with international standards on freedom of religion. There is no legislation specifically on children and religion.

<sup>373</sup> Art.15.1

<sup>374</sup> Art.15.2

## b. constitutional recognition of freedom of expression

Article 40 of the Constitution of Kosovo guarantees freedom of expression, including “the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.” The second paragraph of this article adds that freedom of expression “can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion.” Restrictions of this kind are not only allowed, but are required by international human rights law.<sup>375</sup>

Although the language of Article 40 of the Constitution is not as sweeping as that of article 13 of the Convention, there does not appear to be any reason to conclude that it is narrower. The differences may be more cosmetic than substantial.

## c. constitutional and legislative recognition of freedom of association and assembly

Article 43 of the Constitution guarantees freedom of “gathering”, defined as the “right to the right to organize gatherings, protests and demonstrations and the right to participate in them.” It also provides that these rights may be limited by law to the extent that limitations are “necessary to safeguard public order, public health, national security or the protection of the rights of others.”

Article 44 of the Constitution guarantees freedom of association, including “the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization” and “freedom to establish trade unions and to organize with the intent to protect interests.” Article 44 provides that legislation may be adopted limiting the right of certain categories of workers to form trade unions, and that “Organizations or activities that infringe ... the constitutional order, violate human rights and freedoms or encourage racial, national, ethnic or religious hatred may be prohibited by a decision of a competent court.”

Article 43 is in harmony with international standards on freedom of assembly, and Article 44 is largely in harmony with international standards on freedom of association.

A Law on the Empowerment and Participation of Youth was adopted in 2009. It applies to persons between 15 and 24 years of age, and recognises their right to form, join and participate in organisations, whether formal or informal.<sup>376</sup> The Law for Organising Trade Union recognised the right of persons old enough to be legally employed – 15 years of age - to join a trade union.<sup>377</sup> The law does not recognise the right of children under the age of 15 years to join associations.

<sup>375</sup> See International Covenant on Civil and Political Rights, Art.20.2

<sup>376</sup> Art.3.1.1 and 4

<sup>377</sup> Art.9.1

## d. constitutional and legislative recognition of the right to privacy

Article 36.1 of the Constitution provides:

Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.

The Constitution does not recognise the right to honour and reputation in those terms, but article 42 recognises “the right to correct untrue, incomplete and inaccurate published information, if it violates her/his rights and interests in accordance with the law.” This is an essential part of the right to honour and reputation as recognised by international human rights law.<sup>378</sup>

Many of the laws in force that concern children contain articles that protect their privacy and the confidentiality of information concerning them. The Family Law of Kosovo provides that legal proceedings concerning paternity, maternity and custody of minor children shall be closed to the public.<sup>379</sup>

The Law on Social and Family Services provides that all communications between clients and professional staff concerning the services provided are confidential, and professionals who share information concerning a case with unauthorised parties may be subject to prosecution.<sup>380</sup> Confidential information may be shared to the extent necessary to provide services to the client or protect the safety of a vulnerable child or adult, to comply with a court order, or “if there is an overriding public interest.”<sup>381</sup>

These exceptions seem to be in harmony with international standards, with the exception of the last, which is vaguely defined and does not specify who is entitled to make the determination that the release of certain information is justified by an overriding public interest. Article 203 of the Criminal Code provides that public interest, in the context of unauthorised release of confidential information, means the preparation of crimes against the constitutional order or territorial integrity of Kosovo, and crimes that would cause death or serious bodily injury to a person.<sup>382</sup> It is recommended that the “overriding public interest” clause of the Law on Social and Family Services either be eliminated from the law, or amended to provide that an exception may be made only if a high-ranking official of the Ministry of Labour and Social Welfare makes a determination that disclosure of certain confidential information is necessary, and to replace the broad concept of ‘public interest’ with more restrictive terminology of article 203 of the Criminal Code or the language of international norms, “public safety, order, health or morals.”<sup>383</sup>

The Law on the Social Assistance Scheme recognises the confidentiality of personal information concerning applicants.<sup>384</sup> The Law on Material Support for Families of Children with Permanent Disability also guarantees the confidentiality of personal information.<sup>385</sup> The Law on Pre-School Education provides that personal information provided by students must be treated as confidential, may only be shared with other institutions with the consent of the child’s parent(s) and may not be published in such a way that the identity of the person(s) concerned may be identified.<sup>386</sup>

378 Human Rights Committee, General Comment No.16: Article 17 (The right to privacy), 2008, para.11 (Art.16 of the CRC is based on Art.17 of the International Covenant on Civil and Political Rights)

379 Art.345

380 Art.15.1-2

381 Art.15.1

382 Art.203.4

383 CRC Art.14.3; compare CRC Art.13.2 (b) and Art.15.2.

384 Sect.14

385 Art.24.1

386 Art.34.4 and 37.3-4; see also Art.34.3 which provides that children – except those in need of protection – may be

Law on Rights and Responsibilities of Citizens in Health provides that the dignity and privacy of patients must be respected in the course of medical treatment.<sup>387</sup> It also contains detailed provisions concerning the confidentiality of health records and records of medical treatment.<sup>388</sup>

The Criminal Code criminalises the disclosure of confidential information by any person who became aware of it in the exercise of his or her profession who had a legal obligation to respect the confidentiality of such information.<sup>389</sup> Criminal proceedings must be initiated by a complaint, however.<sup>390</sup>

Article 205 of the Criminal Code also criminalises photographing, filming or video recording of a person “in a way that fundamentally violates” his or her privacy. Consideration should be given to adding a paragraph to this article concerning its application to children.

Some laws also contain provisions intended to protect the honour and dignity of children. The Law on Pre-university Education prohibits humiliating punishment in public or private schools, and requires educators to make efforts to prevent students from “offensive words or actions”.<sup>391</sup> This is a positive measure for the protection of the honour and dignity of children.

#### e. legislative on children’s access to information and the media

In 2009 Kosovo adopted a law establishing an Independent Media Commission. Article 33, on the protection of children and adolescents, regulates the broadcasting of programmes containing pornography and extreme violence. The same year the Commission adopted a Regulation on the Protection of Children and Minors against Harmful Programming Content in the Media. This Regulation is in harmony with one of the provisions of article 17 of the Convention, but focuses exclusively on restricting programmes that may be harmful for children and adolescents, and does not encourage socially and culturally beneficial programming.

Consideration should be given to adopting legislation that encourages programming beneficial to children.

#### f. constitutional and legislative recognition of the cultural rights of minority children

Article 59 of the Constitution provides in part:

Members of communities shall have the right, individually or in community, to: (1) express, maintain and develop their culture and preserve the essential elements of their identity, namely their religion, language, traditions and culture;

This article – one of the longest in the Constitution - contains thirteen additional paragraphs. Others of particular interest recognise the right to receive an education in one’s own language, and use a name in one’s own language and script.<sup>392</sup> Municipalities, which have main responsibility for providing access to primary and

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interviewed by staff only with parental permission.

387 Art.6.1; see also Art.6.5

388 Art.20

389 Art.203

390 Art.203.3

391 Art.4.1-2

392 Art.59(2)-(3) and (8)



secondary education, are obliged to provide access to education in all languages of instruction, or to subsidize transportation to an area where instruction in another language is available.<sup>393</sup>

Many laws also contain provisions intended to ensure the rights of the linguistic and religious minorities and, more broadly, to promote peaceful relations and prevent conflict between the communities.

The Law on Pre-university Education, as indicated in Ch.7, recognises the promotion of friendship between members of all national communities as one of the purposes of education.<sup>394</sup> In organising and providing education, municipalities must respect and promote the constitutional and legal rights of communities and their members, and “foster knowledge of the culture, history and language of all communities.”<sup>395</sup> Another article affirms the duty of the Ministry, municipalities, school directors and governing boards to “foster the spirit of respect, understanding and tolerance among all communities.”<sup>396</sup>

The Law also requires teachers and all staff of educational institutions to take steps to prevent students from being exposed to offensive words or actions.<sup>397</sup> Religion may not be taught in public schools, and activities that indirectly promote any particular religion are banned.<sup>398</sup> The Law also requires controversial issues to be presented to students in a balanced way, and prohibits the promotion in schools of extracurricular activities for or against any political party, ethnicity, or religion.<sup>399</sup>

The Criminal Code also contains provisions that punish denial of the rights of persons belonging to ethnic, religious or linguistic communities. Article 191, for example, criminalises the denial or limitation of the right of a member of any of Kosovo’s ethnic, religious or linguistic communities to freely express his or her identity or to enjoy his or her autonomy.<sup>400</sup> It also criminalises the denial of the right of any national to use his or her own language or script.<sup>401</sup>

## g. the right to rest, to play and to engage in artistic and cultural activities

Apart from Article 59, mentioned above, the Constitution makes no mention of artistic or cultural rights, nor recreation, sport or leisure. Legislation on the family, education and health focuses on the protection of children from dangers and risk, rather than ensuring access to activities that promote healthy, holistic development. References to artistic or cultural activities, recreation, sport or leisure are few. Article 24.5 of the Law on Pre-University Education require the authorities to develop a curriculum framework that “promotes the moral, cultural, mental and physical development” of students, is an exception. The goals of pre-school education include the encouragement of physical development and “artistic experience and expression”<sup>402</sup>

The Law on the Empowerment and Participation of Youth, adopted in 2009, authorises municipalities to “license” Youth Centres for adolescents and young adults, in order to provide opportunities for their physical, mental, social and spiritual development through activities planned by youth themselves. It does not require municipalities to support such Centres, however. Respect for the rights recognised by these articles does not necessarily depend on legislation; the obligations of the State with regard to them could be fulfilled

393 Law on Pre-university Education, Art.13.3

394 Art.1.2.5

395 Art.3.5

396 Art.24.5.4

397 Art.4.1

398 Art.3.7

399 Art.4.3

400 Art.191.2

401 Art.191.3

402 Law on Pre-School Education, Art.3.f) and h)

through programmes that may not require a legislative basis or framework. However, legislation that recognises rights such as these helps to make the public, children and local officials more aware of the full range of the rights of children. Consequently, consideration should be given to enacting legislation that recognises them, and perhaps also to impose on the appropriate authorities some obligations regarding these rights.

## 10. Child protection

The term 'child protection' has two meanings, one very broad and one narrower. Child protection in the narrower sense refers to efforts to ensure that children live in a family or home where their rights are respected and they are safe from violence, neglect, abuse and exploitation. Article 19 refers to child protection in this sense, because it concerns the treatment of children while in the care of parents, guardians and other caretakers. Article 20 also alludes to the right to protection in this sense. (See Ch.11 on alternative care)

The term child protection also is used broadly, to refer the protection of children from violence, exploitation and abuse in any context. Many articles of the Convention are related to child protection in the broad sense. This chapter concerns child protection the narrow sense. The broader dimensions of this right or concept are analysed in other sections. (See below)

The Constitution of Kosovo recognises the right of children to protection in both a broad and a narrow sense. The first paragraph of article 50 provides "Children enjoy the right to protection and care necessary for their well-being"; and the second paragraph adds "Every child enjoys the right to be protected from violence, maltreatment and exploitation." Responsibility for child protection lies with the Guardianship Authority, which is a department or function of Centres for Social Work (CSW).<sup>403</sup>

### a. preventive protection

One of the main principles concerning child protection, as indicated in the chapter on family unity, is that the removal of children from their homes and from parental care should be the last resort. Respect for this principle requires the ability to identify children at risk, and programmes to strengthen the capacity of parents/caregivers to provide children with adequate care. Article 19.2 of the Convention provides that protective measures should include social programmes that provide support "for the child and those who care for the child" in order to prevent violence, neglect, abuse and exploitation. Similarly, article 18.2 provides that the State shall provide "appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities...". The UN Guidelines for the Alternative Care of Children ("UN Guidelines for Alternative Care") also provide:

States should develop and implement ... policies designed to promote and strengthen parents' ability to care for their children.<sup>404</sup>

The Law on Social and Family Services mandates Centres for Social Work to provide social care and counselling to "children in need"; including:

- children whose parents have difficulty providing adequate care and supervision due to disability or illness, addiction, psycho-social problems or 'lifestyle'
- children suffering as a result of family conflict
- children with mental or physical disabilities or illness
- children with behaviour problems, delinquent behaviour or other social problems<sup>405</sup>

The Law also recognises the related categories of 'person in need' and 'family in need.'

<sup>403</sup> Compare Juvenile Justice Code, Art.1.1.12 and Law on Social and Family Services, Art.1.3.j (NB: The English version of the Family Law mistakenly refers to this authority as the "Custodial Body.")

<sup>404</sup> Guideline 32

<sup>405</sup> Art.9.3

The category 'person in need' includes, in addition to the circumstances specifically concerning children listed above, victims of trafficking, domestic violence or substance abuse, persons vulnerable to exploitation or abuse, and persons affected by natural disasters or emergencies.<sup>406</sup> A 'family in need' is one in which the parent/caregiver(s) needs help to care for a child, either because of their circumstances or the circumstances of the child. This includes families in which one or more children is "suffering serious harm" as a result of neglect, abuse or the inability to provide proper care, or is exposed to the risk of such serious harm.<sup>407</sup>

Centres for Social Work are responsible for maintaining a register of children and families in need, including parents or caretakers who have difficulty caring for children and children "at risk of neglect, exploitation or abuse or of any other form of harm," and for ensuring that registered families are visited regularly "to ensure the safety and well-being of the child and provide the family or child with whatever services may be considered necessary."<sup>408</sup>

The Juvenile Justice Code also authorizes juvenile judges to impose appropriate measures to protect a child at any time, including the placement of a child in a shelter or an order placing a child under supervision of the Guardianship Authority.<sup>409</sup>

These provisions of the national law provide an appropriate normative framework for the prevention of violence, exploitation and abuse in the family or while children are in the care of other persons.

## b. obligations to report and investigate

The second paragraph of article 19 of the Convention requires States to adopt "effective procedures" for the "identification, reporting, referral [and] investigation..." of violence, exploitation and abuse of children. The Committee on the Right of the Child considers that this obligation includes recognition of the legal obligation of professionals who work with children to report suspected cases of child to the competent authorities.<sup>410</sup>

The Law on Social and Family Services obliges the teachers, medical workers, police officers and any other professional with a duty of care towards children to report to the CSW evidence or suspicion of physical, sexual or psychological abuse of a child by a parent or caregiver.<sup>411</sup> Other legislation, such as the Law on Pre-school Education, also recognises this obligation.<sup>412</sup> When child abuse is suspected, law enforcement officials must assist the CSW, and open a criminal investigation "if the circumstances warrant."<sup>413</sup> (See below)

The CSW has a broader obligation to investigate grounds to suspect that any child is suffering, not only abuse, but also exploitation, neglect, or any form of physical or mental violence.<sup>414</sup> This obligation is not limited to actual mistreatment, but includes the risk of any of the practices mentioned above.<sup>415</sup> Any professional who has had contact with a child who is the subject of such an investigation must cooperate and assist with the investigation.<sup>416</sup>

406 Art.1.3.e (The definition applies to all persons found in Kosovo, regardless of place of origin or status.)

407 Art.1.3.f (as amended in 2012)

408 Art.9.4

409 Art.6

410 General Comment No.13, supra, para.49. See also Art.12.3 of the Lanzarote Convention, which obliges States Parties to make reporting of sexual abuse of children mandatory.

411 Art.10.6 The Law on Domestic Violence also obliges the police to inform the local Centre for Social Work when they learn of a case in which the victim is a child, or where violence affects a child who is not the primary or direct victim. (Art.24.5)

412 Art.38.9

413 Art.10.10

414 Art.10.7

415 Ibid

416 Art.10.9

During an investigation the CSW must take “whatever steps are necessary” to ensure the child’s safety.<sup>417</sup> One option it has is to seek a “guardianship order.”<sup>418</sup> Such orders may allow children to remain in parental care, subject to supervision by a social work officer.<sup>419</sup> Before making such an order, the court must take the ‘wishes and feelings’ of the child into account.<sup>420</sup> Parents whose child or children are under a guardianship order have a right to assistance from the CSW, and the need for and terms of such orders must be reviewed every six months.<sup>421</sup>

The Criminal Code makes it a crime for any person, including parents and professionals working with children, to fail to immediately report suspected abuse, mistreatment, abandonment or neglect of a child.<sup>422</sup>

The legislation of Kosovo establishes an adequate legal framework for the reporting and investigation of cases of violence, exploitation and neglect of children while in the care of parents or other caretakers.

### c. protective orders

The Law on Protection against Domestic Violence, adopted in 2010, applies to violence against children committed by any member of their household.<sup>423</sup> A wide range of violence is covered, including physical assault, psychological pressure, threats, intimidation, insults and sexual abuse.<sup>424</sup> Every municipal court has competence to issue protection orders and emergency protection orders.<sup>425</sup> Both are enforced by the police force.<sup>426</sup> Protection orders may be requested in writing or orally by the victim an authorized representative, a victim advocate (with the consent of the victim), or a representative of the local Centre for Social Work; emergency protection orders also may be requested by any person with direct knowledge of an act or acts of domestic violence.<sup>427</sup> Decisions on requests for emergency orders must be made within 24 hours.<sup>428</sup> The head of the police domestic violence unit is authorised to issue a temporary emergency protection order when courts are not open (during the night, weekend, and holidays).<sup>429</sup>

Although the law covers child victims as well as adults, it contains few provisions specifically concerning children. It does provide that a representative of the Centre for Social Work shall be heard in cases where a protection order – but not an emergency protection order - has been requested by a child, or the acts of violence for which protection is sought “impact” a child.<sup>430</sup> It does not recognise the right of children to be heard by the court in domestic violence cases, nor does it provide that the best interests of any child affected directly or indirectly by a domestic violence case should be a primary consideration in determining what action to take. There is no recognition of the right of children involved in such proceedings to the assistance of a support person.<sup>431</sup> The Law on Domestic Violence should be amended to recognise the special needs and interests of child victims.

417 Art.10.7

418 Art.10.14

419 Art.10.17

420 Art.10.15.a

421 Art.10.19-20

422 Art.254

423 Art.2.1.1.5

424 Art.2.1.2

425 Art.3.2, 3.4 (Courts also may order a perpetrator of domestic violence to receive psycho-social treatment or treatment for drug or alcohol abuse, with a view to preventing future violence. Art.22)

426 Ibid

427 Art.13-14 (This law refers to victims as a “protected party”)

428 Art.16.1

429 Art.22

430 Art.15.2.4

431 See UN Guidelines on Justice in Matters concerning Child Victims and Witnesses of Crime, Guideline 24

## d. proceedings for the removal of children from their home

The provision of article 20 of the Convention concerning children whose best interests require that they be removed from their family environment is complementary to article 9, which provides that children shall not be separated from their parents unless the competent authorities determine that this is “necessary for the best interests of the child.”<sup>432</sup> Abuse and neglect are expressly mentioned as possible reasons for such a determination. Article 9 recognises the right of all concerned persons to be heard in proceedings that may lead to the involuntary separation of children from their parents and provides that, if separation is ordered by an administrative authority, it must be subject to judicial review.<sup>433</sup>

The UN Guidelines for Alternative Care specify that poverty, as such, should never be an acceptable reason to remove a child from parental care; in this circumstance the duty of the State is to provide parents with such assistance as will enable them to fulfil their responsibilities towards their children.<sup>434</sup>

The Constitution of Kosovo recognises the right of the family to “special protection by the state”, and the right of every child to “regular personal relations and direct contact” with his or her parents, “unless a competent institution determines that this is in contradiction with the best interests of the child.”<sup>435</sup>

Conditions and procedures for the removal of children from parental custody are regulated by the Family Law and the Law on Social and Family Services. Article 148 of the Family Law provides that no child may be removed from the care of his or her parents without their permission, or a court order.<sup>436</sup> This is confirmed by Art.10.3 of the Law on Social and Family Services, which provides:

Except in the case of short-term emergency measures, a child shall not be removed from this care of his parent or parents or caregiver without their permission or an Order of the court.

Article 147 of the Family Law provides that the Guardianship Authority must undertake urgent measures whenever it learns of an “existing danger to [a] child, because of an abuse of parental rights or any danger to the child by serious neglect of parental obligations.”<sup>437</sup> Article 2.4 of the Law on Social and Family Services indicates that Centres for Social Work may initiate legal actions for the removal or reduction of parental rights and the removal of a child from parental.<sup>438</sup>

When there is an “immediate, serious risk to the health, safety or welfare of a child”, a social service official may remove from the child from any premises for 72 hours, during which time to the matter must be brought to the attention of the competent court.<sup>439</sup> The same standard for removal without a court order - “reasonable cause to believe that there is an immediate, serious risk to the health, safety or welfare of a child” - is recognised by article 10.4 of the Law on Social and Family Services.

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432 para.1

433 Legislation often allows social workers or police officers to remove a child from parental custody without a court order in an emergency, and this is a good practice.

434 Guideline 14; Art.27.3 of the CRC also recognises the duty of the State to assist parents unable to provide their children with adequate living conditions.

435 Art.37.3 and 50.5

436 para.1

437 The English version of the Family Law mistakenly refers to this Guardianship Authority – a function of the Centres for Social Work – as “Custodian Body.”

438 Art.2.4 (This is done by the CSW on behalf of the Ministry of Labour and Social Welfare.)

439 Family Law, Art.148.2-3

This law further provides that, during these 72 hours, the CSW must bring the case before the competent judge, unless the parents or caretaker give permission for alternative placement of the child or children removed from their care.<sup>440</sup> The judge may order further investigation and assessment of the case during 21 days, if he or she considers that the grounds for doing so are sufficient.<sup>441</sup>

Article 149 of the Family Law recognises abuse of parental rights or serious neglect of parental obligations as grounds for deprivation of parental custody. Read in the light of articles on parental rights and obligations, this would mean failure to ensure the education of the child, failure to maintain personal relations with the child, failure to ensure the child's emotional, social and material well-being, and failure to protect the child from drug use, sexual abuse or exploitation, economic exploitation or any other activity hazardous to their education or health.<sup>442</sup> Parental custody may be returned to parents who have been deprived of it, by a court order, if the reasons for deprivation of custody have ceased to exist.<sup>443</sup>

The legal framework for protecting children from abuse in their home established by the legislation summarized above appear to be in harmony with the Convention and other relevant international instruments. However, as indicated above, express reference to the last resort principle should be added to the provisions of the Family Law and Law on Social and Family Services concerning removal from the home and deprivation of parental custody.

## e. criminal sanctions for abuse and neglect

Although article 19 of the Convention on the Rights of the Child places emphasis on social interventions and administrative proceedings to protect children from violence, abuse, neglect and exploitation while in the care of parents or other caregivers, the second paragraph of this article recognises that "judicial involvement" is appropriate in some cases. The Committee on the Rights of the Child has commented that

... in cases of violence where perpetrators are primary caregivers... depending on the severity and other factors, intervention measures focusing on social and educational treatment and a restorative approach are often preferable to a purely punitive judicial involvement.<sup>444</sup>

The Criminal Code recognises a number of offences involving child victims. Article 250 makes it a crime for a parent, adoptive parent, guardian or other person exercising parental authority over a child to mistreat the child physically or psychologically, or to violate his or her obligation to care for and educate the child. This crime is punishable by a prison sentence of 3 months to 3 years.<sup>445</sup> Article 250 also makes it a crime to abandon a child in such a way as to place his/her life or health in danger.<sup>446</sup> This crime is punishable by 1 to 5 years in prison, but the sentences for both crimes are greater if 'grievous' damage to physical or mental health has been caused.<sup>447</sup> Article 251 recognises a separate crime of "leaving" a child incapable of caring for him/herself.<sup>448</sup>

440 Art.10.5

441 Ibid

442 Arts.125, 128(3)-(4) and 133, summarised in more detail in Ch.6

443 Art.151

444 General Comment No.13, supra, para.56

445 Art.250.1-2

446 Art.250.3

447 Art.250.3, 250.5

448 Art.251.2 (This offence also applies to adult relatives unable to care for themselves.)

International standards concerning which forms of private violence against children must be criminalised and what the appropriate punishment for such crimes should be are almost non-existent.<sup>449</sup> The exception is the European Convention on the Protection of Children Against Sexual Exploitation and Abuse, which obliges States Parties to criminalize sexual abuse of children, including abuse within the family and by other caregivers. (see below) It also provides generally that the punishment for sexual crimes against children shall be “effective, proportionate and dissuasive”, and must include prison sentences.<sup>450</sup> The criminal legislation of Kosovo concerning crimes against children in the private sphere (i.e. excluding torture and other international crimes) seems to cover the most relevant acts that violate the physical and mental integrity of children, and the sentences that are provided for appear to be proportionate and likely to be dissuasive.

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449 Article 18 Lanzarote Convention does oblige States Parties to criminalize sexual abuse of children, including abuse within the family and abuse by other caregivers or other persons in a position of trust or authority, and article 27 provides generally that the punishment for all sexual crimes against children shall be “effective, proportionate and dissuasive”, and must include prison sentences.

450 Art.27.1



# 11. Alternative care

Article 20 of the Convention provides that children shall be placed in alternative care when they have no parents, when it has been determined that they cannot be left in their family home, or when they are temporarily deprived of a family environment (e.g. by the hospitalisation or detention of a parent). Alternative care includes foster placement, adoption, *kafala* and placement in a children's home.<sup>451</sup> Institutional placement is appropriate only "if necessary," indicating that it is to be used only as a last resort. In selecting the most appropriate alternative care solution, "due consideration shall be paid to the desirability of ensuring continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

Placement in the care of family members is a preferred form of alternative care, according to the UN Guidelines for Alternative Care.<sup>452</sup> The Guidelines recognise that temporary removal of children from their family should be preferred, when appropriate.<sup>453</sup> They also confirm that the views of the concerned children should be taken into account, after they have been provided with all relevant information.<sup>454</sup> They also provide that, in principle, siblings shall not be separated by placement in alternative care.<sup>455</sup>

Article 25 of the Convention provides that children who have been 'placed' for care and protection have the right to periodic review of the treatment they receive, and all other circumstances relative to their placement. The Guidelines for Alternative Care specify that, when children have been removed from their family temporarily, this decision should be reviewed periodically to determine whether the causes that led to removal have been resolved or disappeared, allowing the child to return home.<sup>456</sup>

Article 3.3 of the Convention also provides that the State must establish, and supervise compliance with, standards regulating all institutions, facilities and services for the protection and care of children, especially with regard to health, safety and the number and suitability of staff.

