



Handling of **Terrorism Cases** by the Kosovo Criminal Justice System

September, 2022

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LIST OF ABBREVIATIONS

AML/CFT	Anti-Money Laundering and Combating the Financing of Terrorism
CC	Criminal Code of Kosovo
CPC	Criminal Procedure Code of Kosovo
COE	Council of Europe
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FIU	Financial Intelligence Unit
KBA	Kosovo Bar Association
OSCE	Organization for Security and Co-operation in Europe
OHCHR	Office of the High Commissioner for Human Rights
UATI	Universal Anti-terrorism Instruments
UN	United Nations
VERLT	Violent Extremism and Radicalization Leading to Terrorism

1. INTRODUCTION

“Our responses to terrorism as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension.”

Former UN Secretary General, Kofi Annan (2003)

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) makes a comprehensive contribution to international efforts against terrorism guided by the United Nations.¹ Tackling terrorism and violent extremism and radicalization leading to terrorism (VERLT) is a priority for the OSCE.

Terrorism represents a significant threat to peace, security, and stability. This report covers a number of the OSCE’s strategic focus areas for counter-terrorism activities including: promoting the implementation of the international legal framework against terrorism and enhancing international legal co-operation in criminal matters related to terrorism; preventing and suppressing the financing of terrorism; and promoting and protecting human rights and fundamental freedoms in the context of counter-terrorism measures.²

The OSCE Mission in Kosovo monitors the justice sector for compliance with rule of law principles, fair trial and human rights standards. Terrorism related cases in the Kosovo criminal justice system are monitored as a priority. Within the reporting period, the OSCE has monitored over 200 hearings in more than 50 cases categorized as terrorism or terrorism related. The purpose of this report is to analyse the extensive data contained in the trial monitoring database and consolidate the findings of the OSCE trial monitors. The report will also provide a comprehensive analysis of the existing legal framework for countering terrorism in Kosovo and assess the extent to which that framework is in line with international law and standards. The report bases its findings on information from the OSCE trial monitoring database, internal reports, and first-hand interviews.³ It identifies best practices as well deficiencies in legislation, procedure and/or practice.

¹ Countering terrorism. Available at <https://www.osce.org/countering-terrorism> (accessed 28 January 2021).

² *Ibid.*

³ Conducted over Zoom.

It is anticipated this report will be used by the OSCE in support of advocacy for legislative and policy reform if needed, identification of cross-cutting themes and the development of targeted capacity building activities.

This report was drafted by two legal consultants of the OSCE, Kirsty Brimelow KC,⁴ and Maryam Mir. Kirsty Brimelow KC is a barrister practising in criminal law and international human rights. She is Head of the International Human Rights Law team at Doughty Street Chambers.⁵ She advises governments on counter terrorism and human rights. Maryam Mir is a barrister specialising in criminal defence with a particular focus on counter terrorism at Doughty Street Chambers.

In writing this report, the OSCE wishes to thank the judges, prosecutors, defence lawyers, Kosovo Police (KP) and Financial Intelligence Unit (FIU) for their time, commitment to progress and welcome contributions to this report.

⁴ King's Counsel.

⁵ Further information available at: <https://www.doughtystreet.co.uk/>

2. OVERVIEW

Terrorism remains one of the major global security threats, threatening the enjoyment of the right to life, liberty and physical integrity of victims. This interferes with and violates human rights. The global trend of terrorism and its spread, especially during the last two decades, also poses a threat to the people in Kosovo.

The prevention and combating of terrorism remain one of the stated strategic priorities of the Kosovo Government, with publicly declared commitments to further strengthen the existing mechanisms and to adapt to the current trends and dynamics of terrorist threats. Recognising the threats and consequences of terrorism, the Kosovo Government drafted its first counter terrorism strategy in 2009, which, in addition to establishing the necessary mechanisms, provided a comprehensive approach to preventing and combating terrorism.

The extent to which Kosovo legislation criminalising terrorism and prosecution deal with such cases in compliance with local and international legal standards has been subject to consistent scrutiny by the OSCE. The OSCE, within its mandate, also continues to monitor the Kosovo justice system in order to closely observe the level of respect for human rights, rule of law principles and fair trial standards.

The report analyses the OSCE's findings following a three-year period of monitoring of terrorism cases between 2018 and 2020. Through analysis of the existing Criminal Procedure Code, identifying trends in prosecution practice, illustrative examples and first-hand interviews with practitioners and trial monitors, the report provides an overview of progress in the specific arena of prosecuting terrorism cases in Kosovo within the last three years. Identifying areas for development, particularly in the spheres of strengthening adherence to fair trial standards, the prosecution of financing of terrorism and improving sentencing practice, this report provides recommendations for remedial steps to be taken by key institutions in Kosovo dealing with terrorism related cases to ensure effective adherence to international legal standards.

3. EXECUTIVE SUMMARY

The establishment of two specialised departments in 2019 (the Department of Terrorism in the Special Prosecution Office and the Special Department in the Basic Court of Prishtinë/Priština) proved a significant and positive step towards strengthening institutions committed to the prosecution of terrorism offences.

Judges, prosecutors, KP, the FIU, and defence lawyers all demonstrated a high level of commitment and motivation in dealing with cases involving terrorism. However, the institutional bodies remain inhibited by a lack of specialist expertise and practices fall short of fair trial standards. The key findings of this report include, evidential shortcomings underpinning indictments, deficiencies in the reasoning for use of pre-trial detention, insufficiently detailed verdicts referencing evidential tests, and problems with disclosure at the pre-trial stage and lack of clarity over the legal framework for disclosure throughout the trial.