In Kosovo, alternative care is regulated by the Family Law. Article 157 recognises the principle that "A child without parental care enjoys special social protection" and that "The fundamental forms of legal and family protection of children without parental care .... are: guardianship, family shelter, residential shelter and adoption."<sup>457</sup>

## a. foster care and guardianship

Foster care (also called "family shelter") involves placement in an existing family consisting of one or two parents, and their children.<sup>458</sup> In principle it is temporary and made with the approval of the birth parents, who may visit the children during foster placement.<sup>459</sup> Placement is made by the Guardianship Authority (CSW), which then has an obligation to work with the birth parents to address the issues that led to placement.<sup>460</sup>

A guardian takes responsibility for supervising and making decisions on behalf of the child concerned, but does not necessarily assume direct responsibility for raising the child, who may be placed in a childcare facility.<sup>461</sup>

451 *Kafala* is a form of alternative care recognised by Islamic law, which does not recognise adoption.

452 Art.3 and 17

453 Art.13

454 Art.6 and 6 bis

455 Art.16

456 Art.13

457 (The English version of the Family Law mistakenly uses the term 'custody' instead of 'guardianship', and the guardianship authority is referred to as the Custodian Body.)

458 Family Law, Art.204(2)

459 *Ibid*, Art.204(3), 208(2) and 210(2)

460 *Ibid*, Art.207 and Art.204(4), respectively

461 Art.216(2), 219-220, 244-248

Guardians are appointed by the Guardianship Authority.<sup>462</sup> Any person who is legally competent may be appointed guardian, unless he or she has been deprived of parental rights by a court, has interests that conflict with those of the child concerned, or has a potentially conflictive relationship with the child or the child's parents.<sup>463</sup> Grandparents, aunts and uncles have an obligation to serve as guardian, unless certain exceptions are met.<sup>464</sup> The Guardianship Authority can also decide to assume the responsibility of guardian directly.<sup>465</sup>

The Family Law indicates that this form of alternative care is to be used for a "minor who is not under parental care," while the Law on Social and Family Services indicates that it is for orphans.<sup>466</sup> It would be advisable to remedy this discrepancy by confirming that guardianship may be used for children who are temporarily or permanently without parental care, and that it may be used for children of any age.<sup>467</sup>

The Law on Social and Family Services, as adopted, provides that a child may only be placed in a family "that shares his own family's ethnic, linguistic, cultural and religious background."<sup>468</sup> This requirement incorporated into national law the principle contained in article 20.3 of the Convention, but was more inflexible: the Convention requires only that "due regard be paid" to the desirability of such placement. Religious, ethnic, linguistic and cultural identities are not immutable and not always inextricably linked, and a requirement that limits placement to families that meet all four criteria could create unnecessary obstacles to placement. In 2012 this provision was amended so that it now begins with the words "A child *with priority*..."<sup>469</sup> This amendment brings this provision into greater harmony with the Convention.

A wide variety of persons and entities (e.g. relatives, NGOs, third persons) may make requests or proposals to the Guardianship Authority regarding actions or measures to protect the rights of the child under guardianship.<sup>470</sup> The child under guardianship does not have this right, however, but only the right to comment on the annual report of the guardian to the Guardianship Authority.<sup>471</sup> This is not compatible with the child's right to be heard, as recognised by the Convention.

The Law on Social and Family Services, as enacted in 2005, required Centres for Social Work to review cases of children subject to guardianship orders – including those that involve placement – every six months.<sup>472</sup> The relevant article was amended in 2012. It still requires that cases be reviewed, but does not specify how often this must take place.<sup>473</sup> This does not satisfy article 25 of the Convention, which requires "periodic review" of the treatment provided of all children placed for purposes of care or protection, as well as "all other circumstances relevant to his or her placement." The UN Guidelines for Alternative Care recommend that such review should take place every three months.<sup>474</sup>

The Law should be amended to recognise the right of children under guardianship to make complaints or requests to the Guardianship Authority, and to require review of the situation of children in placement at least every six months.

462 Art.216(1)

463 Art.237

464 Art.238 (e.g. they are under the age of 16, infirm, or have three or more children of their own, or two or more other children, in their care)

465 Art.240

466 Cf. Art.216(1) and Art.11.2

467 The Family Law does not define the term minor, but the Law on Social and Family Services defines it as persons between 14 and 18 years of age.

468 Art.11.14

469 Law No.04/L-81, Art.10.15

470 Art.250,

471 Art.250, 254

472 Art.10.20

473 Law No.04/L-081

474 Guideline 66

## b. informal alternative care

Another form of informal alternative care, not recognised as such by article 157, is temporary entrustment of a child to the care of a third person. This may be done by parents voluntarily for reasons such as temporary absence from the country.<sup>475</sup> Care may be entrusted only to persons who meet the conditions to be a guardian, described above. This does not require any judicial or administrative action, although it can be challenged before a competent court or administrative body.<sup>476</sup> The child does not have a right to challenge this arrangement although, if a legal challenge is made by another party, the court must take the child's "emotional situation" into consideration.<sup>477</sup>

There may well be valid reasons for recognising the right of parents to entrust the care of their children to a third person temporarily. The UN Guidelines for Alternative Care indicates that States should devise "appropriate means to ensure the welfare and protection of children while in such informal care arrangements, with due respect for cultural, economic, gender and religious differences and practices that do not conflict with the rights and best interests of the child."<sup>478</sup>

It is anomalous to not expressly recognise the right of the children concerned to challenge this arrangement, nor to recognise that their views should be taken into account. The law, as indicated above, provides only that the "emotional situation" of the child must be taken into account, and that only if the child is at least 10 years old and the validity of the arrangement has been challenged by someone other than the child. These conditions and gaps in the law are not compatible with the Convention on the Rights of the Child, and the Law should be amended accordingly.

## c. residential care

Article 20 of the Convention, as mentioned above, provides that residential care shall be used only "if necessary". The UN Guidelines for Alternative Care provide:

The use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests.<sup>479</sup>

Institutional care is not appropriate for children under the age of 3 years.<sup>480</sup> The capacity of residential facilities should be small, so as to create a family-like environment where children receive individualised attention.<sup>481</sup> The care provides shall include follow-up or aftercare for children when they leave.<sup>482</sup>

UN Guidelines for Alternative Care contain extensive standards. Some of those applicable to all placement, but especially relevant for institutional care, are these:

- children shall receive adequate amounts of nutritious food, and have access to medical care and counselling and to formal and non-formal education<sup>483</sup>
- the physical environment shall meet all health and safety standards<sup>484</sup>

475 Family Law, Art.142

476 Art.143

477 Art.143-144

478 Guideline 17; see also Guidelines 55 and 75-78

479 Guideline 20

480 Guideline 21

481 Guideline 122

482 Guidelines 130-135

483 Guidelines 82-84

484 Guideline 90

- the child's right to privacy shall be respected<sup>485</sup>
- carers should develop positive, safe and nurturing relationships with children, and young children and those with special needs shall be helped to develop an attachment to a specific carer<sup>486</sup>
- a document in child-friendly language on the rights and duties of children in care should be adopted and made available to all children in care, and children in care shall have access to an ombudsman or similar authority<sup>487</sup>
- codes of conduct that define the role of each professional and include procedures for reporting abuse or other misconduct shall be in force<sup>488</sup>

Finally, appropriate mechanisms should be in place for monitoring conditions.<sup>489</sup>

The legislation of Kosovo does not include any norms specifically on the placement of children in residential care.<sup>490</sup> This is a gap that must be filled; a practice with such profound consequences for the rights of children should not be regulated by to secondary norms alone.

#### d. adoption

Article 21 of the Convention on the Right of the Child contains a number of requirements concerning adoption as a form of alternative care:

- adoption must be permissible in the light of the child's status vis-à-vis his or her parents or guardians, and that any necessary consent has been properly obtained;<sup>491</sup>
- adoption must be authorised by the competent authorities on the basis of the law and all pertinent and reliable information;<sup>492</sup>
- the best interests of the child must be the paramount consideration in adoption orders;<sup>493</sup>

Adoption is regulated in part by the Family Law of Kosovo. Adoption may only be granted by the competent court, which may seek the advice of the Guardianship Authority.<sup>494</sup> Adoption may be approved "if it serves the child's well-being" and there are reasons to believe that a parent-child relationship will develop between the child and prospective adoptive parent(s).<sup>495</sup> Adoptive parents must be 21 years of age, but if a married couple wishes to adopt, one of the spouses must be 25 years of age.<sup>496</sup> Persons who have been deprived of parental custody may not adopt, nor may mentally ill or retarded persons, or those having an illness that "may endanger the health" or life of an adopted child. Potential adoptive parents also are disqualified if there is reason to suspect that they wish to adopt for financial benefit, or would misuse parental rights so as to harm an adopted child.<sup>497</sup>

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485 Guideline 88

486 Guideline 89 and 86, respectively

487 Guideline 71

488 Guideline 106

489 Guidelines 127-128

490 Art.11.7 provides merely "In order to discharge its responsibilities to the children coming into its care the Department provides, according to the needs of each individual child, residential care, foster care or adoption arrangements."

491 Art.21(a)

492 Ibid

493 This is a stronger requirement than the general requirement of article 3.1, which provides that it shall be a primary consideration in all decisions taken regarding children.

494 Family Law, Art.161

495 Ibid, Art.163

496 Art.178(1) and (3)

497 Art.178(2)

Spouses normally must adopt jointly.<sup>498</sup> Unmarried persons may adopt, but not jointly.<sup>499</sup> A 2012 amendment to the Law on Social and Family Services gives priority to married couples.<sup>500</sup> Adoption may not be granted until the child has lived with the prospective adoptive parents, under the supervision of the Guardianship Authority.<sup>501</sup> Adoptive children have the same rights as birth children, and the obligations of parents towards them are the same as their obligations towards any other child.<sup>502</sup>

Most of the requirements mentioned above are in harmony with international standards, and some are well designed to protect children from adoptions that may pose a risk to their well-being and best interests.

Others, however, appear incompatible with internationally recognised standards. Unless there are convincing reasons for the distinctions made between married and unmarried adoptive parents in articles 164 and 176(2), this may amount to discrimination, and a discrimination that needlessly limits the availability of qualified adoptive parents. The disqualification of potential adoptive parents with mental illness or retardation may be too broad, in light of the article 23 of the Convention on the Rights of Persons with Disabilities.<sup>503</sup> Consideration should be given to amending the law to eliminate these restrictions.

The child to be adopted must consent, if 14 years or older.<sup>504</sup> The consent of younger children also is required, in principle, but is given by the child's legal representative.<sup>505</sup> There is no requirement that children under the age of 14 be consulted by those authorised to consent in their name. This is not compatible with the child's right to have his or her views taken into account. The law should be amended to indicate that the views of all children old and mature enough to have an opinion should be heard and taken into account, and to require that appropriate information regarding the proposed adoption should be provided in a way that is appropriate for the child's age, cognitive capacity and circumstances.<sup>506</sup>

The birth parents of a child to be adopted must consent to the adoption, except those who are incompetent, or have been deprived of custody, or whose residence has been unknown for a year or more.<sup>507</sup> Consent may not be given until the child is 8 weeks old.<sup>508</sup> The Law contains no particular requirement that consent be informed, or freely given.<sup>509</sup> The Guardianship Authority or court also may consent on behalf of one parent in certain circumstances.<sup>510</sup> In particular, the Guardianship Authority may consent on behalf of one of a child's parents if the child so requests, and if it concludes that the parent in question "continuously and gravely violates his obligations towards the child, or has demonstrated that he is indifferent towards the child" and the failure to approve adoption "would result in a considerable disadvantage for the child."

This exception seems problematic, from the perspective of international standards. It requires a request by the child and, in contrast to other provisions of the law, there is no age limit for making such a request.<sup>511</sup>

498 Art. 164(1) and 165 (There are exceptions e.g. if one spouse is mentally incompetent, or under 21 years of age.)

499 Art. 162

500 Law No. 04/L-081, Art. 20, adding subpara. (c) to Art. 11 of the original text

501 Family Law, Art. 166

502 Art. 167

503 Paragraph 2 of this article provides that "States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to ... adoption of children [and] in all cases the best interests of the child shall be paramount."

504 Art. 168

505 Art. 168(1)

506 See UN Guidelines for Alternative Care, Guideline 63, 65 and 67

507 Art. 169(1) and (3)

508 Art. 169(2)

509 Art. 183 requires the court to inform the adoptive parents and child of the purposes and consequences of adoption, but not the birth parents.

510 This is called, literally, "substitution of the consent" of a parent.

511 As indicated above, only children aged 14 or older may personally consent to adoption.

The substantive criterion of parental “indifference” and the risk of a “considerable disadvantage for the child” seems like a weak ground for depriving a parent of his or her right to decide whether or not to consent, especially when the decision is made by an administrative body. The law makes no mention of a right to appeal. These provisions of the law should be amended, to ensure that no child may be adopted without the consent of both parents, unless there is no other way to safeguard the child’s right to a home and family that provides a safe and suitable environment.

The Law also provides persons who wish to adopt may present a request for adoption to a court, jointly with the birth parents of the child to be adopted.<sup>512</sup> Except when the concerned parties are relatives, agreements between birth parents and adoptive parents are widely considered inappropriate, given the potential for using improper means for persuading the birth parents to agree to adoption.<sup>513</sup> Consideration therefore should be given to amending this provision of the law.

## e. International adoption

Article 21 of the Convention on the Rights of the Child provides that inter-country adoption is an acceptable alternative for children who cannot be placed in foster care, adopted, or cared for in some other “suitable manner” in the child’s own country, provided that the safeguards and standards applied are not less than those applied in domestic adoption proceedings and that measures are taken to ensure that no “improper financial gain” is involved.<sup>514</sup>

The Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption was adopted by the Hague Conference on Private International Law in 1993, in order to help countries wishing to allow inter-country adoption of children to meet the standards set forth in the Convention on the Rights of the Child.<sup>515</sup> It contains more detailed requirements than the CRC regarding parental consent (it must be written, that the parents must be informed that adoption terminates their legal relationship to the child, that maternal consent given before birth is not valid, etc.), as well as requirements regarding the wishes, opinion and eventual consent of the child.<sup>516</sup> It also requires States to designate a Central Authority to cooperate with the Central Authorities of other countries in all matters concerning inter-country adoption.<sup>517</sup> In addition, the Convention helps to ensure that adoption decisions are recognised by all the countries concerned.<sup>518</sup>

Article 179 of the Family Law of Kosovo provides:

By way of an exception, a foreign citizen/resident may be an adopting party, if the child cannot be adopted or fostered in Kosovo and/or there are reasonable grounds for such action as the child has special needs and requires specialised treatment not available in Kosovo.

An identical provision was added to the Social and Family Services Law in 2012.<sup>519</sup> This standard appears to be in harmony with article 21 of the Convention on the Rights of the Child.

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512 Art.182(1)

513 See the Hague Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption, Art.29 (The same considerations are applicable to national adoptions.)

514 Art.21(b), (c) and (d)

515 Preamble

516 Art.4

517 Ch.III and IV (Arts.6-22)

518 Ch.V, Arts.23-27

519 Law No.04/L-081

The Law on Social and Family Services provides that, in considering applications to adopt by persons not resident in Kosovo, the Child Placements Panel must ensure compliance with the requirements of the Hague Convention. In principle, this requirement satisfies article 21.d of the Convention on the Rights of the Child. However, it is difficult to see how the cooperation between Kosovo and States where potential adoptive parents reside could be carried out within the framework of the Hague Convention, since Kosovo is not a Contacting State and has not appointed a Central Authority.

The Law on Social and Family Services provides that arranging an extra-legal adoption, and placing undue pressure on parents to obtain their consent to adoption, are criminalised.<sup>520</sup> No article of the Criminal Code recognises such an offence, however. Furthermore, article 162 of the Family Law provides that a person who has participated in unlawful or immoral actions in order to obtain a child for adoption may nevertheless adopt the child “if this is imperative for the child’s well-being.”

The above-mentioned provisions of Law on Social and Family Services help to bring the national law into conformity with the Convention on the Rights of the Child, although it would be desirable to expressly criminalise seeking, offering or providing “improper financial gain”, which might not be covered by the norm prohibiting “undue pressure”, and may involve persons other than the birth parents. Article 162 of the Family Law no doubt is intended to protect the best interests of the child, but the incentive for corruption that it creates seems to outweigh any possible benefits it might have in extraordinary cases. Consideration should be given to removing it from the Law.

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520 Law on Social and Family Services, Art.11.22 and 11.23

## 12. Child labour and the rights of working parents

Article 32 of the Convention recognises the right of children to protection from “work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”<sup>521</sup> Work of this kind is called ‘child labour’, and article 32 requires States to take legislative, administrative, social and educational measures to protect children from it. In particular, they must adopt a minimum age or minimum ages for admission to employment, the hours and conditions of employment must be regulated, and appropriate sanctions must be enacted for the enforcement of these standards.<sup>522</sup>

Article 32 indicates that the norms and regulations adopted should take into account “the relevant provisions of other international instruments”. The most relevant instrument is International Labour Convention No.138 on Minimum Age for Admission to Employment, which provides that the minimum age for full-time employment “shall not be less than 15 years” or the age at which compulsory education is completed, whichever comes later.<sup>523</sup> Norms should be adopted concerning the kind of work that may be done by children under 15 and children over the age of 15 who have not completed compulsory education may perform, as well as working conditions and hours for children.<sup>524</sup> The minimum age for work that is hazardous or harmful to health or development is 18; no child may be employed for such work.<sup>525</sup>

The European Social Charter also recognizes 18 as the minimum age for employment in dangerous or unhealthy occupations, and 15 as the minimum age for employment in other professions, provided that employment does not interfere with compulsory education.<sup>526</sup>

International Labour Convention 182 on the Worst Forms of Child Labour was adopted in 1999. Most of the practices it applies to are forms of exploitation covered by other chapters of this report, such as child prostitution and pornography, trafficking and sale of children, and the use of children in armed conflict.<sup>527</sup> However, Convention 182 also establishes additional obligations regarding work likely to harm the health, safety or morals of children, including the obligation to establish a list of such work that should be prohibited for children.<sup>528</sup>

Recommendation 190, which provides States with guidelines on the implementation of Convention 182, indicates that harmful work includes work underground or under water, at dangerous heights, night work, work for long hours, work with dangerous machinery, equipment and tools, handling or transport of heavy loads, work that exposes children to hazardous substances or processes, or to temperatures or noise levels damaging to their health, or which exposes children to physical, psychological or sexual abuse, and work where the child is confined to the work place, such as domestic labour.<sup>529</sup>

521 para.1

522 para.2

523 Art.2.3

524 Art.73 (In principle, these norms apply only to children 13 years of age or older, that is, children under 13 years of age do not have any right to employment.)

525 Art.3.1

526 Art.7.1-3

527 Art.3 (a), (b) and (c) (Art.3(a) also covers slavery, forced labour, trafficking and other slavery-like practices.)

528 Art.3 (d) and 4

529 Art.3



Convention 182 obliges States to adopt “time-bound” programmes to eliminate the worst forms of child labour and to support the rehabilitation and social integration the children affected by such exploitation.<sup>530</sup>

## a. child labour

The Constitution of Kosovo does not contain any provision referring expressly to child labour, although article 50.3 recognises the right of children to protection from exploitation.

The Law on Labour allows the employment of children 15 to 18 years of age in “easy labour that do[es] not represent a risk to their health or development”, provided that such labour is not prohibited by a law or other legal norm.<sup>531</sup> In particular, it prohibits the employment of persons under 18 years of age in underground or underwater work, work in closed premises, work at dangerous heights, work involving dangerous machinery or tools, the transportation of heavy objects or materials, and work in an unhealthy environment that exposes the employee to dangerous substances or processes, or temperatures, noise levels or vibrations that may be harmful to health.<sup>532</sup> Employers also are required to assess the risks to health and safety of employees under 18 years of age and take appropriate measures to protect against them.<sup>533</sup>

An Administrative Instruction adopted by the Ministry of Labour and Social Welfare in 2012 defines light labour as that which is not harmful to the health safety or development of children 15 to 18 years of age, and does not prevent school attendance or participation in an approved training programme. Work that is prohibited for persons under 18 years of age includes work that involves exposure to toxic materials, radiation, harmful chemical or biological agents, asbestos, lead, highly flammable agents, explosives, compressed, liquid or dissolved gases, cisterns, high voltage electricity, extremely high or low temperatures, loud noise or vibrations, pesticides, agricultural machinery, work on assembly lines, mining, demolition, threshing, logging, undersea diving, slaughtering animals, work with wild or poisonous animals, and work in night clubs, discos, place for gambling and other places that may represent a danger to morals.

These norms are in harmony with the relevant international standards.

## b. the rights of working children

The Convention on the Rights of the Child contains no provisions specifically on rights of children who are legally employed.

The Law on Labour of Kosovo contains several articles recognising the right of children 15 to 18 who are employed to working conditions more favourable than those of adults. Children 15 to 18 years of age who are employed may not work more than 30 hours per week, and may not be required to work ‘overtime’.<sup>534</sup> They are entitled to a 30 minute break after working 4 and a half hours, and to a weekly rest of at least 36 hours.<sup>535</sup> Night work is prohibited, and employees under 18 years of age may not be transferred to another workplace without their consent.<sup>536</sup>

530 Art.6 and 7.2

531 Art.7.2

532 Art.45.5

533 Art.45.2-3

534 Art.20.3, 23.5, 26.1 and 45.5.4

535 Art.28.3 (compared to 15 minutes for an adult employee) and Art.31.2 (compared to 24 hours for an adult employee)

536 Art.27.1, 45.5.4, 27.3 and Art.7.4

Violations of the labour rights of workers under the age of 18 are punishable by fines of up to €20,000.<sup>537</sup> The Criminal Code also provides for sentences of up to one year in prison for denial of the legal rights of children who are employed.<sup>538</sup>

These rights seem well-designed to protect the rights of working children.

### c. Rights of pregnant workers and working parents

The Convention on the Elimination of all forms of Discrimination Against Women recognises certain obligations that States have with regard to mothers and pregnant women who are employed, in particular, to recognise maternity leave with pay and to provide special protection to working women during pregnancy.<sup>539</sup> It also recognises an obligation that applies to parents regardless of sex, namely, "To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities..."<sup>540</sup>

The International Labour Convention No.183 on Maternity Protection provides that States should ensure that

- pregnant and breastfeeding workers are not obliged to do work that involves a significant risk to the health of the mother or child<sup>541</sup>
- mothers have the right to breaks or reduced hours to enable them to breastfeed, with no reduction in pay<sup>542</sup>
- mothers/expectant mothers have the right to at least 14 weeks maternity leave, with compensation<sup>543</sup>
- the law recognises the right to additional leave, with compensation, in the event of illness or complications related to pregnancy or childbirth<sup>544</sup>

The Law on Labour satisfies most of the relevant international standards, and in several areas goes further than international standards require. Employed women have the right to 9 months of paid maternity leave, and 3 months of unpaid leave.<sup>545</sup> The father may assume these rights of the mother if she dies, or with her agreement.<sup>546</sup> Fathers have an independent right to 2 days paid leave for birth or adoption, and 2 weeks unpaid leave any time during the first 3 years after birth or adoption.<sup>547</sup>

One of the parents of a child who is born with a disability or is in poor health is entitled to work part-time until the child is 2 years of age.<sup>548</sup>

Pregnant employees, employees on maternity leave or with a child under the age of 3 years, single parents of a child under 5 years of age, and the parents of a child with severe development problems may not be transferred to a new position without their consent.<sup>549</sup> Pregnant women, parents of a child with disabilities and single parents of children under 3 years of age also may not be obliged to work overtime.<sup>550</sup> This right also applies to employees caring for a young child or an abandoned or orphaned child with a disability.<sup>551</sup>

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537 Art.92.1

538 Art.221

539 Art.11.2(b) and (d)

540 Art.11.2(c)

541 Art.3

542 Art.9

543 Art.4

544 Art.5

545 Art.49.1-5

546 Art.49.7-8 and 50.1

547 Art.50.2

548 Art.52 (This right applies after maternity leave.)

549 Art.17.4

550 Art. 26.2

551 Art.48.3

Night work (between 22h00 and 6h00) is prohibited for pregnant and breastfeeding employees.<sup>552</sup> Single parents, women with children under 3 years of age and those having children with disabilities can perform night work only with their consent.<sup>553</sup> Pregnant and nursing women may not perform “hard physical work” or work that involves exposure to biological, chemical or other factors involving a risk to health.<sup>554</sup>

The Law on Labour does not recognise the right of nursing mothers to breaks or reduced hours, and consideration should be given to amending the law to recognise this right.

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552 Art.27.1, 45.5.4 and 27.3

553 Art.27.3

554 Art.47.2

## 13. Sexual exploitation and abuse

Article 34 of the Convention requires States to “protect the child from all forms of sexual exploitation and sexual abuse” and, in particular, to take steps to prevent child prostitution, child pornography, and the exploitation of or inducement or coercion of a child to engage in any unlawful sexual activity. Article 39 of the Convention also recognizes the duty of States to promote the physical and psychological recovery and social reintegration of children who are victims of any form exploitation or abuse, including sexual exploitation or abuse.

Other relevant international instruments include the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography, the European Convention on the Protection of Children against Sexual Exploitation and Abuse (“Lanzarote Convention”) and International Labour Convention No.182 on Worst Forms of Child Labour (“ILO Convention No.182”).

This Optional Protocol to the Convention on the Rights of the Child establishes obligations additional to those contained in articles 34 and 39 of the Convention itself, including a general obligation to “adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent” child prostitution and pornography.<sup>555</sup> It also recognizes an obligation to criminalise these practices, and to give courts jurisdiction over offences committed abroad.<sup>556</sup> Other obligations related to the criminalization of child prostitution and pornography include:

- to recognise child prostitution and pornography as extraditable offences<sup>557</sup>
- to assist other countries in criminal investigations on request<sup>558</sup>
- to seize and confiscate property used to commit these offences and the proceeds generated by them<sup>559</sup>

The Lanzarote Convention also requires States to give their courts extraterritorial jurisdiction over crimes committed by nationals or residents.<sup>560</sup>

ILO Convention No.182 requires States to adopt programmes of action to eliminate *inter alia* child prostitution and child pornography, and to rehabilitate victims and reintegrate them into society.<sup>561</sup> (The rights of victims are analysed in Ch.19-as part of the access to justice below.)

<sup>555</sup> The Protocol does not cover “other unlawful sexual activity.”

<sup>556</sup> Art.3 (Sale must be criminalised when the purpose the sale of a child is sexual exploitation or forced labour; the obligation to criminalise also applies to sale of a child’s organ, and improperly obtaining consent for adoption.) The obligation to recognise extra-territorial jurisdiction applies to situations where a suspect is in the territory of the State, and is not extradited to face charges abroad. (Art.4.3)

<sup>557</sup> Art.5

<sup>558</sup> Art.6

<sup>559</sup> Art.7

<sup>560</sup> Art.25.1

<sup>561</sup> Art.6.1 and 7.2(b)-(c)

## a. sexual abuse of children

Although the Convention requires States to prevent sexual abuse of children, it does not define sexual abuse. The most relevant definition recognised internationally is that found in article 18 of the Lanzarote Convention, which defines it as participation in sexual activities with children too young to give consent, with a child over whom the perpetrator has a position of trust, authority or influence, or with a child who is particularly vulnerable due to disability or dependence.<sup>562</sup> The Convention requires criminalisation of such abuse, as well as “corruption of children”, which is defined as obliging children under the ‘age of consent’ to witness sexual activities.<sup>563</sup>

In Kosovo, only children 16 or 17 years of age have the legal capacity to consent to sexual activities.<sup>564</sup> The three main sexual offences recognised by the Criminal Code are rape, sexual assault and degradation of sexual integrity.

Rape is punishable by a prison sentence of 2 to 10 years.<sup>565</sup> The definition of rape requires penetration, no matter how slight.<sup>566</sup> Since children under the age of 16 lack capacity to consent, any act involving penetration of a child under the age of 16 meets the definition of rape. The minimum sentence is 5 years in prison if the victim is especially vulnerable, or if the perpetrator is a parent, grandparent, aunt, uncle or sibling of a victim who is 16 or 17 years of age.<sup>567</sup>

Sexual abuse involving physical contact but not penetration is punishable as sexual assault. This crime is defined as a perpetrator touching a victim without consent “for a sexual purpose”, or inducing the victim to touch the perpetrator or a third person for the same purpose, without consent.<sup>568</sup> Any such conduct with a person under 16 years of age is punishable under this article, because persons under 16 lack the capacity to consent. This crime carries a prison sentence of up to one year in the absence of aggravating factors, and a sentence of 3 to 10 years if there is relationship of blood or authority between the perpetrator and the victim.<sup>569</sup>

Another, less serious offence involves inducing a person to expose their “private parts”, masturbate, or commit any other act that “degrades their sexual integrity”.<sup>570</sup> This offence is punishable by a prison sentence of 1 to 10 years if there are aggravating factors, such as vulnerability due to age or the kinds of relationship mentioned above.<sup>571</sup> Using or procuring the sexual offences of a victim of trafficking also is a specific offence, punishable by a prison sentence of 2 to 10 years when the victim is a child.<sup>572</sup>

Article 235 of the Code provides for heavier sentences for the offences mentioned above when the victim is 14 or 15 years of age, or below the age of 14. The sentence for rape, for example, is 5 to 20 years when the victim is 14 or 15 years of age, and 10 to 20 years if the victim is under 14 years of age.<sup>573</sup> A number of aggravating circumstances also are recognised, some concerning the methods used (force, intoxication) or resulting injury, or the identity of the perpetrator and his relationship to the victim (parents or other relatives; teacher, religious leader, health care professional, or any other person in a position of authority or with a duty of care towards the victim).<sup>574</sup>

<sup>562</sup> Art. 18.1.a-b (The definition also includes sexual activities with coercion, force or threats.)

<sup>563</sup> Art. 18.1.a and 22, respectively

<sup>564</sup> Art.228.1

<sup>565</sup> Art.230.1

<sup>566</sup> Art. 230.1 and 228.1.3

<sup>567</sup> Art. 230.4.7-8

<sup>568</sup> Art.232.1

<sup>569</sup> Art.232.1 and Art.232.3.7-9 (Other aggravating factors also are recognised.)

<sup>570</sup> Art.233 (“Private parts” include the breasts of a girl. Art.228.1.5)

<sup>571</sup> Art.233.3.7-8 and 233.3.9

<sup>572</sup> Art.231.2 (Under Art.231.3 offence is punishable by a sentence of 5 to 12 years when the victim is a child and the perpetrator is a public official. The sentence also is heavier when the victim is under 16 years of age, as indicated below.)

<sup>573</sup> Art.235.1.1 and 235.2.1

<sup>574</sup> Art.235.4-5

Article 235.3 provides that no offence is committed when a sexual act is done with the consent of two persons who are at least 14 years of age, when the difference in their ages is 2 years or less.<sup>575</sup>

Article 239 of the Code contains provisions concerning the sexual abuse of children 16 or 17 years of age by persons who have a duty of care or position of authority over them.<sup>576</sup> The applicable sentence is 1 to 5 years for crimes involving penetration, 6 months to 3 years for crimes involving 'touching' and 6 months to 5 years for other sexually degrading conduct.

The Criminal Code also recognizes three other sexual crimes specifically concerning children. Article 237 makes it a crime sell, show or provide pornography to a child under 16 years of age, and article 240 makes it a crime to induce a person 16 or 17 years of age to commit sexual acts by false promise of marriage. Article 236 makes it a crime to "broker"; provide, create an opportunity, entice, induce or coerce a children under 16 years of age to engage in illegal sexual acts with a third party. The punishment for this crime varies from under 5 years to 3 to 15 years, depending on the age of the child, the role of the perpetrator and the act facilitated or encouraged.<sup>577</sup>

The provisions of the Criminal Code mentioned above appear to cover the all forms of sexual abuse of children, as defined by the Lanzarote Convention, and even some other forms. The sentences provided by the Code also seem to meet the Lanzarote standard, that is, they are proportionate to the gravity of the offence and calculated to be dissuasive, and thus effective.<sup>578</sup> The Committee on the Rights of the Child considers that States should adopt legislation defining an 'age of consent' for sexual activities, and there is no reason to think that the age of 16 is inappropriate for this purpose.<sup>579</sup>

There are however some inconsistencies in the provisions of the Code concerning sexual offences involving children. Article 235.4, which lists aggravating circumstances, indicates that it is applicable to the third paragraph of this article, which concerns circumstances in which there is no criminal responsibility. Article 236, which criminalises persuading, inducing or facilitating the participation of children in illegal sexual activity, provides for a longer minimum sentence for crimes in which the victim is under the age of 16 than for the same conduct in which the victim is under 14 years of age.<sup>580</sup> The Code should be amended to eliminate these inconsistencies.

## b. incest

Article 243 of the Code recognizes incest as a specific offence.<sup>581</sup> Most paragraphs of article 243 define offences that involve child victims, although this offence can be committed between adults and does not necessarily involve sexual abuse of a child. Lack of consent is not an element of this offence, which has special provisions concerning children above the age of consent.<sup>582</sup> Penetration is an element of this offence.<sup>583</sup>

575 Art.235.3 (This norm applies when one at least one of the participants is under the age of 16, since consensual sex between two children over the age of 16 or 17 years of age would not be an offence.)

576 Art.239.1.1.3, 239.2.2.3 and 239.3.3.3 (This article also applies to perpetrators who take advantage of their financial or other control over the victim, or whose victim is deprived of liberty or resides in a care facility or shelter. Art.239.1.1-2; 239.2.1-2, 239.3.1-2)

577 Art.236.3, 236.6

578 Art.27.1

579 See General Comment No.9, supra, para.9

580 Compare Art.236.2 and 236.5-6

581 The term incest is not used; the article is titled "Sexual relations within the family."

582 Art.243.2 and 243.5

583 Art.228.1.3

Since other provisions of the Code that define sexual crimes recognise a family tie between the victim and perpetrator as an aggravating factor, there is considerable overlap between this article of the Code and others.

All the provisions of article 243 concerning incest in which the victim is under 16 years of age impose lesser sentences than those that are provided for the same conduct under other articles of the Criminal Code. Article 243.5 provides for a minimum sentence of 5 years for incest committed by an adult with a child 14 or 15 years of age, and article 243.4 provides for a minimum sentence of 10 years for incest committed by an adult with a child under 14 years of age. These sentences are comparable to those provided for by article 235 for the same act committed by a stranger with a victim of the same age, but under article 235.4.8 the minimum sentence would be 15 years if the perpetrator is an adult relative of the victim. Similarly, under article 235.4.8 the minimum sentence is 15 years when this act is committed by an older sibling against any child under the age of 16, but under article 243.6 and 243.7 the minimum sentence would be 5 years if the victim is 14 or 15 years of age, and 10 years if the victim is under 14 years of age. All the provisions of article 243 concerning incest in which the victim is under 16 years of age thus impose lesser sentences than those that are provided for the same conduct under other articles of the Criminal Code.

There does not seem to be any valid purpose for imposing a lower sentence for sexual offences against children involving penetration, because the perpetrator is a parent, foster parent, step parent, grandparent, aunt or uncle. The Lanzarote Convention provides that the existence of a family relationship, membership in the same household or abuse of authority over the victim should be considered aggravating factors.<sup>584</sup> There may be some reason to impose a lower sentence if the perpetrator is a sibling who is a minor, but not if the perpetrator is a sibling who is an adult and the age difference between the perpetrator and victim is significant. Article 243 therefore should be amended to eliminate the preferential treatment it gives to perpetrators of sexual abuse children who are adult relatives of the victims, by deleting the provisions of article 243 that overlap with the provisions of other articles of the Code.

### c. child prostitution

The Optional Protocol to the Convention on the Rights of the Child contains this definition of child prostitution:

Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;<sup>585</sup>

The definition contained in the Lanzarote Convention is similar:

... the term "child prostitution" shall mean the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person

The Optional Protocol requires States Parties to criminalise "offering, obtaining, procuring or providing a child for child prostitution."<sup>586</sup> The Lanzarote Convention also obliges States Parties to criminalise "having recourse to child prostitution" i.e. use of the services of a child prostitute, and 'grooming', i.e. contacting children through means such as the

<sup>584</sup> Art.28.d

<sup>585</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Art.2(b)

<sup>586</sup> Art.3.1(b)

internet with the intention of meeting them in order to commit sexual abuse.<sup>587</sup>

Other obligations recognised by these treaties include:

- to give courts competence over offences committed by citizens or residents while abroad<sup>588</sup>
- to authorize the seizure or confiscation of things used in the commission offences regarding child prostitution and the proceeds from such crimes<sup>589</sup>
- to close premises used for crimes involving child prostitution<sup>590</sup>

The Criminal Code of Kosovo does not contain a specific definition of child prostitution, but prostitution is defined as:

... offering or providing sexual services in exchange for payment, goods or services including, but not limited to, the discharge of an obligation to pay or the provision of goods or services including sexual services gratuitously or at a discount. It is irrelevant whether the payment, goods or services are given or promised to the person engaging in the sexual services or to a third person.<sup>591</sup>

Although the exploitation of child prostitution is not a separate offence under the Criminal Code, the age of a child exploited in prostitution is an aggravating factor. Article 241 of the Code criminalises the recruitment, organization, control or assisting another person for the purpose of prostitution. Without aggravating factors, this offence is punishable by a prison sentence of up to 3 years.<sup>592</sup> When the victim is 16 or 17 years of age, the sentence is 1 to 10 years; when he or she is 14 or 15 years of age, the sentence is 5 to 20 years; and if the victim is under the age of 14, the sentence is 10 to 20 years.<sup>593</sup> Commission of the offence within the proximity of a school or other locality used by children also is an aggravating factor.<sup>594</sup>

The Code also makes it a crime to provide premises for purposes of prostitution, or for the recruitment or holding of prostitutes.<sup>595</sup> The sentences – including those where the victims are children – are the same as for exploitation of prostitution.<sup>596</sup>

The crimes concerning the exploitation and facilitation of prostitution and the corresponding sentences appear in harmony with the relevant international standards. The criminalisation of the exploitation of the prostitution of all children under 18 years of age, including those over the ‘age of consent’, is particularly welcome. However, the Code fails to criminalise the use of child prostitutes by clients, and grooming, and should be amended to remedy these gaps.

The definition of prostitution contained in the Criminal Code is consistent with internationally recognised definitions, whose essential element is the provision of sexual services in exchange for any consideration. However, the clause that refers to provision of sexual services in exchange for free or discounted sexual services is not in harmony with any recognised definition of prostitution, and consideration should be given to deleting it.

The Criminal Code provides that property used in the commission of a crime and “objects derived from the commission of an offence” shall be confiscated, regardless of the nature of the offence.<sup>597</sup> However, this only applies when a perpetrator is convicted. The Code also provides that the criminal law of Kosovo applies outside the territory of

587 Art.19.1.c and 23

588 Optional Protocol, *supra*, Art.4.1; Lanzarote Convention Art.25.1.d-e

589 Optional Protocol, *supra*, Art.7(a); Lanzarote Convention Art.27.3

590 Optional Protocol Art.7(c); Lanzarote Convention Art.27.3

591 Art.228.8

592 Art.241.1

593 Art.241.4-6

594 Art.241.2

595 Art.242.1 and 242.6

596 Art.242.1-5

597 Art.69 and 96-97 and 99



Kosovo for certain crimes, including prostitution.<sup>598</sup>

Legislation should be adopted to authorize the closure of premises used for child prostitution, even in the absence of a criminal conviction.

#### d. child pornography

The Optional Protocol to the Convention defines child pornography thus:

Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.<sup>599</sup>

The Lanzarote Convention definition is similar: “ ‘child pornography’ shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.”<sup>600</sup>

Under these treaties States are obliged to criminalise the production, distribution, dissemination, import, export, offer, sale and possession of child pornography, and to authorize the seizure or confiscation of things used in the commission of offences regarding child pornography and the proceeds from such crimes, and to close premises used for these purposes.<sup>601</sup> The Lanzarote Convention also obliges States to criminalise causing a child to participate in a pornographic performance, attending a pornographic performance in which a child participates, and profiting from such a performance.<sup>602</sup>

The Criminal Code of Kosovo contains a detailed definition of child pornography:

“Child pornography” means any visual image or visual depiction or representation, including any photograph, film, video, picture or computer generated image or picture, whether made or produced by electronic, mechanical or other means, which shows or represents:

- 7.1. the genitals (vagina, penis or anus) or the pubic area of a child primarily for sexual purposes;
- 7.2. a real child engaged in actual or simulated sexually explicit conduct;
- 7.3. a person appearing to be a real child engaged in actual or simulated sexually explicit conduct; or
- 7.4. realistic images of a non-existent child engaged in actual or simulated sexually explicit conduct.<sup>603</sup>

The Criminal Code of Kosovo criminalises the production of child pornography, the use of a child in live pornographic performances, the sale, distribution, promotion, display, offer, making available, procurement and possession of child pornography, as well as attempts to commit any of these acts.<sup>604</sup> The maximum sentence, for the production of child pornography or use of a child in a pornographic performance, is prison from 1 to 5 years. The Code also provides that the criminal law of Kosovo applies outside the territory of Kosovo for certain crimes, including those involving child pornography.<sup>605</sup>

598 Art.115.1, referring to Art.241

599 *ibid*, Art.2(c)

600 Art.20.2

601 Optional Protocol, *supra*, Art.3.1(c) and Art.7(a) and (c); see also Lanzarote Convention Art.20.1 and 27.3

602 Art.21

603 Art.228.1.7.1

604 Art.238

605 Art.115.1, referring to Art.238

The definition of child pornography contained in the Criminal Code seems to be in harmony with internationally recognised definitions. The conduct criminalised also covers most of the conduct that international instruments indicate should be criminalised, with the exception of attendance at a pornographic performance involving a child, profiting from such a performance and, perhaps, the importation and exportation of child pornography. It should be amended to fill these gaps.

Clear international guidelines as to the sentences that are acceptable for crimes of this kind do not exist, but a minimum sentence of one year in prison for the production of child pornography is much shorter than the sentences for sexual abuse of children (see above), and seems disproportionate to the consequences of this offence for the victim. Consideration should be given to increasing the minimum sentence for this crime.

Legislation should be adopted to authorize the closure of premises used for the production of child pornography or for pornographic performances involving children, even in the absence of a criminal conviction.

## e. other obligations

The Lanzarote Convention recognizes a number of other obligations regarding the sexual abuse and exploitation of children, including:

- education on the risks of sexual abuse and exploitation should be mandatory in primary and secondary school<sup>606</sup>
- legislative or other measures should be taken to ensure that persons convicted of sexual abuse or exploitation of children are excluded from professions that involve regular contacts with children<sup>607</sup>
- measures shall be taken to assist offenders from reoffending<sup>608</sup>
- a database of convicted offenders and their DNA shall be established<sup>609</sup>

Legislation on education does not recognise awareness the risks of sexual abuse and exploitation as one of the aim of education.

In so far as measures to assist persons who commit sexual offences against children from reoffending are concerned, when sexual abuse occurs within a family or household, the Law on Domestic Violence provides that the perpetrator may be ordered to participate in “psycho-social treatment” for up to six months, to prevent reoffending.<sup>610</sup> Offenders who receive a suspended sentence may be obliged to “visit a psychologist” and comply with the recommendations of the therapist as part of the sentence.<sup>611</sup> The rehabilitation programme offered to convicted offenders in prison does not include a psycho-social component.<sup>612</sup>

The Law on Pre-University Education, which covers primary and secondary schools, bans the hiring of teachers, administrators or other staff who have ever been convicted of a crime of violence or indecency against a child.<sup>613</sup> In addition, courts may, when sentencing an offender, prohibit him or her from exercising a profession, if he or she abused his or her position, activity or duty in order to commit the offence. This “accessory punishment” may not exceed five years and, as the term suggests, it is not designed primarily to protect potential victims.<sup>614</sup>

606 Art.6

607 Art.5.3

608 Art.15-17

609 Art.37.1

610 Art.4

611 Criminal Code, Art.59

612 Law on the Execution of Penal Sanctions, Art.57

613 Art.35.7 and 37.4 (The latter, applicable to non-teaching staff, is broader and applies to any offence against a child.)

614 Art.65

No law authorizes the creation of a database of the DNA of convicted sexual offenders, whether their victims are children or adults. Steps should be taken to adopt legislation in these areas and/or to amend existing legislation to introduce norms requiring education on the risks of sexual abuse and exploitation in primary and secondary school, to ban persons convicted of sexual offences against children from professions that involve regular contacts with children, to establishing a database of convicted offenders and their DNA and to introduce measures to assist persons convicted of such offences from reoffending.

## 14. Abduction, sale, trafficking, and other exploitation of children

Article 35 of the Convention requires States to take “measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

Abduction is the illegal removal of a child from his or her parents or legal guardian. It includes the common crime of kidnapping, as well as the taking of a child by a parent, relative or acquaintance who is not the legal guardian. The consent of the child is immaterial. International abduction is covered by article 11 of the Convention and Ch.5 of this report, but article 35 applies to abduction whether or not the child is taken to another country.

Sale is defined by an Optional Protocol to the Convention as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”<sup>615</sup>

Trafficking of children is defined by a Protocol to the UN Convention against Transnational Organised Crime as:

the recruitment, transportation, transfer, harbouring or receipt of persons ... for the purpose of exploitation.<sup>616</sup>

Examples of exploitation mentioned by the Protocol include prostitution and other forms of sexual exploitation, forced labour, slavery-like practices (e.g. servitude) and the removal of organs.<sup>617</sup>

Article 36 of the Convention, which follows articles on child labour, sexual exploitation, sale, trafficking and the use of children in the drug production and trafficking, provides that States “shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.” The Committee on the Rights of the Child has not yet elaborated on the practices covered by this article, although it has indicated that the use of children to beg is a form of exploitation that should be criminalised.<sup>618</sup>

International Labour Convention No.182 on the Worst Forms of Child Labour obliges States to prevent and punish the exploitation of children through, inter alia, forced labour and other slavery-like practices, and in the production and trafficking of drugs.<sup>619</sup>

The rights of victims in criminal proceedings are analysed in Ch.19, below.

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615 Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography, Art.2.a

616 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (“Palermo Protocol”), Art.3 (The basic definition of trafficking in subparagraph (a) requires the use of certain means, such as the threat or use of force, coercion, abduction, fraud, deception, the abuse of power and so on, but subparagraph (b) indicates that the means used are irrelevant when the victim is under 18 years of age.

617 Art.3(a)

618 General Comment No.9, *supras*, para.76; see also General Comment No.7, *supra*, para.33(e)

619 Art.3(a) and (c), and Art.7.1-2(a)

## a. criminalisation of sale and trafficking

The Optional Protocol to the Convention on sale of children, child prostitution and child pornography requires States to criminalise the sale of children for purposes of sexual exploitation, forced labour, organ harvesting, or adoption.<sup>620</sup> The Palermo Protocol requires States to criminalise the international trafficking of children.<sup>621</sup>

Other obligations regarding the sale of children include:

- to recognise the sale of children as an extraditable offence<sup>622</sup>
- to assist other countries in criminal investigations, on request<sup>623</sup>
- to confiscate property used to commit this offences and the proceeds generated by sale of children<sup>624</sup>

The Constitution of Kosovo prohibits trafficking in persons.<sup>625</sup> Trafficking in persons also is an offence under article 171 of the Criminal Code of Kosovo. The punishment is increased (to a prison sentence of 3 to 15 years) when the victim is a child.<sup>626</sup> The definition of trafficking in article 171 is almost identical to the definition of the Palermo Protocol, except that begging is added to the list of forms of exploitation. The Criminal Code thus fully meets international standards, in so far as the obligation to criminalise trafficking in children is concerned.

The Criminal Code also recognizes certain offences associated with trafficking, such as withholding the identification papers of victims.<sup>627</sup> Crossing the border of Kosovo other than at a recognised border crossing is another example.<sup>628</sup> The punishment for this offence is increased if the perpetrator is accompanied by a child.<sup>629</sup> Refugees and displaced persons may not be prosecuted for this offence if they have a good reason for making an irregular entry and report to the authorities without undue delay.<sup>630</sup>

The Law on Health prohibits “all advertisement, bargaining and illegal trafficking” related to cell, tissue or organ transplants.<sup>631</sup> It also recognises the right of victims of trafficking to free medical care.<sup>632</sup> The Law on Reproductive Health includes victims of trafficking amongst the groups who are specifically entitled to the “highest level” of sexual and reproductive health care services.<sup>633</sup>

Although the Criminal Code recognises the crime of trafficking in persons, sale as such is not recognised as a distinct offence. The definition of trafficking indicates that giving or taking of payments may be an element of trafficking, but is not an essential element.<sup>634</sup> In contrast, the purpose of exploitation is an essential element of trafficking.<sup>635</sup> Although the children often are sold for purposes of exploitation, this is not always the case and, if that purpose is not proved, sale would not be covered by the definition of trafficking. It is therefore recommended that the Code be amended to recognise the sale of children as a distinct crime.

620 Art.3.1(a)

621 Art.5 (Trafficking is not necessarily international, but the Protocol applies only to international trafficking. Art.6)

622 Art.5

623 Art.6

624 Art.7

625 Art.28.3

626 Art.171.2

627 Art.172

628 Art.146.1

629 Art.146.2

630 Art.146.6

631 Art.88.1

632 Art.61.2.1

633 Art.31.4

634 Art.171.6.1

635 Ibid

The Criminal Code authorises judges to confiscate any “material benefit” obtained through the commission of any crime.<sup>636</sup> Extradition is governed by the Law on International Legal Cooperation in Criminal Matters (“Law on International Legal Cooperation”). In principle, the trafficking of a child is an extraditable offence, because it carries a prison sentence of more than one year.<sup>637</sup>

Extradition is, however, conditioned on several other requirements. One is the existence of an agreement with the other State, or reciprocity.<sup>638</sup> Citizens of Kosovo may not be extradited, unless international law provides otherwise.<sup>639</sup> The offence for which extradition is sought be punishable by a sentence of at least one year in prison by the law of Kosovo and the requesting State.<sup>640</sup> Extradition is not permitted for crimes punishable by the death penalty in the requesting State, or if there is reason to suspect the person concerned may be subjected to ill-treatment, or would not receive a fair trial.<sup>641</sup>

The Law on International Legal Cooperation also provides for international cooperation in the investigation of crimes, provided only that the crime is one recognised by the law of Kosovo, is not a political offence, and compliance with the request would not “prejudice sovereignty, security, public order or other vital interests of Kosovo.”<sup>642</sup>

The legislation described above is in harmony with the international standards mentioned above.

A Law on Prevention and Combating Trafficking in Human Beings and Protection of Victims of Trafficking (“Law on Trafficking”) was enacted in 2013. The definition of trafficking it contains, including the definition of exploitation, is almost identical to that contained in the Criminal Code. There is, however, an apparent difference in the modified definition that applies to children. The Criminal Code provides that recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is trafficking, even if the other elements of the basic definition (i.e. threat or the use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or the abuse of a position of vulnerability or the giving or receiving of payments or benefits) are not present. The Code refers to the elements that are not required when the victim is a child as “means”.