There is a need for greater consideration of links between individual cases and terrorist groups and for police and prosecutors to use opportunities to gather intelligence from suspects or convicted persons. One comment made to the drafters of this report, during research, was critical of the purpose of guilty pleas; seeing them as expedient in that the person enters a guilty plea, often irrespective of evidence, and is then released. Further, repeated concerns were raised by the interviewees as to the informal understanding that has arisen that a guilty plea means a suspended sentence and therefore immediate release. It is an incentive to plead guilty irrespective of actual evidence to prove guilt.

The existing law and prosecution practice in the area of financing of terrorism needs to be brought in line with EU and international standards. A lack of operational oversight has led to ineffective prosecution in this area. Judges, prosecutors and the FIU would benefit from training focused on the prosecution of financing of terrorism and areas of cross over with money laundering offences.

Government policy makers are under immense pressure to be seen to be taking positive action in respect of terrorist threats, and frequently face competing political, logistical, and information requirements. There is a risk that the need to show cases going through the courts replaces effectiveness in protecting people's lives as well as focusing upon the easy targets rather than those in organizational and recruiting positions for terrorist groups.

This report is intended to support legal practitioners in Kosovo to maintain the highest standards of professionalism in what is a challenging area of law and policy.

a. Methodology

This report is based on:

- (i) qualitative and quantitative assessment of monitored court cases related to terrorism from 2018 to 2020;⁶
- (ii) assessment of data obtained by relevant criminal justice institutions, namely KP, Kosovo Prosecutorial Council (KPC) and Kosovo Judicial Council (KJC);
- (iii) eight first hand interviews and discussions with representatives of relevant criminal justice institutions, namely police officials, prosecutors, judges and lawyers;
- (iv) observations reported by a systematic court monitoring group overseen by the OSCE.

The report draws on data from observations of the OSCE trial monitors during 220 court sessions in 54 terrorism related cases monitored between 2018 and 2020 before three Kosovo Basic Courts.⁷

⁶ The reporting period was 1 January 2018 to 31 December 2020.

⁷ The following number of hearings involving terrorism related offences were monitored before each of the Basic Courts: Basic Court of Prishtinë/Priština – 210 hearings; Basic Court of Pejë/Peć – 8 hearings and Basic Court of Gjiilan/Gnjilane – 2 hearings only. The OSCE Trial Monitoring team did not include data from other regional courts as there were no hearings involving terrorism related offences either recorded or monitored in other basic court regions, namely Basic Court of Mitrovicë/Mitrovica; Basic Court of Prizren; Basic Court of Ferizaj/Uroševac; and Basic Court of Gjakovë/Đakovica.

4. KOSOVO AND INTERNATIONAL LEGAL FRAMEWORK

4.1. Kosovo Legal and Institutional Framework

The prosecution of terrorism in Kosovo law is not codified within a single piece of legislation; rather the law can be found in various pieces of legislation:

- A. Criminal Code (2012)⁸
- B. Criminal Code (2019)⁹
- C. Law on Prohibition of Joining the Armed Conflicts Outside State Territory
- D. Law on the Prevention of Money Laundering and Terrorist Financing
- E. Law on the Prevention of Money Laundering and Combating Terrorist Financing

4.1.1. Criminal Codes of 2012 and 2019

The Kosovo 2012 Criminal Code (CC),¹⁰ has been recently replaced by the 2019 CC. The two CCs are similar but the 2019 CC sought to fill lacunae in the earlier legislation in two key areas: financing of terrorism and travelling for terrorism. In the 2012 CC, Chapter XIV¹¹ contains 10 articles related to terrorism offences:

- Article 136** Commission of the offense of terrorism;
- Article 137** Assistance in the commission of terrorism;
- Article 138** Facilitation of the commission of terrorism;
- Article 139** Recruitment for terrorism;
- Article 140** Training for terrorism;
- Article 141** Incitement to commit a terrorist offence;
- Article 142** Concealment or failure to report terrorists and terrorist groups;
- Article 143** Organization and participation in a terrorist group;
- Article 144** Preparation of terrorist offenses or criminal offenses against the constitutional order and security of the Republic of Kosovo;
- Article 145** Irrelevance of the commission of terrorist offence.

In addition to these offences, the 2012 CC specifies three additional offences relating to a failure to report terrorist acts (including inchoate offences).¹²

8 Kosovo Criminal Code, No. 04/L-082, 13 July 2012.

9 Kosovo Criminal Code, No. 06/L-074, 14 January 2019.

10 Entered into force on 1 January 2013.

11 Kosovo Criminal Code, No. 04/L-082, 13 July 2012.

12 *Ibid.* Article 385 (2) (2.4) Failure to report preparation of criminal offenses; Article 386 (1.4) Failure to report criminal offenses or perpetrators and Article 388 (2) (2.4) providing assistance to perpetrators after the commission of criminal offenses. Article 145 of the CC reads: "For an act to constitute an offense as set forth in Articles 135-144 of this Chapter, it is not necessary that a terrorist offense actually be committed".

On 14 January 2019, the new CC was published (in force three months after publication; on 14 April 2019).¹³ Chapter XIV of the 2019 CC contains 11 articles related to terrorism offences, including the former, “irrelevance of the commission of terrorist offence”, specifying that for an act to constitute the offence of terrorism, it is not necessary that a terrorist offence actually be committed. Preparatory acts of terrorism and participation/organization remain in the Code of 2019 as do inchoate offences.¹⁴ The available sentences prescribed have not changed from the 2012 CC for these Articles.

In relation to the definition of terrorism,¹⁵ Article 135 of the CC 2012 sets out the definition of terrorism within Articles 121-145 as follows:

“Terrorism, act of terrorism or terrorist offense - the commission of one or more of the following criminal offenses with an intent to seriously intimidate a population, to unduly compel a public entity, government or international organization to do or abstain from doing any act, or to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of the Republic of Kosovo, another State or an international organization.”

The list of criminal offences includes murder, assault, pollution and hijacking. There is also a definition of funds and material resources and terrorist group as follows:

- i. *“Funds - includes assets of any kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evincing title to or interest in such assets, including, but not limited to, bank credits, travellers’ cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit.*
- ii. *Material resources - includes, but is not limited to, lodging, safe houses, false documentation or identification, financial services, facilities, personnel, weapons, means of transportation, communications equipment and other physical assets, except necessary medicine.*

¹³ Kosovo Criminal Code, No. 06/L-074, 14 January 2019; entered into force in April 2019.

¹⁴ *Ibid.* Article 377 (2) (2.4) Failure to report preparation of criminal offenses; Article 378(1.4) Failure to report criminal offenses or perpetrators and Article 380 (2) (2.4) providing assistance to perpetrators after the commission of criminal offenses.

¹⁵ See Annex discussion on definition of terrorism.

- iii. *Terrorist group - a structured group of more than two persons, established over a period of time and acting in concert to commit terrorism. A structured group is a group that is not randomly formed for the immediate commission of an offense and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”*¹⁶

Article 136 of the CC 2012 introduces a stand-alone offence of terrorism:

- i. *“Whoever commits an act of terrorism shall be punished by imprisonment of not less than five (5) years.*
- ii. *When the offense provided for in paragraph 1 of this Article results in grievous bodily injury of one or more persons, the perpetrator shall be punished by imprisonment of not less than ten (10) years.”*

Finally, Articles 137 -144 of the CC 2012 set out being an accessory and preparatory offences to and of terrorism. Article 145 specifies that there is no requirement that a terrorism offence actually is committed.

The date of the coming into force of the CC 2019 is important to note. It came into force three months after its publication in the Kosovo Official Gazette¹⁷ (Article 434).

The above Articles in CC 2012 are duplicated in the CC 2019 with Article 128 being the new Article 135, defining terrorism for the purpose of Articles 114-139. There also is an additional definition of a structured group and a terrorist as follows:

- i. *“A structured group - a group that is not randomly formed for the immediate commission of an offense and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.*
- ii. *Terrorist - any natural person who: (i) commits terrorist act by any means, directly or indirectly; (ii) organises or directs others to commit terrorist acts; or (iii) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act”.*

¹⁶ Kosovo Criminal Code, No. 04/L-082, 13 July 2012, Articles 135 (2), 135 (3), 135 (4).

¹⁷ Publication was on 14 January 2019.

Article 143 under CC 2012 is Article 136 under CC 2019 and the wording is the same:

- i. *“Whoever establishes, organizes or directs a terrorist group shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of ten (10) to twenty (20) years”.*
- ii. *Whoever participates in the activities of a terrorist group shall be punished by imprisonment of five (5) to ten (10) years.*

The most significant development in the 2019 CC is the introduction of articles emphasising the criminalisation of financing of terrorism. Article 131 covers facilitation and financing of the commission of terrorism, broadening the sentencing powers available for terrorist financing from five to up to fifteen years¹⁸, and increasing the available fine to a maximum of €500,000.¹⁹ Article 308 in the 2012 CC criminalising money laundering and terrorist financing becomes Article 302 in the CC 2019.

The other noteworthy addition is the criminalisation of travelling for the purposes of terrorism set out in Article 137 of the 2019 CC, bringing the code in line with international standards on this aspect.²⁰

Both CC 2012 and CC 2019 contain a provision on the application of the most favourable law (Article 3), namely that the law in effect at the time a criminal offense was committed shall be applied to the perpetrator and in the event of a change in the law applicable to a given case prior to a final decision, the law most favourable to the perpetrator shall apply.

18 Article 138 of the Kosovo Criminal Code, No. 04/L-082, 13 July 2012.

19 Article 131 of the Kosovo Criminal Code, No. 06/L-074, 14 January 2019.

20 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism foresaw inclusion of such offense into domestic legislation. See Article 4 paragraph 2, which reads “Each Party shall adopt such measures as may be necessary to establish “travelling abroad for the purpose of terrorism”, as defined in paragraph 1, from its territory or by its nationals, when committed unlawfully and intentionally, as a criminal offence under its domestic law. In doing so, each Party may establish conditions required by and in line with its constitutional principles.”