The Law on Trafficking provides that when a child is victim of the “conduct” referred to by the core definition, it is punishable as trafficking even if the “means” mentioned in the core definition are absent. The term “means” presumably refers the elements that the Code refers to as means, namely, the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or the abuse of a position of vulnerability, or the giving or receiving of payments or benefits. Unfortunately the text of the Law on Trafficking raises obstacles to this interpretation. One is that “the harbouring or reception of persons by means of the threat and [sic] use of force or other forms of coercion” is identified as a single element of the definition of trafficking. Under the Criminal Code, harbouring or reception would be conduct (and hence an element relevant for children), not means.<sup>643</sup>

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636 Art.69, 96 and 99

637 Art.8.1

638 Art.1.2

639 Art.4.2

640 Art.8.1

641 Art.14-16

642 Art.74 and 79; see also Art.78

643 Att.5.1.1.4 (The Criminal Code, like the Palermo Protocol, refers to the threat or use of force.)

Similarly, the Law identifies “the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation” as a single element of the definition, when the purpose of exploitation should be a separate, essential element of trafficking. Consideration should be given to amending the Law to correct these inconsistencies with the Criminal Code.

Consideration also should be given to amending article 10, which provides that “In cases when criminal action contains one of the elements of the offense of trafficking in human beings from the Article 5 of this Law, such an offense shall be considered as an offense that is related to trafficking in human beings.”<sup>644</sup> Taken literally, this would mean, for example, that *any* crime involving fraud, or abuse of power, would be an offence related to trafficking.

## b. criminalisation of abduction and other exploitation

The abduction of children is a criminal offence in the law of many countries, although there does not appear to be any international norm requiring this. (The Convention, as indicated above, requires States to *prevent* abduction.) Nor does there appear to be any international norm requiring States to criminalise other forms of exploitation of children.

The Criminal Code of Kosovo recognises the offence of kidnapping, which is punishable by a prison sentence of 3 to 12 years when the victim is a child.<sup>645</sup>

It also criminalises forced labour and other slavery-like practices, and provides for a more severe sentence (3 to 15 years of prison) when the victim is a child.<sup>646</sup> It also is a crime for parents, guardians or other persons exercising parental authority to make a child work excessively, perform work that is inappropriate given the age of the child, beg or engage in other activities that endanger or damage the child’s development.<sup>647</sup> This crime is punished by a prison sentence of 1 to 5 years.

These provisions of the Criminal Code appear to be in harmony with international standards on the protection of children from exploitation.

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644 Art.10.1

645 Art.194.2.4

646 Art.169.1 and 169.4

647 Art.250.4

## 15. Juvenile Justice<sup>648</sup>

Article 40 of the Convention provides that every child who has committed a criminal offence, or is alleged to have done so, has the right to be “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”<sup>649</sup> To this end, States should establish “laws, procedures, authorities and institutions” specifically for juvenile offenders.<sup>650</sup>

In most countries children who commit acts prohibited by the criminal law must have reached a certain age to be brought before the justice system, and the child welfare system has exclusive responsibility for younger children who commit such acts. Article 40.3(a) of the Convention encourages States to establish such a threshold, and the Committee on the Rights of the Child has indicated that it should not be lower than 12 years of age.<sup>651</sup>

The Committee also recommends that States:

... establish juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States ... should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice.

When an offender is over the minimum age for prosecution as a juvenile, the Convention and the UN Standard Minimum Rules on the Administration of Juvenile Justice (“Beijing Rules”) provide that cases should be resolved without formal legal proceedings when appropriate.<sup>652</sup> “Diversion” should be used when a simple warning or referral to some community-based programme would be appropriate, given the gravity of the offence and background of the offender.<sup>653</sup>

Article 37(b) of the Convention provides that no child shall be deprived of liberty except as a last resort, and when deprivation of liberty is necessary, it may be imposed only for the shortest appropriate period.<sup>654</sup> This principle applies during the pre-trial stage of proceedings, as well as after conviction. The European Rules reaffirm the last resort principle, and add “Special efforts must be undertaken to avoid pre-trial detention.”<sup>655</sup>

The Committee on the Rights of the Child considers that child suspects in police custody should be brought before a judge within 24 hours, to determine whether continued detention is necessary.<sup>656</sup> The Constitution of Kosovo allows suspects to be kept in police custody for 48 hours before being brought before a judge, but the Juvenile Justice Code reduces the time a juvenile may be held in police custody without a court order to 24 hours.<sup>657</sup>

648 In this section, the term ‘juvenile’ has the usual meaning in English, viz., a child old enough to be prosecuted under special norms and procedures not applicable to adults. The Albanian and Serbian versions of the Juvenile Justice Code of Kosovo also use this term to mean persons 14 to 18 years of age, but the official English version is inaccurate. (Art.2.1.4)

649 Art.40.1

650 Art.40.2

651 General Comment No.10, Children’s Rights in Juvenile Justice, 2007, para.12

652 CRC Art.40.3(b); Rule 11 of the Beijing Rules

653 See Beijing Rule No.11, Commentary

654 CRC Art.37(b); Beijing Rule No.13.1 and 19.1; European Rules for Juvenile Offenders (“European Rules”), Rule 10

655 Basic Principle 10

656 General Comment No.10, supra, para.83

657 Art.29.2; Art. 61



Juvenile who are suspected, accused or prosecuted for an offence are entitled to due process. Article 40 of the Convention recognises the following rights:

- to be presumed innocent until proven guilty<sup>658</sup>
- to be informed promptly of the charges and to have legal (or “other appropriate”) assistance in the preparation and presentation of a defence<sup>659</sup>
- to be tried without delay by a competent, independent and impartial court (or other body)<sup>660</sup>
- to not be compelled to confess or testify<sup>661</sup>
- to examine prosecution witnesses and obtain the participation of defence witnesses under equal conditions
- to appeal a conviction<sup>662</sup>
- to the free assistance of an interpreter if needed<sup>663</sup>

Article 40 also provides that the child’s parents should be present during proceedings, unless their presence would be contrary to the best interests of the child.<sup>664</sup>

The Committee on the Rights of the Child has indicated that the right to be tried without delay should be interpreted to mean that a final disposition should be made within 6 months of the time the juvenile is accused of an offence.<sup>665</sup> It also recommends that trials involving accused juveniles should be closed to the public, to protect the privacy of the accused and prevent stigmatization.<sup>666</sup>

The Convention provides that a wide variety of sanctions must be available for children who have committed an offence, including probation, parental supervision, community service, reparation of the injury caused and educational and/or counselling programmes designed to prevent re-offending.<sup>667</sup> Beijing Rule 17 provides that:

Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.

The European Rules for Juvenile Offenders Subject to Sanctions or Measures provide:

The imposition and implementation of sanctions or measures shall be based on the best interests of the juvenile offenders, limited by the gravity of the offences committed (principle of proportionality) and take account of their age, physical and mental well-being, development, capacities and personal circumstances (principle of individualisation) as ascertained when necessary by psychological, psychiatric or social inquiry reports.<sup>668</sup>

Sanctions or measures shall be implemented without undue delay and only to the extent and for the period strictly necessary (principle of minimum intervention).<sup>669</sup>

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658 Art.40.2(b)(i)  
 659 Art.40.2(b)(ii)  
 660 Art.40.2(b)(iii)  
 661 Art.40.2(b)(iv)  
 662 Art.40.2(b)(v)  
 663 Art.40.2(b)(vi)  
 664 Art.40.2(b)(iii)  
 665 General Comment No.10, *supra*, para.83  
 666 *Ibid*, para.66  
 667 CRC Art.40.4; Beijing Rule 18  
 668 Rule 5  
 669 Rule 9

They also provide that “Priority shall be given to sanctions and measures that may have an educational impact as well as constituting a restorative response to the offences committed by juveniles.”<sup>670</sup> The Committee on the Rights of the Child has endorsed the idea that the best interests principle means that, in cases involving juvenile offenders, measures to promote rehabilitation and restorative justice should be given preference over dispositions whose primary aim is deterrence or retribution.<sup>671</sup>

International standards regarding the rights of juvenile prisoners and detainees are detailed. When confinement in a correctional facility is necessary, persons under 18 years of age must be placed in a facility where they will not be in contact with adult prisoners.<sup>672</sup> Other rights include:

- frequent, direct contact with family members<sup>673</sup>
- corporal punishment, solitary confinement restricted access to food, denial of contact with family, obligatory labour and collective punishments may not be used as disciplinary measures<sup>674</sup>
- classification and supervision of prisoners to prevent peer violence<sup>675</sup>
- daily exercise and recreation<sup>676</sup>
- access to health care, including treatment for substance abuse when necessary<sup>677</sup>
- access to religious services<sup>678</sup>
- privacy<sup>679</sup>
- the right to use private clothing, appropriate to the season<sup>680</sup>
- nutritious food, clean water, bedding, toilet and living facilities<sup>681</sup>

The most important right is to have access to an effective programme for the prevention of re-offending. European Rule No.50.1 provides:

Juveniles deprived of their liberty shall be guaranteed a variety of meaningful activities and interventions according to an individual overall plan that aims at progression through less restrictive regimes and preparation for release and reintegration into society. These activities and interventions shall foster their physical and mental health, self-respect and sense of responsibility and develop attitudes and skills that will prevent them from re-offending.<sup>682</sup>

Another essential right is to receive assistance in re-integrating into the community on release from a correctional facility.<sup>683</sup>

670 Recommendation CM/Rec(2008)11, Rule 10 and 23.2

671 General Comment No.10, supra, para.10

672 CRC Art.37(c); see also Beijing Rule No.26.3; European Rule 59.1 (Exceptions to this principle may be made, in the best interests of the child concerned.)

673 UN Rules for the Protection of Juveniles Deprived of Liberty (“Havana Rules”), Rule 60; see also Rule 61; European Rules 83-84

674 Havana Rule 67

675 Havana Rule 28; European Rules 54, 61 and 62.6(b)

676 Havana Rule 47

677 Havana Rule 49, 52, 54, 55; European Rules 69.2, 71, 72.1, 75

678 Havana Rule 48; European Rule 87.2

679 Havana Rule 28

680 Havana Rule 36; European Rule 66.1-3

681 Havana Rules 33, 34, 37; European Rules 65.1-4, 67, 68.1, 68.3

682 See also European Rule 62.6 and Havana Rules No.12 and 27

683 Havana Rule 80; see also Beijing Rule 28.2

## a. the nature, scope and purpose of the juvenile justice system

Kosovo has a Juvenile Justice Code, which was adopted in 2010. The Guiding Principles contained in article 3 of the Code include:

The juvenile justice system shall emphasize the well-being of the juvenile and ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the criminal offence.<sup>684</sup>

Every minor deprived of liberty shall be treated with humanity for the inherent dignity of the human person, and in a manner which takes into consideration the needs of persons of his or her age.<sup>685</sup>

The first of these principles is identical to Beijing Rule No.5, and the second is based on article 40.4 of the Convention.

The Code also provides that, in all actions taken in the presence of a juvenile

the authorities participating in the proceedings are obliged to act carefully, taking into account the psychological development, sensitivity and the personal characteristics of the minor, so that the conduct of the proceedings does not have an adverse effect on his or her development.<sup>686</sup>

The Juvenile Justice Code applies to children between 14 and 18 years of age at the time of the alleged commission of an offence.<sup>687</sup> Children under the age of 14 who are involved in criminal behaviour shall be referred to the child welfare authorities.<sup>688</sup> With the exception of two articles, the Code also applies to young adults, i.e. persons between 18 and 21 years of age.<sup>689</sup> The minimum age for prosecution as a juvenile, of 14 years, is in harmony with international standards, and treating young adults as juvenile offenders is compatible with European standards.<sup>690</sup>

The Code also provides that both trial courts and courts of appeal shall have a juvenile judge "with expertise in criminal matters involving children... who are competent to exercise the responsibilities set forth in the present Code."<sup>691</sup> Cases, whether at the trial level or on appeal, are to be heard by a juvenile judge and 2 lay judges.<sup>692</sup>

These provisions of the Juvenile Justice Code are in harmony with the relevant international norms and standards.

## b. prevention of offending

In 2012, the Law on Social and Family Services was amended by the addition of an article on children under 14 involved in illegal activities, and another on children involved in 'anti-social' behaviour. The Juvenile Justice Code contains no provisions regarding the treatment of children under 14 years of age involved in criminal activities, or children whose behaviour indicates a risk of involvement in offending and the need for preventive interventions.

684 Art.3.1

685 Art.3.5

686 Art.42.2

687 Art.4.1 and 2.2.2

688 Art.41

689 Art.4.2-3 and 1.1.5

690 European Rules 17 and 21.2

691 Art.2.1.12 and 51.1

692 Art.51.1

The provisions added to the Law on Social and Family Services are very general, and consideration should be given to the development of a coherent legal framework on the prevention of offending, based *inter alia* on the Council of Europe Recommendation 2000(20) on the role of early psychosocial intervention in the prevention of criminality.

### c. police custody and the pre-trial stage of proceedings

The Constitution authorizes the deprivation of liberty of juveniles “for the purpose of bringing the minor before a competent institution in accordance with a lawful order,” with no mention of the principle of necessity or last resort.<sup>693</sup> This norm, evidently based on article 5(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted in 1950, is worded very differently from more recent international norms concerning the deprivation of liberty of children. However, Article 62 of the Juvenile Justice Code recognises the last resort principle:

The provisional arrest, police detention or detention on remand of a minor shall be ordered only as a measure of last resort for the shortest time possible.

Orders authorizing detention before trial are to be the exception and are valid for 30 days, which may be extended for an additional 60 days.<sup>694</sup> The total duration of detention on remand may not exceed 12 months.<sup>695</sup> Juveniles detained on remand may not be confined with adults and are entitled to social, educational, vocational, psychological, medical and physical assistance appropriate for their age, gender and personality.<sup>696</sup>

Some guarantees of due process apply during the pre-trial stage of proceedings. The Constitution provides that all persons deprived of liberty (e.g. in police custody as suspects) have the right to be informed of the reasons, the right not to make any statements, the right to legal assistance, the right to promptly communicate with a person of their choice and the right to challenge the legality of the deprivation of liberty.<sup>697</sup> These guarantees are in harmony with international human rights standards.

The Juvenile Justice Code also recognises the right of children 14 to 18 years of age deprived of liberty to prompt access to legal and other appropriate assistance, to challenge the legality of the deprivation of liberty, and to prompt proceedings.<sup>698</sup> The right of an accused juvenile’s parents and lawyer to attend and participate in pre-trial proceedings also is recognised, regardless of whether the child is detained.<sup>699</sup> The prosecutor must provide a written explanation to the judge if pre-trial proceedings last more than 6 months.<sup>700</sup> The Code also provides that a medical examination shall be performed on accused juveniles entering detention facilities, although it indicates that the purpose of this examination is to determine their ability to withstand detention, not to detect evidence of ill-treatment.<sup>701</sup>

Although most of the norms concerning this stage of proceedings are in harmony with international standards, consideration should be given to amending article 61 concerning the time limit for this stage to bring it into compliance with the Committee on the Rights of the Child’s recommendation that the total duration of all stages of proceedings – pre-trial, trial and appeal – should not exceed 6 months. Article 45 should be amended to specify that the registering evidence of ill-treatment is one of the purposes of the medical examination given to adolescents entering detention facilities.

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693 Art.29.1(3)

694 Art.66

695 Art.68.2

696 Art.67

697 Art.29.2-4

698 Article 3.6

699 Art.59

700 Art.61

701 Art.45

## d. diversion and mediation

The Juvenile Justice Code recognises what the English version of the Code calls “diversity measures”, which are intended to prevent repeat offending while avoiding legal proceedings.<sup>702</sup> The decision to dispose of a case in this way may be made by a prosecutor or judge.<sup>703</sup> The offender must accept responsibility for the offence, and express willingness to “make peace” with the victim and to comply with the measures that may be imposed, which include victim-offender mediation, mediation between the offender and his family, compensation of the victim, school attendance, employment or vocational training, community service and psychological counselling.<sup>704</sup> Cases may be disposed of in this way if the offence charged carries a sentence of 3 years or less, and the case may be reopened if the offender fails to fulfil the measure(s) agreed to.<sup>705</sup> The Probation Department has responsibility for the “execution” of diversion measures, under the supervision of the court or prosecutor who ordered diversion.<sup>706</sup> A judge may dispose of a case in this way at any time during trial.<sup>707</sup> The practice reportedly is to make such dispositions only at the end of a trial, which defeats one of the purposes of diversion. Consideration should be given to requiring judges to consider the possibility of diversion before proceeding with the main trial.

Consideration also should be given to giving authority to divert case to police officers, in line with Beijing Rule 11, which recommends that “The police ... shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system...”

A judge or prosecutor also may refer a case to mediation, if he or she considers that appropriate given the nature and circumstances of the act, the background of the juvenile, and the possibility of reconciliation between the victim and of the rehabilitation of the offender.<sup>708</sup> There are no other restrictions on the discretion of prosecutors and judges to refer a case for mediation. The fees of mediators are paid by the State, in juvenile cases.<sup>709</sup>

Article 28 of the 2008 Law on Mediation indicates it does not apply to juveniles, and a separate law on mediation involving juveniles will be adopted. This has not been done, but the Juvenile Justice Code, adopted in 2010, contains a brief chapter on mediation.<sup>710</sup> It provides that, if mediation leads to an agreement between the victim and the offender within 90 days, the case against the juvenile offender will be closed. Agreements that include monetary compensation must be approved by the prosecutor or court that approved referral for mediation. The Code contains no provisions on actual implementation of the mediation agreement.

The chapter of the Juvenile Justice Code refers expressly only to cases involving juvenile offenders. It does not apply to cases in which the victim is a child and the offender is an adult, and it is not clear how it would be applied in cases in which offender is a juvenile and the victim is another juvenile or a child under the age of 14. The existing provisions of the Juvenile Justice Code on mediation are in harmony with international standards, but these gaps should be filled. The existing law should be amended to ensure that the participation of child victims affected by mediation under the Juvenile Justice Code is in harmony with the evolving capacities and best interests principles, and the right of children to be heard and have their views taken into account.

702 Art.16

703 Art.52, 56

704 Art.17-18

705 Art.17.1 and 17.3 (This disposition also is available for unintentional offences carrying a prison sentence of up to 5 years.)

706 Art.83

707 Art.69.3; see also Art.69.1

708 Art.14

709 Art.81.5

710 Ch.XV, Arts.81-82

Although mediation often is seen as a humane and effective alternative way of dealing with juvenile offenders, one of the purposes of VOM is to give the victim more control over the response of the justice system to a crime. For this reason, legislation compatible with the principles mentioned above also should be adopted concerning the mediation in which the victim is a child and the offender is an adult.

### e. due process in the adjudication of accused juveniles

All of the rights recognized by Art.40 of the Convention, except the right to appeal a conviction, are recognised by the Constitution of Kosovo.<sup>711</sup> The right to appeal is recognised by the Juvenile Justice Code and the Criminal Procedure Code, however.<sup>712</sup> Indeed, a convicted juvenile may not waive the right to appeal.<sup>713</sup>

Article 31.3 of the Constitution recognises an exception to the principle that criminal trials should be open to the public, to protect the interests of minors, and the Juvenile Justice Code provides that all trial of juveniles shall be closed to the public.<sup>714</sup> This complies with the recommendation of the Committee on the Rights of the Child.

The Juvenile Justice Code recognises the right to legal assistance “from the beginning to the end of procedure”, and requires the court to appoint a lawyer at public expense if necessary.<sup>715</sup> However, the categorical recognition of the right to a lawyer in paragraph 1 of article 43 is undermined by paragraph 4, which indicates that defence counsel is to be appointed only at the request of the juvenile or his or her representative. Consideration should be given to eliminating this paragraph from the Code, since the Convention expressly recognises the right of every child accused of an offence to “legal or other appropriate assistance in the preparation of a defence and during trial.”<sup>716</sup>

The Code also recognises the right of parents to accompany the child during proceedings, unless their presence would be contrary to the interests of the accused child.<sup>717</sup> The Guardianship Authority and Probation Department also may attend the trial.<sup>718</sup> These provisions of the law are in harmony with international standards.

### f. sentencing and other dispositions

The Juvenile Justice Code provides that the best interests of the individual offender shall be the primary consideration in determining what sentence or measure to impose.<sup>719</sup> Other considerations include the type and gravity of the offence, the character of the offender, and his or her motives, family background and past record.<sup>720</sup>

The non-custodial sentences or measures recognised by the Juvenile Code include fines, community services orders, “judicial admonition,” attendance in a “disciplinary centre” and “intensive supervision.”<sup>721</sup> The last three, known as ‘educational measures’ are the only measures that may be imposed on convicted juveniles under the age of 16 at the time of the offence.<sup>722</sup> A court decision imposing them is not considered a finding of guilt.<sup>723</sup>

711 Art.31.5; Art. 30(1), (3) and (5); Art.31.2; Art.30(6); Art.31.4, and Art.30(4), respectively

712 Art.77 and 381, respectively

713 Art.77.3

714 Art.71.1

715 Art.43.1

716 Art.40.2(b)(ii) and (iii)

717 Art.44, Art.70.2 and Art.71.3

718 Art.70.2

719 Art.8.1

720 Ibid

721 Art.7.1-2, Art.21

722 Art.7.3

723 Art.73.3

The Probation Department has responsibility for cooperating with the implementation of diversion measures.<sup>724</sup> Diversion measures shall be implemented through a programme based on the needs and aptitudes of the offender, as far as possible.<sup>725</sup>

Orders to attend a disciplinary centre may require attendance for up to 4 hours per day for one month, or 8 hours on weekends and holidays for four days.<sup>726</sup> (No such centre exists, at present.)

Supervision may be exercised by parents, a substitute family or the guardianship authority (CSW).<sup>727</sup> Conditions that the court may attach to supervision orders include apology to or compensation of the victim, school attendance, vocational training or employment, counselling, avoiding certain persons or places, and abstinence from drug or alcohol use.<sup>728</sup>

Juveniles convicted of a crime committed while 14 or 15 years of age, although they may not be sentenced to the juvenile prison, may be placed to an educational facility. The Code recognises two kinds of such facilities, the educational facility, where placement may be from 3 months to 2 years, and educational-correctional facility, where placement for more serious offences may be from 1 to 5 years.<sup>729</sup> The execution of educational measures is to be reviewed every 6 months.<sup>730</sup>

At present there is one educational-correctional facility, and no educational facility.<sup>731</sup> Indeed, the nature of the educational facility referred to by the Code – whether it is a school exclusively for offenders or not – is unclear.

It is unclear whether recognition of this particular measure serves a useful purpose, since school attendance can be required either as part of a supervision order or a diversion measure. If there is a reason to retain this as a separate measure, the Code should be amended to clarify what kind of educational facility is meant.

Convicted juveniles having a physical handicap or mental disorder may be placed in a “special care facility” rather than an educational facility.<sup>732</sup> The need for continued placement in such cases must be reviewed every 6 months.<sup>733</sup>

Fines and community service orders may only be imposed on offenders at least 16 years of age at the time of the offence.<sup>734</sup> The amount of fines is to be determined taking the offender’s income, property and obligations into account.<sup>735</sup> Community service orders may not exceed 120 hours.<sup>736</sup>

Only juveniles 16 or 17 years of age may be sentenced to prison, and they may be given a prison sentence only if the offence carries a sentence of 5 years or more, and only if the judge concludes that placement in an educational facility would be inappropriate, given seriousness and consequences of the offence and the level of responsibility of the offender.<sup>737</sup> The maximum prison sentence that may be imposed on a convicted juvenile is 10 years for a single very serious offence or for two or more serious offences; in all

724 Art.83, 84.2; see also Art.92-97, Art.111-112, Art.127

725 Art.85.2-4 and Art.116.2-117

726 Art.22

727 Art.23-25

728 Art.25

729 Art.27-28

730 Art.123-124

731 The educational facility presently is located within the juvenile prison, but a decision has been taken to move it to a new location outside the prison perimeter.

732 Art.29, Art.123

733 Art.127-128

734 Art.72-3 (This refers to community service as a specific sentence.)

735 Art.30.1

736 Art.31.2

737 Art.33

other cases the maximum sentence is 5 years.<sup>738</sup> Sentences of 2 years or less may be suspended, and prisoners serving prison sentences for crimes committed while under the age of 18 are eligible for conditional release after serving one-third of the sentence.<sup>739</sup>

There are no authoritative guidelines on the interpretation of the most relevant international standards, such as the last resort and shortest period principles. However, the sentences provided for by this law are fall within the range of those recognised by the legislation of other countries in the region, and there is no reason to conclude that they might need to be changed in order to bring them into harmony with international standards.

### g. correctional facilities

The Guiding Principles contained by the Juvenile Justice Code recognize the right of juvenile serving a prison sentence to a rehabilitation programme:

During the time of deprivation from liberty imposed as a penalty, a minor offender shall receive educational, psychological and, if necessary, medical assistance to facilitate his or her rehabilitation.<sup>740</sup>

The principle that juvenile prisoners should be separated from adults also is recognised.<sup>741</sup> When convicted juvenile are allowed to remain in a juvenile facility after reaching 18 years of age, they are separated from prisoners under the age of 18.<sup>742</sup> The new Juvenile Justice Code eliminates solitary confinement as a disciplinary measure.<sup>743</sup> The Probation Service is responsible for providing aftercare for up to 12 months after release.<sup>744</sup>

The Ministry of Education, Science and Technology is mandated to “take special measures” for the education of persons in the juvenile prison and facilities for young offenders.<sup>745</sup>

The provisions of the Juvenile Justice Code on juveniles serving prison sentences are largely in harmony with international standards, although it is anomalous that individual treatment programmes are to be developed in educational facilities for younger juvenile offenders but not in juvenile correctional facilities. Consideration should be given to amending the law in this regard.