Criminal Code 2012	Criminal Code 2019
<p>Article 136 “Commission of the offense of terrorism”</p> <ol style="list-style-type: none"> 1. Whoever commits an act of terrorism shall be punished by imprisonment of not less than five (5) years. 2. When the offence provided for in paragraph 1 of this Article results in grievous bodily injury of one or more persons, the perpetrator shall be punished by imprisonment of not less than ten (10) years. 3. When the offence in paragraph 1 of this Article results in death of one or more persons, the perpetrator shall be punished by imprisonment of not less than fifteen (15) years or life imprisonment. 	<p>Article 129 “Commission of the terrorist offense”</p> <ol style="list-style-type: none"> 1. Whoever commits a terrorist offence, shall be punished by imprisonment of not less than five (5) years. 2. When the offence provided for in paragraph 1 of this Article results in grievous bodily injury of one or more persons, the perpetrator shall be punished by imprisonment of not less than ten (10) years. 3. When the offence in paragraph 1 of this Article results in death of one or more persons, the perpetrator shall be punished by imprisonment of not less than fifteen (15) years or life imprisonment.
<p>Article 137 “Assistance in the commission of terrorism”</p> <ol style="list-style-type: none"> 1. When the offence in Article 385 or 386 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years. 2. When the offence in Article 388 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of three (3) to ten (10) years. 3. Whoever assists the perpetrator or his or her accomplice, after the commission of an act of terrorism, by providing funds or other material resources to such persons shall be punished by imprisonment of three (3) to ten (10) years. 	<p>Article 130 “Assistance in the commission of terrorism”</p> <ol style="list-style-type: none"> 1. When the offence in Article 377 or 378 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years. 2. When the offence in Article 380 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of three (3) to ten (10) years. 3. Whoever assists the perpetrator or his or her accomplice, after the commission of a terrorist offense, by providing funds or other material resources to such person or persons for any purpose shall be punished by imprisonment of three (3) to ten (10) years.
<p>Article 138 “Facilitation of the commission of terrorism”</p> <ol style="list-style-type: none"> 1. Whoever by any means directly or indirectly provides, solicits, collects or conceals funds or material resources with the intent, knowledge or reasonable grounds for belief that they will be used in 	<p>Article 131 “Facilitation and financing of the commission of terrorism”</p> <ol style="list-style-type: none"> 1. Whoever, by any means, directly or indirectly, provides, solicits, collects or conceals, organizes, prepares, makes available or raises funds or material resources or directs others to do so, with

<p>whole or in part, for or by a terrorist group or for the commission of a terrorist act shall be punished by imprisonment of five (5) to fifteen (15) years.</p> <p>2. Whoever assists the perpetrator or his or her accomplice, after the commission of an act of terrorism, by providing funds or other material resources to such person or persons shall be punished by imprisonment of three (3) to ten (10) years.</p>	<p>the intention that they be used, or in the knowledge or reasonable grounds for belief that they are to be used, in full or in part, for or by an individual terrorist or a terrorist group or to commit or to contribute to the commission of any terrorist offence, shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of five (5) to fifteen (15) years.</p> <p>2. For an act to constitute an offense set forth in paragraph 1. of this Article, it shall not be necessary that a terrorist act occurred or whether the funds were actually used to commit such terrorist act.</p>
<p>Article 139 "Recruitment for terrorism"</p> <p>Whoever solicits another person to commit or participate in the commission of a terrorist offense, to participate in the activities of a terrorist group or to provide funds or material resources shall be punished by imprisonment of five (5) to fifteen (15) years.</p>	<p>Article 132 "Recruitment for terrorism"</p> <p>Whoever solicits another person to commit or participate in the commission of a terrorist offense or to participate in the activities of a terrorist or terrorist group shall be punished by imprisonment of five (5) to fifteen (15) years.</p>
<p>Article 140 "Training for terrorism"</p> <p>1. Whoever provides or receives training for terrorism shall be punished by imprisonment of five (5) to fifteen (15) years.</p> <p>2. For the purpose of this Article "training for terrorism" means training or instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offense, knowing that the skills provided are intended to be used for this purpose.</p>	<p>Article 133 "Training for terrorism"</p> <p>1. Whoever provides or receives training for terrorism shall be punished by imprisonment of five (5) to fifteen (15) years.</p> <p>2. For the purpose of this Article "training for terrorism" means training or instruction including providing or obtaining knowledge or practical skills in producing or using explosives, firearms or other weapons, chemical, bacteriological, nuclear, or other dangerous or hazardous substances to people, property and environment, or in other specific methods or techniques, for the purpose of committing or contributing to the commission of a terrorist offense, knowing that the skills provided or obtained are intended to be used for this purpose.</p>
<p>Article 141 "Incitement to commit a terrorist offence"</p>	<p>Article 134 "Incitement to commit a terrorist offence"</p>

<p>Whoever distributes, or otherwise makes available, a message to the public, with the intent to incite the commission of a terrorist offense, where such conduct, whether or not directly advocating terrorist offenses, causes a danger that one or more such offenses may be committed, shall be punished by imprisonment of one (1) to five (5) years.</p>	<p>Whoever distributes, or otherwise makes available by any means, a message to the public, with the intent to incite the commission of a terrorist offense, where such conduct, whether or not directly advocating the commission of terrorist offenses, causes a danger that one or more such offenses may be committed, shall be punished by imprisonment of one (1) to five (5) years.</p>
<p>Article 142 “Concealment or failure to report terrorists and terrorist groups”</p> <ol style="list-style-type: none"> 1. Whoever conceals the existence of a terrorist group or its participants or obstructs the discovery or apprehension of a terrorist group or its participants shall be punished by imprisonment of three (3) to ten (10) years. 2. When the offence in Articles 385 or 386 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years. 3. When the offence in Article 388 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of three (3) to ten (10) years. 	<p>Article 135 “Concealment or failure to report terrorists or terrorist groups”</p> <ol style="list-style-type: none"> 1. Whoever conceals the existence of a terrorist or terrorist group or its participants or obstructs their discovery or apprehension, shall be punished by imprisonment of three (3) to ten (10) years. 2. When the offence in Articles 377 or 378 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years. 3. When the offence in Article 380 of this Code is committed in relation to terrorism, the perpetrator shall be punished by imprisonment of three (3) to ten (10) years.
<p>Article 143 “Organization and participation in a terrorist group”</p> <ol style="list-style-type: none"> 1. Whoever organizes or directs a terrorist group shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of ten (10) to twenty (20) years. 2. Whoever participates in the activities of a terrorist group shall be punished by imprisonment of five (5) to ten (10) years. 	<p>Article 136 “Organization and participation in a terrorist group”</p> <ol style="list-style-type: none"> 1. Whoever establishes, organizes or directs a terrorist group shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of ten (10) to twenty (20) years. 2. Whoever participates in the activities of a terrorist group shall be punished by imprisonment of five (5) to ten (10) years.
	<p>Article 137 “Traveling for the purpose of terrorism”</p> <ol style="list-style-type: none"> 1. Whoever travels into or out of the territory of the Republic of Kosovo for the purpose of committing, contributing or participating to the commission of a terrorist offence or for the purpose of participating in the

	<p>activities of a terrorist or terrorist group, or for the purpose of providing or receiving training for terrorism shall be punished by imprisonment of three (3) to ten (10) years.</p> <p>2. Whoever by any means assist as set forth the commission of the offense in this Article and as set forth in Article 33 of this Code, organizes or facilitates the travelling of any person with the knowledge that the travel is for the purposes foreseen in paragraph 1. of this Article shall be punished by imprisonment of one (1) to eight (8) years.</p>
<p>Article 144 "Preparation of terrorist offences or criminal offences against the constitutional order and security of the Republic of Kosovo"</p> <p>1. Whoever prepares for the commission of criminal offences in Articles 135-142 of this Code shall be punished by imprisonment from one (1) to five (5) years.</p> <p>2. For the purposes of this Article "preparation of criminal offence" includes supplying or making available for the perpetrators the means to commit a criminal offence, removing the impediments to the commission of a criminal offence, agreeing, planning or organizing with other persons the commission of a criminal offence, any other activities that create conditions for the direct committal of a criminal offence, but which do not constitute the act itself.</p> <p>3. Whoever sends or carries into or out of the territory of "the Republic of Kosovo" weapons, explosives, poison, supplies, ammunition or other material for the commission of one or more criminal offenses in this chapter, shall be punished by imprisonment from five (5) to fifteen (15) years.</p> <p>4. Whoever, for the purpose of committing one or more acts of terrorist offences in this Chapter, dispatches or transfers armed groups, equipment, or other material resources into or out of "the Republic of</p>	<p>Article 138 "Preparation of terrorist offences or criminal offences against the constitutional order and security of the Republic of Kosovo"</p> <p>1. Whoever prepares for the commission of criminal offences in Articles 128-137 of this Code shall be punished by imprisonment from one (1) to five (5) years.</p> <p>2. For the purposes of this Article "preparation of criminal offense" includes supplying or making available for the perpetrators the means to commit a criminal offence, removing the impediments to the commission of a criminal offence, agreeing, planning or organizing with other persons the commission of a criminal offence, any other activities that create conditions for the direct commission of a criminal offence, but which do not constitute the act itself.</p> <p>3. Whoever sends or carries into or out of the territory of "the Republic of Kosovo" weapons, explosives, poison, supplies, ammunition or other material for the commission of one or more criminal offences in this chapter, shall be punished by imprisonment from five (5) to fifteen (15) years.</p> <p>4. Whoever, for the purpose of committing one or more acts of terrorist offences in this Chapter, dispatches or transfers armed groups, equipment, or other material resources into or out of "the Republic of</p>

Kosovo shall be punished by imprisonment of ten (10) to twenty (20) years.	Kosovo shall be punished by imprisonment of ten (10) to twenty (20) years.
Article 145 “Irrelevance of the commission of a terrorist offence” For an act to constitute an offence in Articles 135-144 of this Chapter, it is not necessary that a terrorist offence actually be committed.	Article 139 “Irrelevance of the commission of a terrorist offence and relationship to terrorist offences” For an act to constitute an offence in Articles 128-138 of this Chapter, it is not necessary that a terrorist offence be actually committed, nor shall it be necessary, insofar as the offences referred to in Articles 132, 133, 134 and 137 of this Chapter are concerned, to establish a link to another offence in this Code.

Figure 1: Table comparison of the 2012/2019 Criminal Codes.

4.1.2. The Law on Prohibition of Joining the Armed Conflicts Outside State Territory

The Law on Prohibition of Joining the Armed Conflicts Outside State Territory, was approved by the Kosovo Assembly on 12 March 2015. It specifically prohibits joining of armed conflicts outside of Kosovo.²¹ The provision creates a number of offences related to joining such armed conflicts²² and is: “applicable to each person that participates or organizes, recruits, finances, incites, leads or trains persons or groups of persons with the aim of joining or participating in foreign army or police, in foreign paramilitary and parapolice formations, in organized groups or individually, in any other form of armed conflict outside the territory of the Republic of Kosovo”²³ with sentencing powers for violations ranging from a minimum of six-months imprisonment to a maximum term of 15 years imprisonment.