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738 Art.34.2

739 Art.75 and Art.35.1

740 Art.3.3

741 Ibid, Art.3.5, Art.136

742 Art.136.3; see also Art.136.4

743 Art.122.2-3 and Art.139.2

744 Art.142.2 (If the child has no parents, or they are not willing and able to receive him or her, this responsibility falls to the Guardianship Authority, Art.143)

745 Law on Pre-university Education, Art.5.15



## 16. Child Refugees and Asylumseekers, Military Service and Armed Conflict

Article 22 of the Convention provides that children who are refugees or who are seeking refugee status (“asylum seekers”) have the right to protection and “humanitarian assistance” in the enjoyment of the rights recognised by the Convention on the Rights of the Child and other relevant international instruments.

The reference to rights that child refugees have under other international instruments refers mainly to the Convention on the Status of Refugees. This Convention defines as refugees persons who have left their State of nationality due to a well-founded fear of persecution on specific grounds, namely, race, religion, nationality, membership of a particular social group, or political opinion.<sup>746</sup> Refugees may not be obliged to return to the country where their life or liberty is in danger for one of the reasons mentioned above.<sup>747</sup> This means, in effect, that they have the right to remain in the country that has recognised their status as a refugee, for as long as they remain refugees.<sup>748</sup> Furthermore, persons who enter a country illegally in order to escape persecution should not be persecuted for illegal entry.<sup>749</sup> The Convention on the Status of Refugees recognises a number of civil and economic rights to which refugees are entitled, but for the most part they add nothing to the rights children have under the Convention on the Rights of the Child.

Article 38 of the Convention provides that States shall not recruit persons under the age of 15 into their armed forces, and that if a State does recruit persons between the age of 15 and 18, those who are older shall be recruited first. A Protocol to the Convention on the Rights of the Child adopted in 2000 allows States to accept two higher standards:

- to not impose compulsory military service on persons under the age of 18,<sup>750</sup> and
- to adopt a minimum age for voluntary entry into the armed forces that is at least 16 years of age.<sup>751</sup>

The Protocol obliges States to make an effort, when engaged in an armed conflict, to prevent the direct participation of members of their armed forces who are under 18 years of the age.<sup>752</sup> It also obliges States to criminalise the recruitment of persons under 18 years of age into non-State armed forces.<sup>753</sup>

Article 38 of the Convention requires States to “take all feasible measures to ensure protection and care of children who are affected by an armed conflict”; “in accordance with their obligations under international humanitarian law.”<sup>754</sup> International humanitarian law includes the Geneva Conventions and Protocol II to the Geneva Conventions, which contains norms applicable to non-international conflicts.<sup>755</sup>

<sup>746</sup> Art.1.A(2) (According to the Convention this applies only to fear of persecution based on events in Europe prior to 1951, but a Protocol adopted in 1967 removed these temporal and geographic restrictions from the definition.)

<sup>747</sup> Art.33; see also Art.32

<sup>748</sup> Art.28 also provides that refugees should be issued documents that allow them to travel internationally.

<sup>749</sup> Art.31

<sup>750</sup> Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Art.2

<sup>751</sup> *Ibid*, Art.3

<sup>752</sup> Art.1

<sup>753</sup> Art.4.2

<sup>754</sup> para.4

<sup>755</sup> Geneva Conventions I and II cover sick, wounded and shipwrecked members of armed forces; Convention III covers prisoners of war and Convention IV covers the civilian population. Protocol I expands on the content of all the four Conventions, which (except Common Article 3) apply during international armed conflicts, while Protocol II contains a smaller set of norms that apply in non-international armed conflicts.

## a. child refugees and asylum seekers

This right recognised by the Convention on the Rights of the Child to protection and “humanitarian assistance” applies to all children seeking asylum or child refugees, regardless of whether they are accompanied by a parent or other responsible adult. When they are not accompanied by a parent, the State should cooperate with efforts to trace the parents or other family members, with a view to facilitating family reunification.<sup>756</sup> Children whose family cannot be located have the same right to alternative care as other children deprived of a family environment.<sup>757</sup>

The Committee on the Rights of the Child recommends that a guardian should be designated as soon as possible for every child outside their country who is not accompanied by a parent.<sup>758</sup> In addition, unaccompanied children should have legal assistance in making a claim for refugee status and, as a rule, should not be deprived of liberty.<sup>759</sup>

The UN High Commissioner for Refugees adopted guidelines for assessing claims by children for refugee status in 2009.<sup>760</sup> These Guidelines confirm that even very young unaccompanied children may be recognised as applicants for refugee status.<sup>761</sup> It also indicates that the key requirement of a “well-founded fear of persecution” must be interpreted from the perspective of the child:

Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child.<sup>762</sup>

The Committee on the Rights of the Child considers that, even when a child’s application for refugee status has been denied, the decision whether to return the child to his or her country or allow the child to remain for humanitarian reasons, must be based on the best interests of the child.<sup>763</sup>

The Law on Asylum adopted in 2013 contains a definition of refugee based on the Convention on the Status of Refugees, and recognises the right of such persons to “asylum” and legal **residence in Kosovo**.<sup>764</sup>

In addition, foreigners and stateless persons who do not meet the definition of refugee are entitled to “subsidiary protection” if, in the country of nationality or habitual residence, they face a real risk of execution, torture, inhuman or degrading treatment or imprisonment, or death due to indiscriminate violence in armed international or internal conflicts. Persons who meet these requirements are entitled to a residence permit for one year.<sup>765</sup> The Law on Asylum requires the authorities to “undertake all measures aimed at protecting the unity of the family” in applying the procedures it establishes.<sup>766</sup>

Article 14, on unaccompanied child asylum seekers, provides that an official of the CSW will be appointed to represent and assist the child in making an application for asylum, that applications shall be handled by officials having knowledge of the special needs of children, and the best interests of the child shall be a primary consideration in handling the cases of unaccompanied children.<sup>767</sup>

<sup>756</sup> see Art.10 of the CRC, and Ch. 6

<sup>757</sup> see Arts.20-21 of the CRC, and Ch.12

<sup>758</sup> General Comment No.6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005, para.21, 33, 69

<sup>759</sup> General Comment No.6, para.21, 36, 40, 61, 69

<sup>760</sup> Guidelines on International Protection No.9

<sup>761</sup> para.8 and note 16, mentioning the case of a child 3 years of age

<sup>762</sup> para.10; see also para.15-17

<sup>763</sup> General Comment No.6, supra, para.82-83

<sup>764</sup> Art.1.11 and 6.1 (Art.7 recognises exceptions, which are in harmony with those recognise by the Convention of the Status of Refugees.)

<sup>765</sup> Art.8.3 (unless compelling reasons of national security or public order otherwise require)

<sup>766</sup> Art.3.1

<sup>767</sup> Art.14.1-4

Efforts must be made to trace the family of the child and, if refugee status or subsidiary protection is granted, a legal guardian shall be appointed and the views of the child shall be taken into account in selecting an appropriate placement.<sup>768</sup>

The Criminal Code provides that persons who enter the territory of Kosovo illegally shall not be prosecuted provided that they are fleeing a territory where their life, body or fundamental freedoms or rights are threatened and they present themselves to the authorities within a reasonable time.<sup>769</sup> The Law on the Social Assistance Scheme recognises the right of refugees, asylum seekers and “persons enjoying provisional or complementary protection” to apply for financial benefits.<sup>770</sup> The Law on Reproductive Health mentions refugees and displaced persons amongst the groups entitled to the highest possible level of sexual and reproductive health care.<sup>771</sup>

In conclusion, the legislation of Kosovo on child refugees and asylum seekers appears to be in harmony with the relevant international norms.

## b. military service

The Criminal Code of Kosovo contains a large number of articles criminalising violations of international humanitarian law. Articles 151 and 153 criminalise the conscription or recruitment of children under the age of 15 into the national armed forces or any armed force or group, or their use in hostilities during an international or non-international armed conflict.<sup>772</sup> These crimes are punishable by a sentence of 5 years to life in prison. Both of these articles apply only in the event of an actual armed conflict.<sup>773</sup>

Article 155 criminalises the conscription or recruitment of children between 15 and 18 years of age, as an offence punishable by a sentence of 1 to 10 years of prison. This article applies whether or not an armed conflict exists, leading to the anomalous situation that, in times of peace, the conscription or recruitment of children 15 to 18 years of age is an offence, but the conscription or recruitment of children under 15 years of age is not.

The Code should be amended to ensure that the recruitment of children under 15 years of age is an offence at all times.

## c. the protection of children from the consequences of armed conflict

Article 38 of the Convention, as indicated above, requires States to take measures to protect children affected by an armed conflict, in accordance with their obligations under international humanitarian law.<sup>774</sup> The norms of humanitarian law applicable to an individual depend to a large extent on his or her status, the three most important of which are combatant, member of the armed force no longer capable of participating in the conflict (wounded combatant, prisoner of war, etc.), and member of the civilian population.

Since children should not participate in armed conflict, the rules of humanitarian law most relevant for them are those that apply to the civilian population. The most important rule is that the civilian population and civilian objects (e.g. schools, hospitals) shall not be

<sup>768</sup> Art. 14.6-8

<sup>769</sup> Art. 146.6

<sup>770</sup> Art. 4.2 (as amended in 2012)

<sup>771</sup> Art. 32

<sup>772</sup> Art. 151.2.26 and 153.2.7 (The former applies only to conscription or recruitment to national armed forces; the latter to any armed force or group.)

<sup>773</sup> Art. 151.1 and 153.3

<sup>774</sup> para. 4

attacked militarily.<sup>775</sup> Convention IV recognizes the broad the right of civilians to respect for their “persons, their honour [and] their family rights...”.<sup>776</sup>

If children participate in an armed conflict despite the norms that prohibit this, they remain entitled to special protection, but may be detained as prisoners of war and are not exempt for criminal responsibility for their acts.<sup>777</sup> The Committee on the Rights of the Child has stated, however, that in general former child soldiers should be seen primarily as victims, and the emphasis should be on providing them with assistance in recovering from their experience and reintegration into society.<sup>778</sup>

International humanitarian law also recognizes obligations to trace family members separated by armed conflict, to protect children separated from their families and to enable family reunification.<sup>779</sup>

The Committee on the Rights of the Child also has pointed to the obligation of States to take steps after an armed conflict to protect children from mines, unexploded ordinances and the excessive availability of small arms.<sup>780</sup> The Kosovo Security Force has a legal mandate to dispose of mines and other unexploded ordinances.<sup>781</sup>

The Criminal Code of Kosovo criminalises most, if not all, grave violations of humanitarian law.<sup>782</sup> In particular, intentional attacks on the civilian population and individual civilians offences are punishable by a sentence of 10 years to life, whether they occur in an international or non-international armed conflict.<sup>783</sup> Children over the age of 14 could be prosecuted for violation of the articles of the Criminal Code on war crimes, but would be entitled to special treatment under the Juvenile Justice Code. (see below)

The Law on Asylum, as indicated above, contains norms on these issues that would apply to foreign or stateless children who may have been affected by a war anywhere in the world.

These articles of the Criminal Code and Law on Asylum are in harmony with the most important obligations States have with regard to the impact of armed conflict on children.

#### d. the right of victims to assistance

Article 39 of the Convention, which recognizes the right of child victims to measures that promote “physical and psychological recovery and social reintegration”, applies to children affected by armed conflict as well as those affected by other forms of violence. This right applies regardless of where the armed conflict took place, and regardless of whether the State where children reside has any responsibility for the armed conflict.

The Law on Reproductive Health, as mentioned above, includes refugees and displaced persons amongst the groups entitled to the highest possible level of sexual and reproductive health care.<sup>784</sup> More generally, the Law on Health provides that health care includes “measures for the prevention and elimination of health consequences of emergency conditions”.<sup>785</sup> The Law on Asylum recognises exposure to indiscriminate

775 Protocol I, Arts 48-58; Protocol II, Art.13-14

776 Art.27; see also Art. 32, which prohibits murder, torture and other acts of brutality.

777 Protocol I, Art.77(3)-(5) and Protocol II, Art.4.3(d) and Art.6.4

778 General Comment No.6, supra, para.56

779 Convention IV, Art.24 and 26; Protocol II, Art.4.3(b)

780 General Comment No.9, supra, para.55

781 Law on Kosovo Security Force, Art.10.2(c)

782 Arts.150-160

783 Art.151.1.12 and 151.2.1 (international armed conflicts) and 153.1.2 and 153.2.1 (non-international armed conflicts); see also Arts. 151.2.2.4 and 153.2.14 (attacks on civilian objects) and 151.2.4 151.2.28 and 153.2.15-16 (indiscriminate attacks and attacks predictably causing disproportionate collateral damage)

784 Art.32

785 Art.12.1.11; see also Art.89-91

violence during armed conflict as a ground for “subsidiary protection” and residence (see above), and provides that persons who are entitled to such protection and who have “special needs” shall be given special treatment with regard to accommodation, medical treatment and psycho-social assistance, as needed.<sup>786</sup>

The Law on Social and Family Services recognises any person in the national territory who needs social services because of a natural or other disaster or emergency as “persons in need”; regardless of their place of origin, but the operative provisions of the law focus on children who are victims of violence or neglect in their home and children whose parents are unable to care for them.<sup>787</sup> There appears to be a gap in the legislation with regard to the right of child victims of armed conflict who are not covered by the Law on Asylum to the sort of assistance described by article 16 of that law, that it would be desirable to fill at an appropriate time.<sup>788</sup>

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786 Art.16.3

787 Art.9-11

788 This gap would affect, for example, citizens of Kosovo who are exposed to an armed conflict in a foreign country and return to Kosovo.

## 17. Equality and non-discrimination

Article 2 of the Convention recognises the obligation of States to “respect and ensure” all the rights recognises in the Convention

to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.<sup>789</sup>

Children also must be protected “against all forms of discrimination or punishment on the basis of the status, activities, ... opinions, or beliefs of the child’s parents, legal guardians, or family members.”<sup>790</sup>

The Committee on the Rights of the Child endorses the view that the principle of non-discrimination includes discrimination on grounds of sexual orientation.<sup>791</sup> It also has urged an end to discrimination against children with HIV.<sup>792</sup>

The State has an obligation to protect children against discrimination “whatever forms it takes and wherever it occurs – within families, communities ... or other institutions.”<sup>793</sup> *De facto* discrimination often is a problem when essential services such as health and education are provided by a combination of State, private and other actors, and are not equally available throughout the territory. States have an obligation to monitor and collect data on the availability of and access to services, and take any actions that may be required to guarantee that all children have an equal opportunity to benefit from existing services.<sup>794</sup>

The principle of non-discrimination does not necessarily require identical treatment of all persons.<sup>795</sup> CEDAW provides that measures to protect maternity, as well as temporary special measures that aim to eliminate *de facto* inequality between men and women, are not discrimination.<sup>796</sup> The Committee on Human Rights has stated that differential treatment is not discrimination if its purpose is legitimate and the criteria for different treatment are reasonable and objective.<sup>797</sup> The Committee on Economic, Social and Cultural Rights has adopted a similar position.<sup>798</sup>

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789 para.1

790 para.2

791 General Comment No.3, supra, para.7 and 9; General Comment No. 4, supra, para.6; General Comment No.15 supra, para.8; see also the Committee on Economic, Social and Cultural Rights, General Comment No.20, Non-discrimination in economic, social and cultural rights, para.32

792 General Comment No.1, supra, para.10; General Comment No.3, supra, para.8; General Comment No.7, supra, para.11(b) (iii); see also General Comment No.20 of the Committee on Economic, Social And Cultural Rights, supra, para.32

793 General Comment No.7, supra, para.12

794 Ibid

795 Committee on the Rights of the Child, General Comment No.5, General Measures of Implementation of the Convention on the Rights of the Child, 2003, para.12

796 Art.4; Art.1.4 of the Convention on the Elimination of Racial Discrimination makes a similar exception for the purpose of ensuring the advancement of certain racial or ethnic groups.

797 General Comment No.18, Non-discrimination, 1989, para.13

798 General Comment No.20, Non-discrimination in economic, social and cultural rights, 2009, para.13

## a. constitutional prohibition of discrimination

The Constitution of Kosovo provides, in article 24, that “All are equal before the law” and “Everyone enjoys the right to legal protection without discrimination.”<sup>799</sup> The second paragraph of this article expressly prohibits discrimination on the following grounds:

- race
- colour
- gender
- language
- religion
- political or other opinion
- national or social origin
- relation to any community
- property or economic condition
- social condition
- sexual orientation
- birth
- disability
- other personal status

Article 47 of the Constitution, on the right to education, also provides that “Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs.”<sup>800</sup>

This list contained in article 24 - assuming that ‘relation to a community’ is the equivalent of ethnicity - includes all the grounds of discrimination expressly prohibited by the Convention on the Rights of the Child and the European Convention on Human Rights.<sup>801</sup> It also prohibits discrimination on some grounds not mentioned by these treaties, namely, sexual orientation and social condition.<sup>802</sup> Unlike the Convention on the Rights of the Child, the Constitution does not expressly prohibit discrimination against children based not on their own characteristics, but on those of the child’s parents. The Law on Pre-University Education does, however, prohibit discrimination on grounds that apply to a student’s family.<sup>803</sup>

The third paragraph of article 24 creates an exception for temporary special measures necessary to protect and advance the rights of individuals and groups in a position of inequality.

799 Art.50.1

800 Art.47.2

801 See Art.2 of the CRC and Art.14 of the ECHR.

802 The CRC bans discrimination based on “social origin,” which may be different from “social condition.” The ECHR does not expressly ban discrimination based on disability.

803 Art.3.6 (The grounds are essentially the same as those listed in the Constitution, plus marital status.)

## b. legislative prohibition of discrimination

Discrimination also is prohibited by ordinary legislation, including article 4 of the Family Law, article 2.1 of the Law on Social and Family Services, articles 1.17 and 5 of the Law on Labour, article 1 and 4(b) of the Law on Pre-school Education, article 3.4 and 3.6 of the Law on Pre-university Education, article 4.1 of the Law on Rights and Responsibilities of Citizens in Health Care and article 4.2, 5.1.2 and 8.1 of the Law on Health.

Article 4 of the Family Law, article 4 of the Law on Rights and Responsibilities in Health Care and article 5 of the Law on Health expressly ban discrimination on the ground of marital or family status. Although discrimination on this ground may be covered by the constitutional ban of discrimination 'personal status', the express prohibition of discrimination on the basis of marital in the Family Law is particularly welcome.

In some cases, the list of prohibited grounds of discrimination found in legislation omits some forms of discrimination prohibited by the Constitution. Article 2.1 of the Law on Social and Family Services, for example, does not prohibit discrimination on grounds of gender or sexual orientation. Moreover, in 2012 an amendment to this law deleted from article 2.1 reference to social origin, property, birth and other status as prohibited grounds of discrimination.<sup>804</sup> This amendment is incompatible with international standards, and the original text of article 2.1 should be restored.<sup>805</sup> The Law on Labour does not prohibit discrimination on the grounds of relation to any community, property or economic condition, sexual orientation, birth, disability, other personal status or opinion (other than political opinion).<sup>806</sup> Consideration should be given to amending the Law on Labour to prohibit discrimination on the grounds mentioned above.

The Law on Health recognises the right of citizens and residents to "equal access [to] health care," and indicates that discrimination on specific grounds should not be allowed.<sup>807</sup> The Law on Rights and Responsibilities of Citizens in Health Care expressly prohibits discrimination on most of the grounds listed in article of the Constitution.<sup>808</sup> Despite its title, it is the only law to expressly prohibit discrimination on grounds of nationality.

Article 191 of the Criminal Code provides that anyone who unlawfully denies or limits the freedoms or rights of any person, or grants anyone a privilege or advantage arbitrarily, may receive a sentence of three years in prison.

<sup>804</sup> Law No.004/L-081 on Amending and Supplementing the Law No.02/17 on Social and Family Services, Art.2.1

<sup>805</sup> It also appears to be incompatible with the Constitution.

<sup>806</sup> Art.1.17

<sup>807</sup> Art.4.2

<sup>808</sup> Art.4.1 and 4.5



## 18. Access to justice

The right to a remedy for violations of human rights or legal rights is an essential part of international human rights law. The Universal Declaration of Human Rights provides:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.<sup>809</sup>

This right is recognised by three articles of the International Covenant on Civil and Political Rights. Article 2 recognises the obligation of every State Party to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...”<sup>810</sup> Article 26 states “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” In addition, article 14 provides that “In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

This right is not recognised expressly by the Convention on the Rights of the Child, but the Committee on the Rights of the Child has stated:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention ...<sup>811</sup>

In addition, Article 12 of the Convention provides:

... the child shall ... be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>812</sup>

Other provisions of the Convention also concern certain aspects of the child’s right to justice. Article 9 recognises the right of “all interested parties” to participate in proceedings concerning the separation of children from parents, and make their views known.<sup>813</sup> Article 19 refers to the need for effective procedures, including judicial intervention, for the identification, investigation, treatment and follow-up of violence, abuse, exploitation and neglect of children.<sup>814</sup> Article 38 recognises the right of children to challenge to the legality of any deprivation of liberty, and to legal assistance for that purpose.<sup>815</sup> Article 40 recognises the right of children accused of an offence to due process.<sup>816</sup>

Article 10 mentions the right of children to apply to leave or enter a State for purposes of family reunification. Article 22 alludes to the right of children to seek refugee status. Article 23 mentions a right of children with disabilities to assistance “for which application is made.”<sup>817</sup> Article 25 recognises the right to children placed for purposes of health care, childcare or protection to periodic review of the treatment provided and other relevant circumstances.

809 Art.8

810 para.3.(a)

811 General Comment No.5, supra, para.24

812 para.2

813 para.2

814 para.2

815 para.(d)

816 para.2

817 para.2

The right of access to justice has both procedural and substantive dimensions. The articles mentioned above concern access to justice as a procedural right. Other articles of the Convention provide that children whose rights have been violated are entitled to measures designed to repair the damage they have suffered. Article 39, for example, recognises the right of a child victims of neglect, exploitation, violence, abuse, torture or armed conflicts to appropriate measures of physical and psychological recovery and social reintegration.

Legal assistance is essential for effective access to legal remedies. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems contain useful standards on children's right of access to legal assistance. They recommend that legal assistance should be provided to victims of crime, as well as suspects, accused persons and defendants.<sup>818</sup> The right of children to legal assistance should not depend on a means test, and

Legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.<sup>819</sup>

The UN Principles and Guidelines also contain this useful comment on the child's right to information about legal rights and proceedings:

Providing information on legal rights in a manner appropriate for the child's age and maturity, in a language that the child can understand and in a manner that is gender- and culture-sensitive. Provision of information to parents, guardians or caregivers should be in addition, and not an alternative, to communicating information to the child.<sup>820</sup>

To enable legal assistance providers to discharge these responsibilities adequately, a Guideline recommends that:

All legal aid providers working with and for children should receive basic interdisciplinary training on the rights and needs of children of different age groups and on proceedings that are adapted to them, and training on psychological and other aspects of the development of children, with special attention to girls and children who are members of minority... groups...<sup>821</sup>

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818 Principle 4 and Guideline 7

819 Guideline 1(c) and Principle 11

820 Principle 10, para.53(e)

821 Guideline 11, para.58(d)

## a. constitutional and legislative recognition of the right to a legal remedy

The Constitution of Kosovo contains several articles that recognise the right to a remedy. Article 54 recognises the right to a remedy for violations of any constitutional or legal right:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

Article 32 of the Constitution recognises a narrower right to a remedy against “judicial and administrative decisions which infringe on his/her rights or interests.”<sup>822</sup> The right to fair legal proceeding for the determination of one’s rights also is recognised, in terms similar to the relevant international standards:

Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.<sup>823</sup>

The principle of equality before the law also is recognised in broad terms:

Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.<sup>824</sup>

Legislation also recognises the right of access to justice. Article 7 of the Law on Courts provides:

Every person has the right to address the courts to protect and enforce his or her legal rights. Every person has the right to pursue legal remedies against judicial and administrative decisions that infringe on his or her rights of interests, in the manner provided for by Law.<sup>825</sup>

It also provides that “All persons shall have equal access to the courts and no one shall be denied due process of Law or equal protection of the Law.”<sup>826</sup> Discrimination on a number of grounds is expressly prohibited, but age is not one of them.<sup>827</sup>

No law expressly recognises and regulates the capacity of children in legal proceedings in general terms. The Family Law provides that parents have the right and obligation to “legally represent” their children.<sup>828</sup>

The article that recognises this right and obligation does not require them to take the views of their children into account. The Family Law also recognise a limited capacity of children 14 years of age or older to undertake legal transactions, with parental consent, but this does not include capacity to initiate legal action.<sup>829</sup>

<sup>822</sup> Art.31

<sup>823</sup> Art.31.2; compare Art.14.1 of the Int. Covenant on Civil and Political Rights

<sup>824</sup> Constitution, Art.31.1

<sup>825</sup> para.3

<sup>826</sup> Art.7.2

<sup>827</sup> Art.7.1

<sup>828</sup> Family Law, Art.133

<sup>829</sup> Art.136(1)

In the absence of a general norm on the capacity of children to participate in legal proceedings (other than as victims of crime or accused persons), various laws contain provisions on their participation in specific kinds of proceedings.

The Family Law provides that the opinion of children of all ages is to be taken in to account in cases concerning custody.<sup>830</sup> Children are parties to legal proceedings concerning paternity, and a special representative shall be appointed if there is a conflict of interest between the child and the parent having legal responsibility for the child. Only boys 16 years of age or older may recognise paternity. (see Ch.4)

The Law on Citizenship provides that parents may apply for citizenship or renounce citizenship on behalf of their children; children under 14 must consent to the acquisition of Kosovar nationality, but not the renunciation of such nationality. (see Ch.4) Under the Law on personal names, only parents or guardians may request a change of the name of a child, and the consent of children 10 years of age or older is required. (see Ch.4)

The Law on Voluntary Termination of Pregnancy recognises the right of girls 16 or 17 years of age to request permission to terminate pregnancy, with the consent of their parents or guardian. (see Ch.6)

In other areas there are gaps in the law. The Law on Labour, for example, recognises the right of employees to seek a legal remedy, or resort to mediation, for violations of their labour rights.<sup>831</sup> Children 15 years of age may be employed, but the Law on Labour does not expressly recognise of the capacity of employees under 18 years of age to use these remedies, or their right to assistance in doing so.