4.1.3. Law on the Prevention of Money Laundering and Combating the Financing of Terrorism

The previous Law on the Prevention of Money Laundering and Combating Terrorist Financing²⁴ in 2010 established the FIU within the Ministry of Finance and Economy (MFE) as a central independent institution, “responsible for requesting, receiving, analysing and

21 Law No. 05/L -002, on Prohibition of Joining the Armed Conflicts Outside State Territory, 2 April 2015.

22 *Ibid.* Article 3 [Joining or participation in a foreign army or police, in foreign paramilitary and parapolice formations, in organized groups or individually, outside the territory of the Republic of Kosovo]

23 *Ibid.* Article 2.

24 Law No. 03/L-196, on the Prevention of Money Laundering and Terrorist Financing, 9 November 2010. Law No. 04/L-178, on Amending and Supplementing the Law No. 03/L-196, on the Prevention of Money Laundering and Terrorist Financing, 8 March 2013.

disseminating to the competent authorities, disclosures of information which concern potential money laundering and terrorist financing.”²⁵

This Law was subject to ongoing criticism from non-governmental organizations (NGOs) who complained it contained many restrictive provisions, which were considered excessively burdensome.

The more recent Law No. 05/L-096, on the Prevention of Money Laundering and Combating Terrorist Financing²⁶ was adopted on 16 May 2016 and entered into force on 15 June 2016.²⁷ It contains specific sections on customer due diligence as well as the establishment of an independent board. As a result of intensive engagement and advocacy by civil society organizations and the European Center for Not-for-Profit Law (ECNL), the new law abolished most of the pre-existing restrictive provisions. However, ECNL maintain that some remaining provisions for NGOs are not in line with international standards, including restrictions on accepting cash donations and obligations to fund training programs against money laundering and performing a regular professional analysis. As standard measures for banks and durable entities, it is complained these obligations can hardly be implemented by the majority of registered NGOs, which are small and community-based organizations.²⁸

Law No 05/L-096 creates sanctions ranging from five to 15 years’ imprisonment for breaches of its Articles, with financial punishments of up to €500,000.²⁹ Despite noting laudable progress in the codification of the criminalisation of terrorist financing, the 2019 EU Progress Report for Kosovo found that, “the Law on money laundering and terrorism financing is not fully in line with the EU *acquis* and international standards”.³⁰ According to the report: “The main flaws in the legal and institutional framework remain; i.e. (i) the ambiguity of shared supervisory responsibility of the financial sector between the FIU and the Central Bank; (ii) the lack of targeted financial sanctions and measures to ensure full deprivation of terrorists’ assets; (iii) significant deficiencies with regard to the registration, monitoring and oversight of NGOs for the purpose of countering the financing of terrorism; (iv) significant loopholes in the supervisory regime, in particular for the non-banking sector; and (v) uneven and ineffective suspicious transaction reporting in all sectors as regards preventive measures.”

25 *Ibid.* Article 4.

26 In addition the law, pursuant to Article 23, paragraph 1, Article 35, paragraph 1, sub-paragraph 1.1 of “the Law no. 03/L-209 on the Central Bank of the Republic of Kosovo” (16 August 2010), Article 85, paragraph 1 of “the Law no. 04/L-093 on Banks, Microfinance Institutions and Non-Bank Financial Institutions” and Article 66, paragraph 2 of “the Law no. 05/L096 on the Prevention of Money Laundering and Combating Terrorist Financing”, Board of the Central Bank of Kosovo, in the meeting held on 24 November 2016, approved the Regulation on Prevention of Money Laundering and Financing of Terrorism.

27 Law No. 05/L-096, on the Prevention of Money Laundering and Combating Terrorist Financing, 15 June 2016

28 Kosovar Civil Society Foundation (KCSF) statement on website: <https://www.kcsfoundation.org/en/information-capacities/resources/environment-for-civil-society-2/law-on-the-prevention-of-money-laundering-and-financing-of-terrorism/> (accessed 1 February 2021).

29 Law No. 05/L-096, on the Prevention of Money Laundering and Combating Terrorist Financing, 15 June 2016, Article 57 [Criminal offence of Terrorist Financing].

30 Kosovo 2019 Report, European Commission, Brussels, 29.5.2019, pg. 34, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-kosovo-report.pdf>; (accessed 1 February 2021). See also: Project against Economic Crime in Kosovo (PECK II) <https://www.coe.int/en/web/corruption/completed-projects/peck2> (accessed 11 October 2021).

In January 2021, in interview with staff from the FIU it was reported that a draft Law addressing these issues was currently being debated with a view to addressing these deficiencies.³¹

4.1.4. Procedural Law

The overarching framework for treatment of persons and guarantees of rights for individuals charged with terrorism offences is contained within the Criminal Procedure Code (CPC), which applies to all suspects of criminal offences equally.³²

There are some slightly unusual curtailments within the CPC concerning the right of suspects involved in allegations of terrorist offences to choose their own counsel:

Article 166 Right of Arrested Person

1. *“An arrested person has the right to the immediate assistance of defence counsel of his or her own choice upon arrest”.*
5. *“If the arrested person is suspected of terrorism or organized crime and there are grounds to believe that the defence counsel chosen by the arrested person is involved in the commission of the criminal offence or will obstruct the conduct of the investigation, the pre-trial judge may, upon the application of the state prosecutor, order that alternative defence counsel be appointed to represent the arrested person for a maximum period of seventy-two (72) hours from the time of arrest”.*

The provision is silent on what burden of proof the prosecutor has to establish before the pre-trial judge to prove the assertion that defence counsel is “involved in the commission of the criminal offence” or indeed what sort of conduct amounts to a notifiable threat that counsel “will obstruct the conduct of the investigation”. No provision appears to be made within the CPC for the aggrieved defence counsel to rebut any allegation of obstruction/involvement in the offence, and no justification is provided for why, upon having had a fear of some measure that counsel was so adversely involved, the restriction on access to the client can be lifted 72 hours after it is imposed. In the absence of qualification to this unrebuttably punitive presumption, it is a source of concern that Article 166 might lead to abuses. The right to counsel of one’s choice is a right afforded across multiple jurisdictions and a seemingly arbitrary restriction of this right risks undermining the fairness of proceedings overall, particularly during the pre-trial stage.

The presumption of innocence is set out in Article 3 and the right to a fair and impartial trial within a reasonable time is under Article 5 of the CPC. Article 7 specifies that the court,

³¹ Meeting with FIU, 12 January 2021.

³² Criminal Procedure Code No. 04/L-123, (28 December 2012), as amended by the Law No. 06/L-091 on Amending and Supplementing the Criminal Procedure Code No. 04/L-123 (4 July 2019).

the police and the prosecutor have a duty to examine carefully and to establish its case with the facts against the defendant as well as those in his or her favour. In other words, the investigation must be alive to evidence, which may point away from the defendant. Importantly this evidence should be made available to the defendant “before the beginning of and during the proceedings”.³³ The duty of the prosecutor to consider inculpatory as well as exculpatory evidence is set out under Article 48 of the CPC. There appears to be no entrenched practice of disclosure of evidence, which may undermine the prosecution case and or assist the defence. This means that each case is approached on an ad hoc basis and disclosure is arbitrary.

Articles 70 to 77 of the CPC set out police powers including the right to photograph a suspect and take his or her fingerprints. There is no detail as to the length of time they can be preserved and no apparent consideration of rights of a suspect to privacy, including destruction of private information.

Article 9 of the CPC sets out the defendant’s right to give evidence in his or her defence and to examine or have examined witnesses against him or her. Article 10 sets out that on his or her arrest the defendant shall be promptly informed in a language that he or she understands and in detail the nature of and the reasons for the charge against him or her. Further, Articles 10 to 14 of the CPC include a set of other important rights of a defendant including rights to counsel, but with a proviso (and so another qualification) of “if required by the interests of justice”.³⁴

Chapter V of the CPC provides further details of a defendant’s rights to defence counsel and there are codified rights for those with mental health issues. However, in practice, we have been given examples of cases where these protections and safeguards are given inadequate or no consideration.

Other significant provisions include that the age of a child is under the age of 18 years old with a minor defined as between the ages of 14 and 18 years old.

In relation to children’s rights, the Kosovo legal framework largely complies with international standards, but implementation has not been analysed and is reported to be limited.³⁵ In July 2020, a new Law on Child Protection entered into force.³⁶ It establishes a new integrated system of child protection, at both central and local levels. A strategy and action plan on children’s rights 2019-2023 is in force. This remains an important area of focus as many children remain in camps in Syria and may wish to enter/return to Kosovo in the near future.

In relation to hearsay evidence, it is codified that evidence is intrinsically unreliable if the origin of the evidence or information is unknown, is based on rumour or is information that is impossible or inconceivable.³⁷

33 *Ibid.* Article 7(2).

34 *Ibid.* Article 11 (4).

35 See EC Report on Kosovo 2020 available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/kosovo_report_2020.pdf (accessed on 24 May 2021)

36 Law No. 06/L-084, On Child Protection, 17 July 2019.

37 Criminal Procedure Code No. 04/L-123, Article 19 1.16 and 1.17 and 1.29.

Under Article 22 of the CPC, terrorist related offences are listed as serious crimes.

4.1.5. Law on International Legal Cooperation in Criminal Matters

In 2013, the Kosovo Assembly approved the Law on International Legal Cooperation in Criminal Matters,³⁸ which establishes the conditions and procedures for legal cooperation in criminal matters between Kosovo and other jurisdictions, unless otherwise provided by other agreements. Furthermore, the law *inter alia* regulates the rules and procedures on extradition; transfer of criminal proceedings; transfer of sentencing; recognition and enforcement of judgments of mutual legal assistance; appearance of witnesses, experts and defendants; judicial records and other forms of co-operation relevant to the cross jurisdictional investigation of terrorism offences.

It is in this context that co-operation in criminal matters related to terrorism is realised with the goal of preventing and suppressing such offences. However, mechanisms for co-operation are only as effective as their practical implementation.

The Council of Europe Project against Economic Crime in Kosovo (PECK II) considered the level of compliance in Kosovo with the Financial Action Task Force (FATF) 40 recommendations and the EU Directive (2015) 849.³⁹ Concerning the financial aspects of terrorism related cases, Kosovo institutions were found to be particularly lacking in implementing a comprehensive system of targeted financial sanctions. The legal framework remains lacking with suspicious transaction reporting still uneven.

Reporting entity	2014	2015	2016	2017
Banks	15	23	19	10
Other, including:	1	3	17	8
Supervisor			(1)	
Designated Non-Financial Business or Profession			(15)	(8)
Total	16	26	36	18

Figure 2: Suspicion Transaction Requests received by the Financial Investigations Unit.