There may be valid reasons to establish different thresholds for capacity to take legal action for some purposes, but there is a need to adopt a general norm that recognises the capacity of children to take legal action, and that regulates who may represent them when they are unable to do so personally, and when this capacity should be vested in some person especially designated for this person. The general norm also should recognise the obligation of children's legal representatives to take their views and best interests of children into account in deciding how to represent their interests, and the obligation of courts and other authorities to give due weight to the views of children, and the obligation to provide children with appropriate assistance in understanding the nature and possible consequences of proceedings, and their role in them. Once this has been done, existing legislation establishing concerning the capacity of children to take legal action in specific cases should be reviewed, in order to determine whether there are sufficient reasons for any differences from the general norm.

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830 Art.140(5)

831 Art.80-81

## b. administrative remedies

Some laws contain provisions recognising the general terms the right to make complaints to an administrative authority. Article 14.A of the Law on Social and Family Services, for example, provides that any “aggrieved party” dissatisfied with a decision by social services may request the head of the pertinent Centre for Social Work to review their case.<sup>832</sup> The decision of this authority may be appealed to the department’s complaints commission, and the decisions of the complaints commission may be appealed to a court.<sup>833</sup> The law, as amended in 2012, indicates that aggrieved parties may request a review personally or through a representative, but there are no norms indicating specifically whether children could exercise this right personally, and what assistance they would be entitled to in making a complaint either personally or through a representative.<sup>834</sup>

Similarly, article 11 of the Law on the Social Assistance Scheme provides that an applicant dissatisfied with a decision may request the head of the office responsible to review the decision, and may appeal the decision of the head of office to a complaints commission. Decisions of the complaints commission may be appealed to the competent court.<sup>835</sup> The Law on Material Support for Families of Children with Permanent Disability also recognises the right to appeal decisions.<sup>836</sup>

The procedural norms of these administrative proceedings should be reviewed to ensure that they comply with the right of children to an effective remedy for any act, policy or omission that they believe has an adverse effect on their rights, to procedures that are child-sensitive, and in harmony with the evolving capacity principle and the right of children to be heard.

## c. the right to legal assistance in seeking remedies

The Constitution recognises a qualified right to free legal assistance:

Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.<sup>837</sup>

A Law on Free Legal Aid was adopted in 2012. It provides that citizens and residents who are entitled to social assistance have the right to free “primary” legal aid, which includes legal advice, preparation of legal documents, representation in civil, criminal and administrative legal matters and assistance in mediation.<sup>838</sup> Citizens and residents whose gross family income is below average are entitled to free “secondary” legal aid, which includes drafting legal documents and representation in civil, administrative and minor criminal cases.<sup>839</sup> In both cases, entitlement to free legal services also depends on the legal basis for the claim, the strength of the evidence, and the probability of success.<sup>840</sup> The law establishes an administrative procedure to appeal denial of legal aid.<sup>841</sup>

This law appears to meet the recommendations of international human rights bodies regarding access to legal assistance in non-criminal matters. It nevertheless would be desirable to recognise expressly the right of children to the assistance of lawyers in cases affecting their rights.<sup>842</sup>

<sup>832</sup> Art. 14.A.1 (article 15 prior to amendment of the Law in 2012)

<sup>833</sup> Art. 14.A.3 and 14.A.8

<sup>834</sup> Given the nature of the issues likely to concern children, a request for review of action taken or not taken presumably often would need to be made by an independent representative.

<sup>835</sup> Art. 11.3

<sup>836</sup> Art. 23

<sup>837</sup> Art. 31.6

<sup>838</sup> Art. 5.2 and 8.2 (The previous UNMIK Regulation on Free Legal Aid defined primary legal aid as including “representation of minors in any matter”, but it is not clear that the substantive scope of such representation was actually broader than the scope of representation guaranteed by the present law.)

<sup>839</sup> Art. 5.3 and 8.3

<sup>840</sup> Art. 9

<sup>841</sup> Art. 34

<sup>842</sup> The Legal Aid Agency reportedly does not receive requests to provide legal assistance to children. (see Ch. 27, below)

## d. other remedies - the ombudsman

An ombudsperson was established by the United Nations Mission in Kosovo in the year 2000. The Constitution, adopted in 2008, recognizes the mandate of the ombudsperson to “monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.”<sup>843</sup> The Constitution recognises the independence of the Ombudsperson, and the obligation of all public institutions and authorities “to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law.”<sup>844</sup> The Ombudsperson is appointed by and reports to the Assembly of Kosovo (parliament).<sup>845</sup>

The mandate and functions of the Ombudsperson Institution are further defined by the Law on Ombudsperson adopted in 2010. The Law confirms that the mandate of the Institution covers violations of human rights recognised by international conventions and the Constitution and laws of Kosovo. The Ombudsperson may investigate complaints made by a victim or by another person on behalf of a victim; situations concerning groups of persons, including children, may be investigated without a complaint.<sup>846</sup>

Complaints should be made in writing, but an investigation may begin based only on a verbal complaint that cannot be submitted in writing.<sup>847</sup> The institution has ample powers, including authority to invite witnesses and experts, the right of access to the files of all public bodies, and the right to enter any facility where persons are deprived of liberty at any time without advance notice.<sup>848</sup> Failure to cooperate with an investigation the ombudsman may lead to dismissal of a public servant.<sup>849</sup>

When the investigation of a complaint is completed, the ombudsperson adopts a decision containing findings and recommendations, which is delivered to the complainant and the responsible authority.<sup>850</sup> The authority must inform the ombudsman of the action taken within 30 days.<sup>851</sup>

A Code of Ethics for the staff of the Ombudsperson Institution adopted in 2011 stresses the need for independence and professionalism. It does not contain any provisions concerning children, but does contain an article that provides:

Staff members of the Institution shall perform their duties with social sensitivity and act or make decisions taking into account the peculiarities of individuals or groups and demonstrate due respect for liberties and civil rights.<sup>852</sup>

The powers of the Ombudsperson Institution are strong, and the guarantees of independence are largely in harmony with United Nations standards. However, the Council of Europe has recommended a number of amendments to the Law on Ombudsman, based on European standards and good practices. These recommendations deserve serious consideration.

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843 Art.132.1

844 Art.132.2-3, 133.1 and 134.4

845 Art.134.1 and 135.1-2

846 Art.15.4-5, and 1

847 Art.18

848 Art.16.6-7 and 24

849 Art.23-24

850 Art.35

851 Art.36

852 Art.8

In addition, given the special need of children for an effective, non-judicial mechanism for protecting their rights, special procedures should be established for receiving and examining complaints from children of different age groups, especially children from disadvantaged social groups, a team specialised in child rights should be established, the reports of the OIK should contain a special section on child rights, and a permanent programme should be developed and implemented to make children aware of their rights and the role of the OIK in defending them.

The possibility of adopting legislation that would give the OIK competence over complaints of discrimination by private persons is under consideration. This would not be consistent with article 132 of the Constitution, and it would not be advisable to give the institution a vastly expanded mandate when, for various reasons, it does not yet fulfil its core mandate effectively.<sup>853</sup>

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<sup>853</sup> See Reform Proposals to Energise Non-Judicial Human Rights Institutions in Kosovo, EU/COE, 2013, para.112-116

## 19. Child-friendly justice

States have an obligation under international law to criminalise certain violations the rights of children, including the trafficking and sale, child prostitution and pornography, and the recruitment of child soldiers and the forcible transfer of the children of one **national, ethnic, racial or religious group to another**.<sup>854</sup> In addition, children may become victims of almost any crime recognised by the criminal law. Effective protection of the rights of children therefore depends, to a significant extent, on whether procedures for the investigation and prosecution of crimes against children allow them to participate effectively, respect their rights and avoid re-victimisation. The perceived risk of shame and re-victimisation is a major contributing factor to impunity for crimes against children.

The need for legal proceedings that are adapted to the special needs of children is not limited to criminal proceedings. It is no less important for proceedings concerning child protection, the family, access to health, education and other essential services, and to remedies for discrimination, ill-treatment, and other human rights violations.

In recent years much progress has been made in the development international standards that should be respected in legal proceedings concerning children. Some concern the treatment of child victims and witnesses in criminal proceedings, while others cover the treatment of children in legal proceedings of any kind. The most relevant instruments are:

Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography (2002)

Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000)

Council of Europe Guidelines on Child-Friendly Justice (2010)

UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (2005)

The following is a synthesis of the most relevant standards recognised by them:

- Age should not be a barrier to the participation of a child in legal proceedings; every child whose age and maturity allow the child to give understandable and credible evidence, with or without appropriate forms of assistance, should be considered *a priori* as a capable witness or party.<sup>855</sup>
- Every child should be treated as an individual, with personal needs, wishes and feelings; child friendly language shall be used, and medical, social or other factors that give rise to special needs shall be taken into account.<sup>856</sup>
- The best interests of the child shall be determined taking the child's views and feelings into account, and shall be given due weight.<sup>857</sup>
- Interference in the child's private life should be limited to the minimum needed.<sup>858</sup> Proceedings in which children participate personally shall be closed to the public.<sup>859</sup>
- Interviews, examinations and other investigative acts should be conducted by

854 Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography, Art.3; Palermo Protocol, Art.5; Optional Protocol to the CRC on Involvement of Children in Armed Conflict, Art.4.2; Convention on the Prevention and Punishment of the Crime of Genocide, Art.II (e), IV and V

855 UN Guideline 18; European Guidelines III.A.2 and IV.D.6.73

856 UN Guideline 11; European Guidelines III.D.1, IV.A.5.16-17, and IV.D.5.54-57

857 European Guidelines III.B.2;

858 UN Guideline 12; European Guideline IV.A.5.18

859 European Guidelines IV.A.2.9



trained professionals in a sensitive and respectful manner.<sup>860</sup>

- Interventions should be conducted in an environment that accommodates the special needs of the child.<sup>861</sup>
- Professionals intervening with children shall coordinate their activities to ensure continuity and to avoid subjecting the child to unnecessary interventions.<sup>862</sup>
- Child victims and witnesses should have access to assistance and support services including financial, legal, counselling, health, social and psychological services.<sup>863</sup>
- Support persons should be allowed to accompany and, when appropriate, assist children during pre-trial interviews and while giving testimony.<sup>864</sup>
- Contact between the child and alleged perpetrator shall be prevented, as far as possible, and child victims and witnesses shall be allowed to testify and be cross-examined out of sight of the alleged perpetrator.<sup>865</sup>
- Investigations and proceedings involving child victims, and the execution of judicial decisions, shall be given priority and proceed without unnecessary delay<sup>866</sup>
- Child victims and witnesses, and their parents, guardians and legal representatives, should be promptly informed of the rights of the child in proceedings, the availability of support services, the role of the child, the ways in which the while will be questioned before and during trial, the place and time of hearings and other relevant events, the progress of the case, all significant decisions taken and available mechanisms or procedures for seeking a review of decisions.<sup>867</sup>
- Children should be enabled to express freely their views and concerns regarding their involvement in the justice process, including concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the outcome of the process, with due regard being given to the child's views and concerns and, to the extent it is not possible to accommodate them, the reasons shall be explained to the child.<sup>868</sup>
- Guardians shall be appointed to safeguard the rights and interests of the child during legal proceedings when necessary.<sup>869</sup>

860 UN Guideline 13; European Guidelines III.C.1 and IV.A.4

861 UN Guideline 14 and 30(d); European Guidelines IV.D.5.62 and IV.D.6.74

862 UN Guideline 23 and 30(b); European Guidelines IV.D.6.66-67

863 UN Guideline 22; European Guidelines IV.D.2.37-40

864 UN Guideline 25(b) and 30(a); compare European Guideline IV.D.58

865 UN Guideline 31(b); European Guidelines IV.D.5.59 and IV.D.6.68-69

866 UN Guideline 30(c); European Guidelines IV.D.4.50 and IV.E.76

867 UN Guidelines 19-20; European Guidelines IV.A.1, IV.D.3.49 and IV.E.75

868 UN Guideline 21; European Guidelines III.A.1 and IV.D.3

869 UN Guideline 25(c); European Guideline IV.D.2.42

## a. overview of legislative norms on the treatment of child victims

The Constitution of Kosovo provides that “Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.”<sup>870</sup> The terms “minor” and “juvenile” are not defined by the Constitution, but it seems clear that this norm concerns persons 14 to 18 suspected or accused of an offence.

There are seven courts of first instance, known as Basic Courts. Each has ‘branches’ located in smaller municipalities.<sup>871</sup> Each Basic Court (not their branches) has a General Department, a Department for Serious Crimes and Department of Minors.<sup>872</sup> There is one Court of Appeal, which also has a Department for Minors.<sup>873</sup> There are no special requirements for appointment to a Department for Minors.<sup>874</sup> Consideration should be given to amending the Law on Courts to establish special requirements for appointment to the Department for Minors, including training in child development and skills in communication with children.

Standards on the treatment of child victims of crime are contained in the Criminal Procedure Code, the Juvenile Justice Code, and the Law on Trafficking. The Juvenile Justice Code applies to certain crimes against children, including 13 sexual offences, child abduction, child abuse and abandonment, non-payment of maintenance, interference with child protection measures, trafficking, underage recruitment and forced labour. The Law on Trafficking, adopted in 2013, applies to trafficking and related offences. (see Ch.14). The rights and treatment of child victims of other criminal offences are covered by the Criminal Procedure Code.

Article 27 of the Criminal Procedure Code, entitled “The Court for Minors,” provides:

The procedure when the perpetrators are minors, or minors are victims or witnesses shall be governed by the Juvenile Justice Code or the relevant law.

This Code defines child as any person under 18 years of age, and ‘minor’ as persons between 14 and 18 years of age.<sup>875</sup> Chapter XXI of the Juvenile Justice Code, on crimes committed by adults against children, applies to children of all ages. Cases in which a child who is not a victim is a witness are not mentioned. Article 27 of the Criminal Procedure Code should be amended to indicate that the Juvenile Justice Code applies to cases in which the accused is a juvenile, or the victim is a child.

The meaning of article 27 is unclear. The title implies that the Juvenile Justice Code is to be applied by the specialised panels recognised by the Juvenile Justice Code and the Law on Courts. Interpreted literally, however, the text of this article would require other courts to apply the provisions of the Juvenile Justice Code concerning child victims or witnesses, when they try cases in which a child is a witness but not the victim, or is a victim of a crime not covered by Chapter XXI of the Juvenile Justice Code. Article 27 should be amended, although the nature of the amendments to be made depends on the decision that should be made with regard to the scope of application of the Juvenile Justice Code over crimes against children. (see below)

<sup>870</sup> Art.31.7 (The Albanian version of the Constitution uses a term that should be translated as ‘juvenile’, rather than ‘minor’.)

<sup>871</sup> Law on Courts, Art.10

<sup>872</sup> Ibid, Art.12

<sup>873</sup> Ibid, Art.21.1.5

<sup>874</sup> Ibid, Art.26 (There are special requirements for assignment to the Serious Crimes, Administrative and Commercial Departments.)

<sup>875</sup> Art.19.1.16-1.17

The Juvenile Justice Code contains a more comprehensive set of norms concerning the treatment of child victims than the Criminal Procedure Code. However, it applies only to certain crimes against children and, although all offences by juveniles are tried under this Code, in principle the norms concerning the treatment of child victims apply only to cases in which the accused is an adult.<sup>876</sup> The most recent international standards, the Council of Europe Guidelines on Child-Friendly Justice and the UN Guidelines on Child Victims, apply to child victims of any crime. Ideally, the law of Kosovo concerning the rights and treatment of child victims also should provide equal protection to all child victims, regardless of the crime committed against them. This could be achieved either by making the Juvenile Justice Code applicable to all criminal offences against children, or by amending the Criminal Procedure Code to ensure that all the safeguards concerning child victims recognised by the Juvenile Justice Code are incorporated into it. If the Criminal Procedure Code made these norms applicable to all cases involving child victims, they could be deleted from the juvenile justice code. However, making the Juvenile Justice Code applicable to all crimes against children would have the advantage of giving competence over all such crimes to special panels.

The two sections that follow describe the gaps in each of these Codes and make recommendations as to how they should be filled, irrespective of what decision is taken as to the scope of the Juvenile Justice Code.

## b. the Criminal Procedure Code

The Criminal Procedure Code contains few provisions specifically intended to adapt criminal proceedings to the needs of child victims. Article 130, concerning interviews during pre-trial stage of proceedings, provides:

A person who has not reached the age of eighteen (18) years, especially if that person has suffered damage from the criminal offence, shall be examined considerately to avoid producing a harmful effect on his or her state of mind. If necessary a child psychologist or child counsellor or some other expert should be called to assist in the examination of such person.<sup>877</sup>

The first sentence of this article captures one of the key principles recognised by the international instruments cited above. However, the law should be amended to make this principle applicable to all stages of criminal proceedings.

The second sentence incorporates into the Code a key safeguard recognised by international norms, although the words “if necessary” weaken its protective effect.<sup>878</sup> It should be reworded to indicate the presence of a support person during questioning should be the usual practice.

Article 127 states that children may testify if the court finds “that he or she is capable of understanding that he is she is undergoing the examination in order to tell the truth.”<sup>879</sup> This criterion is compatible with international standards. Witnesses under the age of 16 are not required to take an oath, and should be summoned to testify through their parents.<sup>880</sup>

<sup>876</sup> Art.145 et seq.

<sup>877</sup> para.5

<sup>878</sup> It seems obvious that a child psychologist or pedagogue need not be present if their presence would serve no useful purpose, but the term “if necessary”, when necessity is to be determined by an authority, lends itself to subjective interpretations that are not always in the best interests of the child concerned.

<sup>879</sup> Art. 127.4; see also Art.128.1.3

<sup>880</sup> Art. Art.340.1 and 132.4, respectively

Article 294 indicates that the public may be barred from a trial or part of a trial when necessary to protect the interests of children.<sup>881</sup> This is positive, but protection of the right of child victims to privacy requires a norm indicating that certain kinds of trials concerning child victims should always be closed to the public.

Article 144 on the examination of bodily injuries requires “full respect for the persons dignity and due consideration for the physical and psychological impact of the injury”; but does not require any special care to be taken when the person to be examined is a child, nor is there any special provision concerning consent to medical examinations with the person to be examined is a child. Article 146 on psychological examinations and records of psychological treatment also contains no provisions specifically concerning children.

These articles should be amended to require that the person performing the examination have special training when the person to be examined is a child, and should indicate that such examinations be performed in the presence of a support person when possible.

In addition, the provisions of these articles on consent to medical and psychological examinations of children should be amended by the addition of provisions concerning the procedures to be followed to inform the child of the need for the examinations, the possible use of the information obtained, the consequences of non-performance of the examination, and for allowing the child to consult with an independent support person in order to form views on whether he or wishes the examination to take place. Provisions also should be added recognising the weight that should be given to the child’s views, that the best interests of the child shall be the primary consideration in deciding when a guardian should be able to give consent on behalf of a child.

Article 339 provides that victims of sexual offences under the age of 16 shall not be allowed to testify at trial, if their testimony was taken during the pre-trial stage of proceedings.<sup>882</sup> It also provides that child victims and witnesses shall be removed from courtrooms as soon as their presence is “no longer necessary.”<sup>883</sup> These provisions reduce the risk of emotional trauma, but they do not take into account the child’s right to have his or her views taken into account with regard to the extent and modalities of his or her participation in criminal proceedings. This article should be amended to indicate that child victims of sexual offences may be allowed to attend trial of an accused perpetrator if they have made an informed decision that they wish to do so and their presence would not endanger their psychological well-being and best interests. It also should be amended to indicate that a child victim of a sexual offence may be allowed to testify at trial if she or he has made an informed decision that she or he wishes to do so and it would not be contrary to their best interests, even when their testimony is not required because of the existence of admissible pre-trial testimony.

The Criminal Procedure Code also contains some provisions applicable to both children and adults that could, in principle, be applied in such a way as to adapt proceedings to the needs of children. Article 62 provides that the “injured party” (victim) shall be treated with respect by the police, prosecutors and judges.<sup>884</sup> An injured party is entitled to participate in criminal proceedings, and to be represented by an attorney, or a victims advocate.<sup>885</sup> The court also has a duty to inform any participant in a proceeding of his or her rights under the Code, and of the consequences of failure to exercise them.<sup>886</sup> These provisions are positive.

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881 para.1.1.5 (Art.31.3 of the Constitution recognises that the interests of children justify exceptions to the principle that legal proceedings should be public.)

882 Art.339.1, referring to testimony taken pursuant to articles 132 and 149

883 para.2

884 Art.62.1.1

885 Art.63

886 Art.16

Prosecutors have discretion to suspend prosecution for relatively minor offences, with the consent of the injured party.<sup>887</sup> Reparation of the damage caused, possibly including payment of compensation to the victim, is a requirement. There is no special provision concerning the capacity of children to give free and informed consent to this disposition. Similarly, there are no special provisions concerning the participation of child victims in mediation proceedings.<sup>888</sup>

The Law on Mediation also contains no provisions on the consent of children, although the freely given agreement of the parties is a prerequisite for the commencement and successful completion of mediation.<sup>889</sup> These provisions of the law should be amended to bring them into harmony with the evolving capacities and best interests principles, and the right of children to be heard and to have their views taken into account.

A victim (lit: injured party) or witness may request protective measures if there is a serious risk to his or her life or physical or mental health, based on his or her anticipated testimony during or before trial.<sup>890</sup> Protective measures may include allowing a witness to testify via a closed video link or video recorded testimony, or removing the defendant from the courtroom during the witnesses' testimony.<sup>891</sup> Such measures may be taken before and/or during trial.<sup>892</sup> The prerequisite of a serious threat to life or health seems inappropriate for child witnesses. The main concern and aim of the authorities in all cases concerning child witnesses should be to create a secure and supportive atmosphere that encourages the child to testify freely and without fear or intimidation. Conditioning such efforts on a determination that a serious threat exists imposes an unnecessary obstacle to taking appropriate measures. The Code should be amended to make such measures more widely available in cases concerning child victims.

The victim has the right to address the court personally or through an authorized representative at the close of evidentiary stage of the trial.<sup>893</sup> However, the Code does not recognise the right of a child victim to assistance in exercising this right, or indicate how the decision should be made as to when this right will be exercised by the child victim personally. The Code should be amended to establish criteria based on the best interests and evolving capacities principles as to when children should be allowed to address the court personally, and to recognise their to assistance in doing so.

The Code also provides that courts must "carry out proceedings without delay and ... prevent any abuse of the rights of the participants in proceedings."<sup>894</sup> However, the normal time limit for a criminal investigation is 2 years, and the Code contains no special norm for the investigation of crimes against children.<sup>895</sup> It should be amended to provide that crimes against children must be given priority in criminal investigations, and consideration should be given to recognising a time limit of less than 2 years.

Judges have authority to order a recess during trial, for purposes of rest.<sup>896</sup> This norm does not specify the reasons why rest might be needed, although it would seem to allow judges to adapt the pace of proceedings to the attention span of child victims, as recommended by international standards. A norm requiring judges to order a recess when one is necessary to accommodate the needs of child participants would be an improvement.

887 Art.230 (Those punishable by a sentence of 3 years or less, excluding sexual offences.)

888 Art.232

889 Art.3 and 14.1.a

890 Art.220-221

891 Art.222.1.3 and 1.7

892 Ibid, and Art.339.3

893 Art.354

894 Art.5.2

895 Art.159

896 Art.321.1

If an accused is found guilty the victim has a right to compensation for physical, emotional and financial harm. The court may order the convicted offender to compensate the victim or, if he has insufficient resources, it may refer the case to the victim compensation fund.<sup>897</sup> This norm, applicable to children and adults alike, is in harmony with the right to a remedy. The victim may appeal a judgment, and if the Court of Appeals decides to hold a hearing on the appeal, the victim has a right to be present.<sup>898</sup> These rights also are, in principle, in harmony with international standards.

Some provisions of the Criminal Procedure Code designed to make proceedings victim-friendly do not apply to children. Article 132, on testimony given before trial, allows witnesses to be examined out of court if they are elderly, ill or disabled, but not children. Article 290, on the testimony of witnesses out-of-court during trial, also does not recognise factors related to childhood as a reason for permitting a witness to testify from his or her residence.<sup>899</sup> Similarly, article 134 on Witnesses with Special Needs applies only to witnesses who are deaf or mute or require an interpreter, and not to children who may require assistance in communicating effectively. Articles 132 and 290 on the out-of-court testimony of witnesses before and during trial, should recognise factors related to childhood as a reason for permitting a witness to testify from his or her residence. Article 134 on Witnesses with Special Needs should be amended to recognise that some children may require assistance in communicating effectively because of their age, immaturity, dependence and vulnerability.

### c. Juvenile Justice Code

Article 145 of the Juvenile Justice Code provides that juvenile panels and juvenile judges shall try cases in which adults are charged with certain crimes against children. Most of the offences by definition are offences against children; the list does not include common crimes where the age of the victim is immaterial, such as grievous bodily harm, kidnapping, or coercion. There is an apparent contradiction between this article of the Code and article 15 of the Law on Courts, which indicates that the Serious Crime Departments have competence over some of the crimes listed in article 145, such as trafficking in persons and rape. In practice such cases reportedly are assigned to Departments for Minors when the victim is a child, and consideration should be given to amending the law to indicate that this should be so.

The chapter of the Juvenile Justice Code concerning the trial of adults accused of the above-mentioned offences against children recognises the following norms intended to protect the child victims:

- such offences shall be investigated by specialised police officers<sup>900</sup>
- proceedings shall be conducted with “particular care” bearing in mind
- the age, personal characteristics and background of the victim, to avoid possible harm to his or her development<sup>901</sup>
- the examination of the child shall be conducted with the assistance of a psychologist, pedagogue or other specialist<sup>902</sup>
- child victims may not be examined as witnesses more than twice<sup>903</sup>

897 Art.62.1.3-1.4

898 Art.381.1 and 381.3, and Art.392.2

899 para.1 (The grounds recognised are “chronic illness or some other impediment.”)

900 Art.146.2

901 Art.147.1

902 Ibid

903 Art.147.2

- the court may allow child victims to testify by means to a closed circuit video link<sup>904</sup>
- proceedings are confidential, and information that could be used to identify the child victim may not be made public<sup>905</sup>
- proceedings shall be conducted expeditiously and without delay<sup>906</sup>

This covers many of the measures recommended by international standards to make legal proceedings involving child victims 'child friendly'. Special measures required or recommended by international instruments that are not expressly recognised by this chapter of the Juvenile Justice Code include:

- Interference in the child's private life should be limited to the minimum needed.
- Interventions should be conducted in an environment that accommodates the special needs of the child.<sup>907</sup>
- All professionals intervening in cases involving juvenile victims (prosecutors as well as police) shall be specialised.
- Professionals intervening with children shall coordinate their activities to ensure continuity.
- Child victims and witnesses should have access to assistance and support services including financial, counselling, health, social and psychological services, in addition to legal assistance.<sup>908</sup>
- All contact between the child and alleged perpetrator shall be prevented, as far as possible (not only when the child is testifying).
- Child victims and witnesses, and their parents, guardians and legal representatives should be prepared for legal proceedings by informing them of the rights of the child in proceedings, the availability of support services, the role of the child, the ways in which 'questioning' will be conducted before and during trial, the place and time of hearings and other relevant events; during proceedings they shall be informed of the progress of the case, all significant decisions taken and available mechanisms or procedures for seeking a review of decisions.
- Children should be enabled to express freely their views and concerns regarding their involvement in the justice process, including concerns regarding safety, the manner in which they prefer to provide testimony and their feelings about the outcome of the process; due regard shall be given to the child's views and concerns and, to the extent it is not possible to accommodate them, the reasons shall be explained to the child.
- Guardians shall be appointed to safeguard the rights and interests of the child during legal proceedings when necessary.
- The best interests of the child shall be a primary consideration in all decisions taken during the criminal investigation and proceedings.

Chapter XXI of the Juvenile Justice Code should be amended to make express reference to all the special measures required or recommended by international instruments, including those listed above.

904 Ibid

905 Arts. 147.5 and 50

906 Art.153

907 UN Guidelines 14 and 30(d); European Guidelines IV.D.5.62 and IV.D.6.74

908 UN Guideline 22; European Guidelines IV.D.2.37-40

## d. Law on Trafficking

The 2013 Law on Prevention and Combating Trafficking in Human Beings and Protection of Victims of Trafficking also contains extensive provisions on the treatment of victims, including special provisions on child victims. Two provisions nevertheless falls short of international standards. One provides that judges should have discretion to exclude the public from hearings in which a child victim is involved.<sup>909</sup> Exclusion of the public should be mandatory, when a child victim is present. Another provides that information provided by a medical or psychological personnel shall be confidential, and not provided to 'third persons' without the consent of the child's legal representative. This conflicts with article 254 of the Criminal Code and the provisions of other laws that recognise an obligation to report evidence of child abuse. (see Ch.13)

The Lanzarote Convention provides that an exception should be made to rules on the confidentiality of information held by professionals, for information concerning sexual abuse or exploitation.<sup>910</sup> The Committee on the Rights of the Child has taken a similar position, with regard to violence of any kind.<sup>911</sup> The Law on Trafficking should be amended to bring it into harmony with this recommendation and other legislation.<sup>912</sup>

## e. Law on Witness Protection

The Law on Witness Protection establishes a programme for the protection of witnesses to serious crimes who cooperate with law enforcement officials.<sup>913</sup> The protective measures available include change of identity.<sup>914</sup> The law has only a few provisions concerning children. Article 5.5 provides that protective measures may only be applied to 'minors' with parental consent. Similarly, article 26.4 provides that agreements on the entry of a minor into the Witness Protection Programme must be signed by a parent or guardian.

The term minor is not defined by this law although, because of the links between this law with the Criminal Code and Criminal Procedures Code, it could be interpreted to mean children 14 to 18 years of age. Since, in principle, children of any age may be witnesses in criminal cases, the law should be amended by replacement of the word minor with the word child.

The Law contains no specific standards on the inclusion of children under 18 in the programme, when one of their parents is a protected person. Protected persons have a qualified right to visit children not covered by the programme. In the absence of a definition, it is not clear whether this right applies to children under the age of 18 years and/or adult children.

Article 13 provides generally that "Social, legal support and any other kind of support necessary for protected person shall be offered in order to guarantee his security and his or her welfare as well as minimum living standard..." Similarly, article 26.2.3.2 recognises an obligation to provide protected persons with "necessary psychological, social and legal assistance during the implementation of program."

This law should be amended to recognise that children should be consulted personally

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909 Art.16.3.1

910 Art.12

911 General Comment No.13, supra, para.49

912 see e.g, Art.256 of the Criminal Code and Art.10.1 of the Law on Social and Family Services

913 Art.2

914 Art.5



about possible entry into the programme as protected persons, and their views and best interests should be given due weight in determining whether to admit them. It also should be amended to clarify the criteria for inclusion in the programme of the minor children of protected persons, and to recognise the rights of children in the programme to education and to special social and psychological assistance.



# Part II

**Summary of  
Recommendations**

Existing legislation concerning many rights, although it may be in harmony with international standards in many respects, contains some provisions that are not in harmony with them, or gaps that should be filled in order to bring the law of Kosovo into full harmony with the Convention and related standards. The following is a summary of the recommendations made in Part I of the study. Reference to the specific articles of the legislation referred to, where missing, can be found in Part I. Recommendations expressed by the phrase “the law should be amended” or similar words are those that deserve priority; those introduced by the phrase “consideration should be given” are a lower priority.

## Constitution

The Constitution of Kosovo contains an article on the rights of children, and many other articles on human rights that apply to children and adults alike. Two recommendations are made, however, concerning the Constitution.

One concerns article 29.1, which authorises deprivation of liberty “for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order.” This language is almost identical to article 5.1.c of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted in 1950. In contrast, the Convention on the Rights of the Child provides “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” Recent European instruments reaffirm the ‘last resort’ principle.<sup>915</sup> It would be desirable to amend article 29.1 of the Constitution to replace the above mentioned provision regarding ‘minors’ with one indicating that children shall not be deprived of liberty for any purpose, except as a last resort.

The Law on Health and Law on Rights and Responsibilities of Citizens in Health Care recognise the right of all persons to access to health care. However, given the fundamental importance of this right, consideration should be given to amending the Constitution to recognising the right to health and health care as a constitutional right, and to recognising the right of children and adolescents to health care appropriate to their special needs.

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915 See the 2008 European Rules for juvenile offenders, Basic Principle No.10

## a. The Family Law and/or Law on Social and Family Services

The Family Law does not clearly recognise the principle set forth in article 5 of the Convention, namely, that parents and guardians have a responsibility to allow children to exercise their own rights, with appropriate direction and guidance, in a manner consistent with the evolving capacities of the child. It should be amended to recognise this principle, which is fundamental to the relationship between parents and children.

The principle that the best interests of the child should be a primary consideration in all decisions taken concerning children is recognised in broad, general terms by the Constitution and the Law on Social and Family Services, but it is recognised by the Family Law only in certain specific contexts. The Family Law should be amended to include an article recognising this principle in terms similar to the Law on Social and Family Services. Similarly, the Family Law recognises the right of children to be heard and to have their views taken into account only with regard to specific decisions, and it should be amended to recognise this right in broad, general terms.

The Family Law recognizes the obligation of both parents to provide financial maintenance for minor children. In most cases unmarried parents have the same rights and responsibilities as married parents, but an exception is made when there is a legal obstacle to marriage (e.g. one of the parents is already married). This limitation on the duty of parents to support their children is not in harmony with the principle that the interests of the child should be the main concern, and the law should be amended to bring make the obligation to financial support a function of the needs of the child and ability of the parent to provide support.

Article 317 of the Family Law recognises special obligations of an unmarried father towards his child and the child's mother for a limited time during and after pregnancy. Consideration should be given to amending the Law to indicate expressly that these obligations are additional to any longer-term obligation to provide maintenance that may be recognised by a court. Article 317(1) or 318(1) also should be amended to eliminate the contradiction between them regarding the number of weeks (4 or 6) an unmarried father is obliged to provide child maintenance before the birth of his child.

The Law should be reviewed and amended as necessary to ensure that the terms alimony and maintenance are used throughout the law in accordance with the definitions contained in articles 278 and 297.<sup>916</sup>

The grounds for removal of children from parental care recognised by the Law on Social and Family Services are different from those recognised by the Family Law for deprivation of parental custody. This is understandable, because the former govern the action of social workers, while the latter establishes the criteria to be applied by legal proceedings. The provisions of both laws are largely in harmony with international standards on the separation of children from their parents, but it would be desirable to amend both to expressly recognise that removal from the family should be a last resort. Even when the risk to a child is great, other protective measures may be effective in some cases.

The Law on Social and Family Services also allows children to be placed in alternative care at the request of parents, if the child consents. Given the vulnerability of children in this situation, it would be advisable to expressly require that consent be informed and freely given. The Law on Social and Family Services mentions that children removed from parental custody may be placed in residential care, but contains no norms specifically on the conditions in which such placement may be authorised, or on the rights of children in residential care. It should be amended to fill these gaps.

<sup>916</sup> Certain articles, e.g. 330(3) and 332(1), appear to use the term alimony to refer to support for children.

The Law on Social and Family Services does not recognise the right of children under guardianship to make requests and proposals to the Guardianship Authority, and a requirement that the cases of children under guardianship be reviewed every six months by the CSW was deleted in 2012. The law should be amended to recognise the right of children to make such requests and proposals, and to require the review of cases every six months, to bring the law into harmony with article 25 of the Convention.

The Law on Social and Family Services also should be amended to recognise the right of any child in informal care to express any concerns they have to the competent authorities, and to have his or her views taken into account if the arrangement is challenged by any other person.

The purposes of guardianship are defined differently by the Family Law (“minor who is not under parental care”) and Law on Social and Family Services (orphans).<sup>917</sup> This discrepancy should be remedied by confirming that guardianship may be used for children of any age who are temporarily or permanently without parental care.

The Family Law requires the consent of birth parents for the adoption of a child, subject to certain exceptions. Most of the exceptions are in harmony with international standards, although consideration should be given to amending the Law to expressly require that consent be informed and freely given.

The Law also allows the Guardianship Authority or court to consent on behalf of one parent if the child so requests, if the non-consenting parent “continuously and gravely violates his obligations towards the child or has demonstrated that he is indifferent towards the child”, and if the failure to approve adoption “would result in a considerable disadvantage for the child.” A child of any age may make such a request, although there is an age limit for children to consent to adoption (see below). The criteria of parental “indifference” and the risk of a “considerable disadvantage for the child” are weak grounds for depriving a parent such an important right, especially when the decision is made by an administrative body and the law does not expressly recognise the right to appeal. These provisions of the law should be amended to bring them into harmony with international standards.

The Family Law also requires the consent of the child to be adopted, but legal representatives consent on behalf of children under 14 years of age, and there is no requirement that the child be consulted. The law should be amended to indicate that the views of all children old enough to have an opinion should be heard and taken into account, and to require that appropriate information regarding the proposed adoption should be provided in a way that is appropriate for the child’s age, cognitive capacity and circumstances.

The Family Law does not allow unmarried couples to adopt jointly, establishes different age limits for adoption by married and unmarried persons, and disqualifies potential adoptive parents with mental illness or retardation. These provisions may be discriminatory and unnecessarily restrict the pool of adoptive parents, and consideration should be given to amending the legislation to modify them.

The Law provides persons who wish to adopt may present a request for adoption to a court jointly with the birth parents of the child to be adopted. Consideration should be given to amending this provision of the law, because of the potential for inappropriate arrangements between birth parents and adoptive parents.

In most respects the provisions of the Family Law and Law on Social and Family Services on inter-country adoption are in harmony with the relevant international standards. However,

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<sup>917</sup> cf. Art.216(1) and Art.11.2

the legislation does not expressly prohibit seeking, offering or providing improper financial gain to arrange an adoption, and the Family Law allows a person who has participated in unlawful or immoral actions in order to obtain a child to nevertheless adopt the child “if this is imperative for the child’s well-being.” The legislation should be amended to expressly prohibit seeking, offering or providing improper financial gain, and consideration should be given to amending the provision of the law concerning adoption by persons who have participated in illegal actions.

The Family Law provides that persons who marry at 16 or 17 years of age acquire majority when they marry. Consideration should be given to amending the relevant article of this law because, although marriage makes it appropriate to acquire some of the legal capacities of adulthood, some of the special rights of childhood remain relevant. Consideration also should be given to recognising the capacity of persons who become parents before the age of 18 to the legal authority needed to fulfil the responsibilities of parents, whether or not they are married.

The right of every child to be raised in conditions that support healthy “physical, mental, spiritual, moral and social development” is fundamental. The Family Law contains numerous references to it, but the Law on Social and Family Services focuses mainly on the protection of children. Consideration should be given to amending the latter law to recognise that children have the right to development as well as the right to protection.

The Law on Social and Family Services requires that the views of the child be taken into account both when parents request placement of a child in alternative care, and when the authorities seeks a court order to removal of a child from parental custody. The legislation should be amended to ensure that children whose views are sought are provided with sufficient information about the reasons and context, and with assistance in presenting their views to the court.

The Family Law contains some provisions on parental contact with children temporarily in alternative care, but does not formulate such contact as a right. Consideration should be given to amending the law to recognise contact with their parents as a right, to be respected unless contact would be contrary to the best interests of the child.

The Law on Social and Family Services allows confidential information to be released “if there is an overriding public interest.” It is recommended that the clause either be eliminated, or replaced with the more restrictive terminology of article 203 of the Criminal Code or the language of international norms, “public safety, order, health or morals.”<sup>918</sup> Furthermore, it is recommended that the law be amended to provide that only by a high-ranking official of the Ministry may authorise the release of information for this purpose.

## b. Legislation concerning education

The Law on Pre-University Education contains a provision indicating that primary school education begins at 6 years of age. It should be amended to ensure that children who were not enrolled at 6 years of age may not be denied access to primary education subsequently for that reason.

Consideration should be given to amending legislation on education to recognise awareness of the risks of sexual abuse and exploitation as one of the aim of education.

<sup>918</sup> CRC Art.14.3; compare CRC Art.13.2 (b) and Art.15.2.

### c. Legislation concerning health

Legislation on the confidentiality of information obtained by professionals providing medical care should be amended to recognise an obligation to provide the appropriate authorities with evidence of the physical, psychological or sexual abuse of children.

The Law on Health recognises some important principles concerning the right of children with disabilities to health care. However, legislation should be adopted to recognise the fundamental right of children with disabilities to receive appropriate health care and rehabilitative services in a child-sensitive environment, and consideration also should be given to recognizing a legal obligation of the competent authorities to review periodically the treatment of all children placed in institutions for purposes of health care or rehabilitation.

Consideration should be given to amending the Law on Health or other legislation in order to give children and adolescents opportunities to express their views about the delivery of services and participate in development of health care policies.

The Law for Termination of Pregnancy is largely in harmony with the internationally recognised principles. However, the provisions concerning girls 16 or 17 years of age should be amended to recognise that termination of pregnancy should be allowed without parental consent in certain circumstances, taking into account the best interests principle and the principle that the views of the pregnant adolescent must be given due weight. The Law also should be amended to regulate the conditions in which termination of pregnancy in girls under the age of 16 is allowed.

The Law on Infant's Breastfeeding and Law on Labour provide considerable protection to the rights of working women who are nursing, but should be amended to recognise their right to breaks or reduced working hours, to bring the law into full compliance with the relevant international standards.

The provisions of the Law on Rights and Responsibilities of Citizens in Health Care Law on issue of consent to medical treatment make no reference to the consent of children and adolescents. The Law should be amended to add provisions specifically on this complex issue that are compatible with the best interests and evolving capacities principles. It also should be amended to recognise the right of children and adolescents to have their views about treatment taken into account, and their right to make complaints about treatment received or decisions made.

The right of victims of armed conflict to assistance is recognised by several laws, including the Law on Reproductive Health, the Law on Health, Law on Asylum and the Law on Social and Family Services. There is a gap, however, in that the most comprehensive recognition of the right to medical services is contained by the Law on Asylum, which does not apply to citizens of Kosovo. Consideration should be given to filling the gap in the legislation with regard to child victims of armed conflict who need the kind of assistance envisaged by the Law on Asylum, but are not covered by that law.

Although the Law on Reproductive Health is largely in harmony with international standards, consideration should be given to amending it to make it clear that the provisions on access to information and education apply to all children and not only to adolescents. Consideration also should be given to amending the law to recognise the right of single women to assisted reproduction, in appropriate circumstances.



The legislation includes some standards on the right of children to clean and nutritious food, but consideration should be given to adopting legislation and policy based on the World Health Assembly Recommendations on the marketing of food and beverages to children. Consideration also should be given to amending the Law on Tobacco Control to clarify that the restrictions and prohibitions it contains apply to all children under 18 years of age.

The Law on Health contains only one general provision on mental health care. The Law on Social and Family Services also contains some provisions on persons with mental illness or disability and addiction, but they do not address the needs of children with mental disorders, including addiction, from the perspective of the right to medical and psycho-social assistance. New legislation on this issue should be adopted, or existing legislation should be amended to incorporate a 'rights-based' approach to children with mental disorders.

Similarly, existing legislation should be amended or new legislation adopted to recognise certain basic principles concerning the treatment of children with drug addiction or other substance abuse syndromes, including the right to treatment specifically designed for persons their age, and the principle that treatment shall be provided in a closed setting only as a last resort and only with the consent of those concerned or a court order.

#### d. The Criminal Procedure Code

Prosecutors have discretion to suspend prosecution for certain offences, with the consent of the injured party. The law should be amended to specify the circumstances in which a parent or guardian may take this decision on behalf of a child, provided that the decision is based on the interests of the child and the views of the child are heard and given due weight.

The Code also provides that courts must "carry out proceedings without delay," but the normal time limit for a criminal investigation is 2 years. The Code should be amended to provide that crimes against children must be given priority, and consideration should be given to recognising a time limit of less than 2 years in cases involving child victims.

The Criminal Procedure Code provides that some measures for the protection of witnesses, such as allowing testimony by a video link or recorded testimony, or removing the defendant from the courtroom during the testimony of a witness, are available only if there is a serious threat to life or health of the witness. This requirement is inappropriate for child witnesses, and should be replaced by one providing that such measures should be taken when necessary to create a secure and supportive atmosphere that encourages the child to testify freely and without fear or intimidation.

The Code also provides that children, especially victims, must be "examined considerately" to avoid mental harm, and that a child psychologist or other expert should "assist in the examination" of child witnesses "if necessary." This provision should be amended to indicate that a child psychologist should always be present during the questioning of a child victim of crime, and to clarify that it applies to all questioning, before and during trial.

The Code authorises judges to order a recess during trial for purposes of rest.<sup>919</sup> It should be amended to require a recess, when one is necessary to accommodate the needs of a child victim or witness.

The Code indicates that the public may be barred from a trial or part of a trial when necessary to protect the interests of children. This norm should be amended to provide

<sup>919</sup> Art.321.1

that the public should always be barred from certain trials in which the victims is a child, in particular sexual offences and domestic violence.

An injured party is entitled to participate in criminal proceedings, and to be represented by an attorney or a victim advocate. This is positive, but consideration should be given to recognising the right of child victims to the services of specialised victim advocates, free of charge. Article 339, which limits the right of the child to testify and be present during trial, should be amended to indicate that the child's wishes and best interests are to be taken into account in determining whether a child a child who wishes to testify and attend trial should be allowed to do so.

The Criminal Procedure Code indicates that the Juvenile Justice Code shall be applied to cases of crimes against minors, when in fact it applies to crimes against children of any age. The relevant article should be amended to correct this error.

The articles of the Code concerning forensic medical and forensic psychological examinations should be amended to require that the experts to have special training when the person to be examined is a child, and should indicate that such examinations be performed in the presence of a support person when possible. The provisions of these articles on consent to such examinations should be amended to recognise a duty provide the child with the information needed to form an opinion, on the child's right to consult with an independent support person, and on the weight to be given to the child's views. A provision also should be added to require guardians, when they have authority to consent on behalf of a child, to give due weight to the best interests of the child.

Articles on witnesses with special needs should be amended to include childhood as a factor to be taken into account when determining whether special arrangements should be made to facilitate testimony.

The law on trafficking provides "In cases when there is grounded suspicion that a premise or business, acting legally or illegally, is involved in issues of trafficking in human beings, according to this Law and Criminal Procedure Code, the prosecutor demands from the judge immediate closure of the premises or the business." No article of the Criminal Procedure Code authorises this, and it should be amended to establish a procedure for closure of premises or businesses used for trafficking, as well as for child prostitution and the production of child pornography.

## e. The Juvenile Justice Code

The Juvenile Justice Code represents an important step towards the establishment of a juvenile justice system in harmony with international standards. Some amendments are needed, however, in order to bring it into greater harmony with evolving international standards. The provision requiring medical screening of juveniles admitted to detention facilities should be amended to specify that registering evidence of ill-treatment is one of its purposes. The ambiguity in articles 110-113 to as to the nature of the "educational institution for juveniles" in which juvenile offenders could be placed as an alternative to sentencing, should be eliminated.

Although the Code recognises the right to legal assistance "from the beginning to the end of procedure" and requires the court to appoint a lawyer at public expense if necessary, the right to a lawyer is undermined by paragraph 4 of article 43, which indicates that defence counsel is to be appointed only at the request of the juvenile or his or her representative. Consideration should be given to eliminating this paragraph from the Code.

Consideration also should be given to an amendment making the maximum duration of proceedings to six months, as recommended by the Committee on the Rights of the Child.

Although the provisions of the Code on diversion are largely in harmony with international standards, in practice judges tend to use this measure only at the end of trials. This defeats one of the purposes of diversion, and consideration should be given to amending the law to require judges to decide whether or not to divert juvenile cases when the case is referred for trial, before the main trial begins. Consideration also should be given to giving police officials authority to divert cases.

The Juvenile Justice Code contains many references the “rehabilitation and reintegration” of juvenile offenders. Consideration should be given to amending the law to add a reference to the aim of supporting their “physical, mental, spiritual, moral and social development.” Furthermore, the Code requires individual treatment programmes to be developed in educational facilities for younger juvenile offenders but not in juvenile correctional facilities. Consideration should be given to amending the law in this regard.

Consideration also should be given to the development of a coherent legal framework on the prevention of offending by juveniles, including the question of interventions benefitting children under 14 years of age involved in criminal activities.

The Juvenile Justice Code contains a chapter on procedures to be followed in cases where adults are charged with certain offences against children, including sexual offences, child abduction, child abuse and abandonment, and other crimes specifically concerning children.

This chapter represents a valuable step towards recognition of the special rights of child victims in criminal proceedings, but does not does it recognise all the measures for the protection of child victims recommended by international standards. Consideration should be given to amending the Code to recognise the following rights and principles:

- the best interests of the child are to be a primary consideration in all decisions taken
- interference in the private life of the child should be limited to the minimum necessary
- all interventions should take place in an environment that accommodates the special needs of the child
- all professionals intervening in cases involving juvenile victims should be specialised, and they should coordinate their activities to ensure continuity
- child victims and witnesses should have access to assistance and support services including financial, counselling, health, social and psychological services
- contact between the child and alleged perpetrator shall be prevented as far as possible (not only during the child’s testimony)
- child victims and witnesses should be prepared for legal proceedings by informing them of the role and rights of the child in the proceedings, the ways in which questioning will be conducted, the place and time of hearings and the availability of support services; during proceedings they shall be informed of the progress of the case, all significant decisions taken and available mechanisms or procedures for seeking a review of decisions.
- children should be enabled to express freely their views and concerns regarding their involvement in the justice process, including concerns regarding safety, the manner in which they provide testimony and the outcome of the process; due regard shall being given to the child’s views and concerns and, to the extent it is not possible to accommodate them, the reasons shall be explained to the child
- guardians shall be appointed to safeguard the rights and interests of the child during legal proceedings when necessary

The Code also should be amended to provide that the chapter on cases involving child victims should apply to all cases in which a child is a victim, regardless of whether the accused is a juvenile or an adult.

More generally, consideration should be given to extending norms on the treatment of child victims to all crimes in which the victim is a child. This could be achieved either by making the Juvenile Justice Code applicable to all criminal offences against children, or by amending the Criminal Procedure Code to ensure that all the safeguards concerning child victims recognised by the Juvenile Justice Code are incorporated into it.

## f. The Criminal Code

The provisions of the Criminal Code concerning sexual crimes involving children are for the most part in harmony with international standards on the rights of children. One exception concerns article 243 on sexual offences within the family, which provides for shorter prison sentences for incest committed by adults against children than the sentences provided by articles on rape, sexual assault and degradation of sexual integrity, with aggravating circumstances.

The provisions of this article on incest that overlap with other articles of the Code should be deleted, to eliminate the preferential treatment of perpetrators of sexual abuse who are adult relatives of the victims. The paragraph of this article on incest by an older sibling also should be amended, to provide that the sentence should be longer, not shorter, when the victim is under 14 years of age.

The article of the Criminal Code on persuading, inducing or facilitating the participation of children in illegal sexual activity also should be amended to make the sentence heavier when the victim is under 14 years of age, not lighter than the sentence for this crime when the victim is under the age of 16.

Most of the provisions of the Code on the exploitation of child prostitution are in harmony with international standards, but the Code should be amended to criminalise the use of the services of child prostitutes by clients. The Code also should be amended to increase the sentence for producing child pornography, which is presently one year in prison, and to criminalise attendance at a pornographic performance involving children.

The Code criminalises trafficking, abduction, forced labour and other slavery-like practices, but it should be amended to add a prohibition of the sale of children, regardless of the purpose of a sale.

The Code criminalises the recruitment of children between 15 and 18 years of age, and the conscription, recruitment or use in hostilities of children under the age of 15 during a conflict. It should be amended to ensure that the recruitment of children under 15 years of age is an offence at all times, whether or not there is an armed conflict.

The age of the victim is an aggravating factor for many crimes, reinforcing the dissuasive effect of the criminal law for crimes against children. Nevertheless, the minimum sentence for torture when the victim is a child is 3 years of prison, and the minimum for ill-treatment is 6 months. These sentences are not proportionate to the gravity of the offence, and should be increased.

The Law on Social and Family Services provides that arranging an extra legal adoption, and placing undue pressure on parents to obtain their consent to adoption, are criminalised, but the Criminal Code does not recognise such an offence. It should be amended to do so.

The Code criminalises photographing, filming or video recording of a person “in a way that fundamentally violates” his or her privacy. Consideration should be given to amending this article by the addition of a paragraph that criminalises the publication of any information that allows the identification of children who are victims of crimes, and the publication of any images of children without (depending on the age and maturity of the child) the consent of the child and/or his parents or guardians.

Consideration should be given to amending the Criminal Code to prohibit the sale of alcohol to persons under 16 years of age, in addition to the serving of alcohol to them.

## g. Law on Protection against Domestic Violence

This law gives the authorities broad powers to intervene promptly to protect children or adults from physical, mental or sexual violence, but it should be amended to recognise the right of children to be heard in domestic violence cases, the right of children involved in such proceedings to the assistance of a support person, and the principle that the best interests of any child should be a primary consideration in determining what action to take.

## h. Law on Prevention and Combating Trafficking in Human Beings and Protection of Victims of Trafficking

Articles 5.1 and 5.3 of the Law do not accurately restate the elements of the crime of trafficking as defined in the Criminal Code (which is consistent with international standards). The definition of offences related to trafficking in article 10.1 is overbroad. The law should be amended to correct these defects, which appear to be due to errors in drafting.

## i. Law on Mediation

The Law on Mediation now in force does not apply to juveniles. The Juvenile Justice Code contains two articles on mediation in cases involving accused juveniles. These articles are positive, but do not recognise the principles that should be respected if the victim is a child. The Code should be amended to require respect for the evolving capacities and best interests principles and the right of children to be heard and have their views taken into account, in cases involving a child victim that are referred for mediation. Legislation also should be adopted to regulate cases in which mediation would be appropriate when the victim is a child and the offender is an adult.

## j. Law on Witness Protection

This law should be amended to recognise that children should be consulted personally about possible entry into the programme as protected persons, and their views and best interests should be given due weight in determining whether to admit them. It also should be amended to clarify the criteria for inclusion in the programme of the minor children of protected persons, and to recognise the rights of children in the programme to education and to special social and psychological assistance.

## k. Law on Citizenship

Although this law is very largely in harmony with the relevant international norms, some articles provide that the acquisition or loss of citizenship by parents automatically affects the nationality of their children. The law should be amended to require that the views of children be taken into account, when they are old enough to understand and appreciate the significance of nationality.

## l. Law on Civil Status and Law on Civil Registers

The contradictions between these two laws regarding the time limit for birth registration (15 or 30 days), and the persons who have responsibility for registering birth, should be eliminated by amending one or both of them.

Consideration should be given to amending the Law on Civil Status to eliminate the fine for failure to register a birth.

## m. Law on Free Legal Aid

The Law on Free Legal Aid adopted in 2012 satisfies the recommendations of international human rights bodies regarding access to legal assistance in non-criminal matters. Consideration nevertheless should be given, at some appropriate time, to recognition of the right of children to the assistance of lawyers having special training.

## n. Law on Travel Documents and Law on Civil Aspects of International Child Abduction

The Law on Travel Documents does not contain requirements designed to prevent the abduction of children by parents or other relatives, of the kind recommended by the Hague Conference on Private International Law. The law should be amended to bring it into greater harmony with such recommendations, in particular by expressly requiring the permission of both parents for a child to travel abroad – even when accompanied by one parent – and to require that parental permission be required for children 15 to 18 to travel abroad unaccompanied.

There does not appear to be any legislation that establishes measures to ensure that no parent enters Kosovo with a child in violation of custody agreements or orders in force in the child's country of residence. Steps also should be taken to adopt legislation for this purpose, or to amend existing legislation to bring it into compliance with the recommendations of the Hague Conference on this subject.

The Law on Civil Aspects of International Child Abduction regulates cooperation in the enforcement of agreement between parents and children living in different States, but applies only to children under 16 years of age. This is in harmony with the Hague Convention on the same subject, but the provisions of the Convention on the Rights of the Child on family unity apply to all children under 18 years of age.

Consideration therefore should be given to amending the legislation so that mechanisms to enforce orders and agreements on contact between children and parents apply to all children under 18 years of age.

## o. Law on the Social Assistance Scheme and Law on Material Support for Families of Children with Permanent Disability

Children living in poverty are not entitled to assistance if there is one member of the household who is able to work, unless the household also includes a child under 5 years of age. This is an arbitrary limitation on the right of children in need to receive assistance, and the law should be amended to eliminate this requirement or modify it to ensure that assistance is made available to all children who need it, regardless of age.

The list of persons eligible for assistance under the Law on the Social Assistance Scheme includes children “up to” 14 years of age, and students 15 to 18 years of age. The former provision should be modified to refer to children under 15 years of age, in order to prevent a literal interpretation of the law that would result in the exclusion of children 14 years of age.

The Law on Material Support for Families of Children with Permanent Disability recognises the right of families having a totally disabled child to assistance, regardless of their economic position.<sup>920</sup> It is understandable for a place with limited resources to give priority to assisting families with the most severely disabled children, but this should be seen as a step towards providing assistance to all children with disabilities as soon as possible. Consideration therefore should be given to amending the definition of disability in this law to bring it into harmony with the definition of the Convention on Rights of Persons with Disabilities.

The families of children under the age 18 years are not entitled to receive support for a disabled child 16 or 17 years of age who is married, even though, under the Law on Disability Pensions, the married child may not apply for the assistance to which disabled adults are entitled until reaching the age of 18. This gap in entitlement should be remedied by amending one or both of these laws.

## p. child care for the young children of working parents

Consideration should be given to the adoption of legislation supporting the establishment of childcare services or centres for the working parents of pre-school children.

## q. Law on Ombudsperson

Given children’s special need for access to an effective, non-judicial mechanism for protecting their rights, consideration should be given to amending the Law to require the adoption of special procedures for receiving and handling complaints from children, as well as the establishment of a specialised child rights team and a permanent programme to make children aware of their rights and the role of the OIK in defending them.

Consideration also should be given to the recommendations made by the Council of Europe regarding the independence and effectiveness of the OIK.

Draft legislation that would give the OIK competence over complaints of discrimination by private persons is under consideration. The mandate of the institution should not be expanded until such time as its ability to fulfil its core mandate effectively has been fully consolidated.

<sup>920</sup> Art.18.1

## r. legislation on discrimination

The Constitution provides that “All are equal before the law” and “Everyone enjoys the right to legal protection without discrimination, and expressly prohibits discrimination on all the grounds mentioned by the Convention on the Rights of the Child. Discrimination also is prohibited by the Family Law, the Law on Social and Family Services, the Law on Labour, the Law on Pre-school Education, the Law on Pre-university Education, the Law on Rights and Responsibilities of Citizens in Health Care and the Law on Health, but in some cases, the list of prohibited grounds of discrimination contained in these laws omits some grounds of discrimination prohibited by the Constitution. All laws that contain articles on discrimination should be reviewed to ensure that they prohibit discrimination on all the grounds mentioned by the Constitution.

## s. the legislative distinction between children and minors

The Criminal Code, Criminal Procedure Code, Juvenile Justice Code, the Law on Citizenship, the Law on Social and Family Services, the Law on Pre-university Education and Family Law all define child as a person under the age of 18. The Juvenile Justice Code and Law on Social and Family Services define ‘minor’ as persons 14 to 18 years of age.<sup>921</sup>

Recognition of this age group is essential to the Juvenile Justice Code, because children under 14 involved in criminal acts may not be prosecuted. In contrast, only one operative provision of the Law on Social and Family Services applies to minors. In comparative law, the term minor refers to persons below the age of civil majority, that is, any person who is not an adult. The Family Law uses the term minor but does not define it. In many articles, it is used as adjective to distinguish minor children (offspring or descendants under 18 years of age) from adult children i.e. descendants who have reached the age of majority.<sup>922</sup>

The Constitution uses both terms, minor and child. The term child is used only in article 50, on the rights of children. The term ‘minor’ is used in article 29, on the right to liberty and security (see above), in article 31 on the right to a fair and impartial trial. To interpret the term ‘minor’ in these articles to mean persons 14 to 18 years of age would be appropriate for the seventh paragraph of article 14, if one assumes that it applies only to trials of children accused of a criminal offence, and not to trials involving children in other capacities. But to interpret it in this way would imply denial of the entitlement of children under 14 years to the basic rights recognised in article 29 and the third paragraph of article 31, which recognises exceptions to the principle that trials shall be open to the public.

There seems little reason to use the term ‘minor’, except in the context of legislation concerning children who involved in criminal offences. In other legal contexts, the age of 14 years does not appear to have broader relevance than other age-based thresholds, such as 15 years for employment, or 16 years for consent to sexual intimacy. Indeed, in some contexts where the age limit of 14 years is used, such as consent to adoption, the use of a fixed age limit is not in harmony with the principle that the views of all children should be taken into account and given the weight that is consistent with their maturity. Consequently, the legislation should be reviewed and amended to ensure that terms child and minor are used appropriately and consistently. Consideration should be given to eliminating the use of the term minor in legislation other than the Juvenile Justice Code, except in the sense that it is used in the Family Law.

<sup>921</sup> Art.1.2.2 and Art.1.3.h, respectively

<sup>922</sup> See e.g. Art.80, 84, 110, 115, 126-128



# Part III

**The importance of a legal  
framework for the rights  
of children**

.Legislation alone does not suffice to ensure that children enjoy the rights to which they are entitled. Article 4 of the Convention on the Rights of the Child obliges States to take “all appropriate legislative, administrative and other measures” in order to recognise and safeguard the rights of children. The Committee on the Rights of the Child recognises the value of strategies and plans of action on child rights, including sectoral plans of action in areas such as child health.<sup>923</sup> Some international instruments, in particular ILO Convention No.182 on the Worst Forms of Child Labour, expressly require States to adopt programmes of action to eliminate violations of the rights of children.<sup>924</sup>

Strategies and plans of action identify concrete goals to be accomplished within a specific time period, the responsibilities of the public (and often private) actors expected to cooperate in the effort, and the resources to be allocated to it. They can be valuable tools for protecting the rights of children, and may even have greater direct impact on social and economic problems than legislation, in the short term. They are, however, prepared and implemented within a legal framework. The roles assigned to different actors are within the competencies and responsibilities defined by law, and the aims and targets recognised by strategies and plans should be steps towards the full enjoyment and protection of the fundamental rights of children and their families. The rights of children cannot be reduced to mere aims of a strategy or plan of action, however; they must have a permanence and hierarchy that can only be recognised by law.

A legislative framework for children necessarily consists of at least two components, namely, laws and secondary legal norms. Secondary legal norms – guidelines, regulations, protocols, administrative instructions - are important because they contain detailed guidelines about the way laws should be implemented. They often have greater impact than laws on the way civil servants carry out their professional duties from day to day. They are, however, adopted by appointed officials, rather than the elected representatives of the public; they are less transparent, and more changeable. Fundamental rights and basic principles concerning fundamental rights should be recognised by laws; the function of secondary norms is to provide public officials with more detailed guidance on how to implement the laws.

Two other components of a legislative framework for children are optional: constitutional norms, and a comprehensive law on child rights. Each of the components of a legal framework, whether essential or optional, has a unique role to play.

The fact that the Constitution recognises certain rights of children, and incorporates the Convention on the Rights of the Child in to the national legal order, is very positive. In theory, incorporation of the Convention into the domestic legal order should make it unnecessary to adopt legislation that expressly recognises every right contained in the Convention.

The reality, however, is different. Judges and other public servants are guided mainly by legislation and secondary norms. In most countries, most judges do not adopt decisions based directly on the constitution, and few authorities would take a decision based on a treaty, even one that has been incorporated into the national law.

It is not realistic to expect all the rights of children to be expressly recognised by the constitution. Moreover, the extent to which children are actually entitled to exercise rights recognised by the Constitution is sometimes unclear. For example, the Constitution of Kosovo recognises the freedom of association in broad general terms, but the legislation expressly regulates the exercise of this right only by persons over 15 years of age. This underlines the importance of ensuring that ordinary legislation recognises and regulates all the rights of children.

923 General Comment No.10, supra, para.32

924 Art.6 and 7.2

In Kosovo the legislative part of the legal framework is good, and implementation of the recommendations made above will make it even better. It is difficult, however, to recognise all the rights of children by the amendment of ordinary legislation. A number of rights and obligations recognised by the Convention on the Rights of the Child are not expressly recognised by any law now in force in Kosovo. They include:

- the right of children with mental or physical disabilities to “a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community” (CRC Art.23.1)
- the right to rest, leisure, play, to appropriate recreational activities and to participate in cultural life and the arts (CRC Art.31)
- no law recognises criteria for placement in ‘residential shelters’ for children without parental care and the rights of children in such facilities (CRC Art.20.3 and UN Guidelines for the Alternative Care of Children)
- the obligation to encourage the production and dissemination of children’s books and the production and dissemination of programming beneficial for children by the media, including through international co-operation, and taking into account the needs of children of linguistic minorities (CRC Art.17(a)-(d))
- the obligation to provide parents and children with information about the whereabouts of family members, when an individual has been separated from his family by State action such as detention, expulsion or extradition (CRC Art.9.4)
- the obligation to ensure that working parents have access to child care (CRC Art.18.3)
- the obligation to close premises used for child prostitution or pornography (Optional Protocol Art.7(c))

Two obligations recognised by the Lanzarote Convention are not expressly recognised by any law in force in Kosovo:

- to ban persons convicted of sexual abuse or exploitation of children from professions that involve regular contacts with children (Art.5.3)
- to establish a DNA database of convicted offenders (Art.37.1)

A comprehensive law on the rights of children is a practical way of ensuring that all the rights of children are appropriately recognised and defined.

The capacity of children to take legal action is another right that it would be useful to recognise by a law that has broad application. At present no law recognises the capacity of children to participate in legal proceedings in general terms. Several laws contain different standards on this, and there also are gaps where the capacity of children to take legal action is not recognised. There is a need to adopt a general norm that recognises the capacity of children to take legal action, regulates who may represent them when they are unable to do so personally, and when this capacity should be vested in some person especially designated for this person. The general norm also should recognise the obligation of children’s legal representatives to take their views and best interests of children into account in deciding how to represent their interests, and the obligation of courts and other authorities to give due weight to the views of children, and the obligation to provide children with appropriate assistance in understanding the nature and possible consequences of proceedings, and their role in them.

It is particularly important to recognise, in a comprehensive law on child rights, the basic principles contained in the Convention, such as the best interests principle, the right to development, the evolving capacities principle and the right of children.

These principles are already recognised in the most important legislation concerning children, but it may not be practical to be expressly incorporated them into all laws that affect children. A child rights law also offers legislators an opportunity to clarify how these principles are to be interpreted and applied. It could include, for example, a list of factors to be taken into account in determining the best interests of a child.

Legislation also has what can be called an educational function. In Kosovo, as in all countries, full recognition of the rights of children requires a cultural change, a change in the values of adults and children, of public institutions and communities. Adoption of a law on the rights of children can be a valuable tool for promoting this kind of cultural transformation, in addition to its legal consequences.

Many provisions of the Convention – which was adopted by consensus amongst countries having very different social systems, cultures and levels of development - are formulated in relatively vague terms. Furthermore, the Convention – like any international human rights instrument - recognises minimum obligations. Every country is free to adopt laws that recognise additional rights or obligations. Kosovo has already done so, in recognising the right to pre-primary education.

Comprehensive child rights laws provide an opportunity to incorporate the Convention into the national law in a way that will have the maximum possible impact, while giving the legislature an opportunity clarify the meaning of the rights and principles contained in the Convention and to add any other rights that it considers consistent with the needs, culture and aspirations of Kosovo and its communities.

A law of this kind must be carefully drafted to ensure that it fills gaps and complements other legislation, rather than creating conflicting norms and causing confusion amongst those who apply the law. One way to do this would be to include in child rights law an article stating that the provisions of this law prevail over any incompatible provision of other legislation. The child rights law thus would occupy a place in the hierarchy of norms between the Constitution and ordinary legislation. This would help to ensure that all legislation is interpreted and applied in a way that is consistent with the rights of children. Another way would be to draft a comprehensive law on child rights as part of a broader process of law reform, that would include revision and amendment of other legislation concerning children.

A legal framework is not an end in itself, of course. Laws are of little use if they are not implemented adequately, and laws that cannot be implemented properly, due to financial or other objective constraints, are not good laws. A good law must address the most significant problems to be solved, and must be based on a realistic assessment of the resources that are needed to do so, and available.

## Appendix I. List of laws consulted

### Constitution of Kosovo

Criminal Code, No.04/L-082  
 Criminal Procedure Code, No.04/L-123  
 Juvenile Justice Code, No.03/L-193  
 Law on Execution of Penal Sanctions No.03/L-191  
 Law on International Legal Cooperation in Criminal Matters, No.04/L-031

Law on Domestic Violence, No.03 /L-182  
 Law on Witness Protection, No.03/L-04/L-015  
 Law on Prevention and Combating Trafficking in Human Beings and Protection of Victims of Trafficking No.04/L-218

Law on Civil Status, No.04/L-003  
 Law on Civil Registers, No.04/46  
 Law on amending ... Law on Registers of Civil State [sic] No.02/L-126  
 Law on Citizenship, No.04/L-215  
 Law on Personal Names, No.02/L-118  
 Law on Readmission, No.03/L-208  
 Law on Asylum, No.04/L-217  
 Law on Travel Documents No.03/L-037  
 Law on Civil Aspects of International Child Abduction, No.03/l-238

Law on Courts, No.03/L-199  
 Law on Free Legal Aid, No.04/L-017  
 Law on Ombudsperson No.03/L-195  
 Law on Witness Protection No. 04/L-015

Family Law of Kosovo, No.2004/32  
 Law on Family and Social Services, No.02/L-17  
 Law on amending ... the Law on Family and Social Services, No.04/L-081  
 Law on the Social Assistance Scheme, No.2003/15  
 Law on amending... Law on the Social Assistance Scheme, No.04/L-096  
 Law on Material Support for Families of Children with Permanent Disability, No.03/L-02  
 Law for Blind Persons, No.04/L-082  
 Law on Disability Pensions No.2003/23

Law on Pre-school Education, No.02/L-53  
 Law on Vocational Education and Training, No.04/L-138  
 Law on pre-University Education, No.02/L-52  
 Law on Education in the Municipalities of ROK, No.03/L-068

Law on Health, No.04/L-125  
Law on The Rights and Responsibilities of Citizens in Health Care No.2004/38  
Law on Reproductive Health, No.02/L-76  
Law for Termination of Pregnancy, No.03/L-110  
Law on Tobacco Control, No.04/L-156  
Law on Flour Fortification, No.04/L-114  
Law on Infant's Breastfeeding Incitement and Protection, No.02/L-81

Labour Law, No.03/L-212  
Law for Organising Trade Union No.04/L-011, Art.9.1  
Law on the Kosovo Security Force, No. 03/L-046

Law on Empowerment and Participation of Youth, No.03/L-145  
Law on Independent Media Commission, No.04/L-044

## Appendix II. International instruments consulted

### UN treaties

Convention on the Rights of the Child  
Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography  
Optional Protocol to the CRC on the Involvement of Children in Armed Conflict

Convention on the Elimination of all forms of Discrimination against Women  
Convention on the Rights of Persons with Disabilities  
International Convention on the Elimination of all forms of Racial Discrimination

International Covenant on Civil and Political Rights  
International Covenant on Economic, Social and Cultural Rights

Convention Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment

Convention on the Status of Refugees  
Convention on the Reduction of Statelessness

International Labour Convention No.102 on Minimum Standards of Social Security  
International Labour Convention No.138 on Minimum Age for Admission to Employment  
International Labour Convention No.182 on the Worst Forms of Child Labour  
International Labour Convention No.183 on Maternity Protection

WHO Framework Convention on Tobacco Control  
Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances  
Protocol to the Convention against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol)

### Other UN instruments

Universal Declaration of Human Rights

UN (Beijing) Standard Minimum Rules on the Administration of Juvenile Justice  
UN Guidelines on Justice in matters involving Child Victims and Witness of Crime  
UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems  
UN Guidelines for the Alternative Care of Children

### **European instruments**

Convention on the Protection of Human Right and Fundamental Freedoms (European Convention on Human Rights)  
European Social Charter

European Convention on Nationality  
European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children  
European (Lanzarote) Convention on the Protection of Children Against Sexual Exploitation and Abuse  
Council of Europe Convention on Contact concerning Children (2003)

European Guidelines on Child Friendly Justice  
European Rules for Juvenile Offenders Subject to Sanctions or Measures

Council of Europe Recommendation 2000(20) on the role of early psychosocial intervention in the prevention of criminality

### **Other international treaties**

Hague Convention on Civil Aspects of International Child Abduction  
Hague Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption

Geneva Convention IV relative to the Protection of Civilian Persons in Time of War  
Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts  
Protocol II to the Geneva Conventions relating to the Protection of Victims of Non-international Armed Conflicts



## **General Observations of the Committee on the Rights of the Child**

General Comment No.1 (2001) The aims of education  
 General Comment No.2 (2002) The role of independent national human rights institutions in the promotion and protection of the rights of the child  
 General Comment No.3 (2003) HIV/AIDS and the rights of the child  
 General Comment No. 4 (2003) Adolescent health and development in the context of the CRC  
 General Comment No.5. (2003) General Measures of Implementation for the Convention on the Rights of the Child  
 General Comment No.6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin  
 General Comment No.7 (2005) on Implementing Child Rights in Early Childhood  
 General Comment No.8. (2006) **The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment**  
 General Comment No.9 (2006) The rights of children with disabilities  
 General Comment No.10 (2007) Children's Rights in Juvenile Justice  
 General Comment No.12 (2009) The Right of the Child to be Heard  
 General Comment No.13 (2011) The Right of the Child to Freedom from all forms of Violence  
 General Comment No.14 (2011) The right of the child to have his or her best interests taken as a primary consideration  
 General Comment No.15 (2013) on the right of the child to the enjoyment of the highest attainable standards of health

## **Other international standards and recommendations**

World Health Assembly Recommendations on the Marketing of Food and non-Alcoholic Beverages to Children

International Code of Marketing of Breast-milk Substitutes

UNICEF-WHO Baby-Friendly Hospital Initiative

Declaration of the Alma-Ata International Conference on Primary Health Care, 1978

Committee on Economic, Social and Cultural Rights, General Comment No.19 (2008), The right to social security, and General Comment No.20, Non-discrimination in economic, social and cultural rights (2009)

CEDAW, General Recommendation No.21, Equality in marriage and family relations, 1994

Human Rights Committee, General Comment No.16: Article 17 (The right to privacy), 2008

Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/CRP.1/Rev.4

ILO Recommendation 190 on the Worst Forms of Child Labour

UN High Commissioner for Refugees, Guidelines on International Protection, 2009

Guide to Good Practice under the Hague Convention on the Civil Aspects of International Child Abduction, Part III, Preventive Measures, Jordan Publishing Ltd, Bristol, 2005

## Appendix III. Other documents consulted

UNGA Resolution 1244 (1999)  
UNMIK/REG/1999/1  
UNMIK/REG/2001/9

Report of the Secretary General on the UN Interim Administration Mission in Kosovo, S/2002/62

Report of the Secretary General on the UN Interim Administration Mission in Kosovo, S/2002/436

Report of the Secretary General on the UN Interim Administration Mission in Kosovo, S/2008/62

UN General Assembly Resolution 55/66 (2000)

UN Population Fund, State of World Population 2003

Report of the Secretary General on Traditional Practices affecting the Health of Women and Girls, A/5/316, 2001

Report of the Special Rapporteur on Violence Against Women, its causes and consequences, A/HRC/20/16 (2012)

Human Rights Committee, Views on Communication No.1153/2003 (2005)

Committee Against Torture, Concluding Observations on the second report by Albania, CAT/C/ALB/CO/2, 2012; Concluding Observations on third report by Turkey, CAT/C/TUR/CO/3, 201; and Concluding Observations on the third report by Mauritius, CAT/C/MUS/CO/3, 2011

UNICEF consultancy report, Assessment of the Kosovo Chamber of Advocates' Capacity to Fulfill the Child's Right to Legal Defence, 2010

Promoting equitable access to justice for all children, S. Golub and A. Grandjean, Insights: Child Rights in Central and Eastern Europe and Central Asia, No.1, 2014, UNICEF Geneva

Implementation Measures for Legislation Impacting Human Rights in Kosovo, OSCE Mission in Kosovo, 2012

Reform Proposals to Energise Non-Judicial Human Rights Institutions in Kosovo, European Union and Council of Europe, 2013

Child Marriage Factsheet, Equality Now, 2010, available at [www.equalitynow.org](http://www.equalitynow.org)