Source: Council of Europe Project against Economic Crime in Kosovo (PECK II)⁴⁰

38 Law No. 04/L-213 on International Legal Cooperation in Criminal Matters, 2 September 2013.

39 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 (Official Journal of the European Union L141/73, 5.6.2015) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L0849> (accessed 2 February 2021).

40 Assessment Report on compliance of Kosovo with international anti-money laundering and combating the financing of terrorism standards, Project against Economic Crime in Kosovo (PECK II), 2018 at page 81; available at: <https://rm.coe.int/assessment-report-on-compliance-of-kosovo-with-international-anti-mone/16809381e1> (accessed on 24 May 2021)

4.1.6. Kosovo Strategy against Terrorism and Action Plan 2018 – 2022

The Kosovo Strategy Against Terrorism and Action Plan 2018-2020 developed by the government sets out a strategy which is based on four pillars or strategic objectives that are attuned to the EU Counter Terrorism Strategy:⁴¹

“Prevention which aims to prevent terrorism by identifying and opposing the perpetrators, respectively opposition to ideologies and radical doctrines that encourage individuals in acts of violence.

Protect, through which the institution's defence capacities will be strengthened against the terrorist attacks, respectively the threats of terrorism presented to the Republic of Kosovo or its interests in the region and beyond. In addition to strengthening defence capabilities, specific measures are also planned to minimize the vulnerability to this phenomenon.

Pursue, through which law enforcement agencies will pursue, investigate and bring to justice individuals or groups posing terrorist threats or committing terrorist offenses.

Respond, which aims at preparing institutions to manage and minimize the consequences of a potential terrorist attack.”

In summary, the strategy reinforces that effective preparation and response are of critical importance in saving lives and minimizing the potential damage and consequences of terrorism.⁴²

The action plan also bases its strategy upon fundamental principles of constitutionality and legality, that is, actions undertaken to counter terrorism must be based on the provisions in the Constitution and the applicable legislation. There must be a comprehensive approach that is effective in the prevention and combat of terrorist threats. It is achieved through a comprehensive approach to this issue by all government institutions, public institutions, civil society, the private sector and international organizations. Respect for human rights and freedoms must be paramount - meaning guaranteeing the rights and freedoms of all individuals during all phases of the institutional involvement in preventing and combating the terrorism. This includes, but is not limited to, maintaining confidentiality, namely institutions responsible for preventing and combating terrorism should ensure the protection of confidentiality of information during the investigation stage and relevant processes and promotion of co-operation and

41 The European Union Counter-Terrorism Strategy, 2005, available at <https://data.consilium.europa.eu/doc/document/ST%2014469%202005%20REV%204/EN/pdf> (accessed on 24 May 2021).

42 At pages 16 to 18 the Kosovo Strategy against Terrorism and Action Plan 2018-2020 outlines the four pillars of the strategy in line with those defined in the EU Counter-Terrorism Strategy.

coordination of activities between institutions to ensure efficiency and proper channels of communication. More widely, co-operation among jurisdictions is essential in the fight against global serious crime.

4.1.7. Institutional Framework

The police, prosecution and courts are the crucial institutions involved in the investigation, prosecution, and adjudication of terrorism cases in Kosovo, supported by the Intelligence Agency and FIU. This report focuses on the performance of justice system institutions namely the police, prosecution and courts involved in handling terrorism related cases.

The Directorate against Terrorism within the Division for Crime Investigation of Kosovo Police was established in October 2006 as a specialized entity chiefly to investigate terrorism related cases falling within the jurisdiction of Kosovo.⁴³

The Kosovo Special Prosecution, based in Prishtinë/Priština, is the main institution responsible for the investigation and prosecution of terrorism related cases. This relatively new department is governed by the Law on Special Prosecution⁴⁴ and has oversight of the entire territory of the seven Basic Courts, including the Basic Court of Prishtinë/Priština and the Special Department, which tries terrorism related cases.

Prior to January 2020, the prosecution of terrorism offences was not specialised in this way with all criminal conduct being handled by a single, broader crime unit. Since February 2020 the Special Prosecution Office approved an internal reorganisation strategy, establishing for the first time a specific Terrorism Department consisting of two prosecutors who focus solely on the investigation and prosecution of all terrorism related crimes.⁴⁵

This structural change bringing about the specialisation of terrorist prosecutions was extended to the courts post June 2019,⁴⁶ with the establishment of the Special Department within the Basic Court of Prishtinë/Priština.⁴⁷ The Special Department currently operates with 12 judges.⁴⁸

43 On 27 December 2017, this Directorate has approved Standard Operation Procedures (SOPs), while from 28 February 2019, the Directorate has a new organizational structure, with approximately 50 staff. This was confirmed in August 2020 in a meeting between OSCE and representatives of Directorate against Terrorism. Additional information about the role and competences of the Directorate can be found on the Kosovo Police website available at <https://www.kosovopolice.com/en/departments/investigation-department/>

44 Law No. 03/L-052 on “the Special Prosecution Office of the Republic of Kosovo”, 3 June 2008.

45 Strategy on Reorganization of the Special Prosecutor’s Office of Kosovo (February 2020), available at <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/PSH/Dokumente%20Strategjike/Strategjia%20per%20Riorganizimin%20e%20PSRK-se%20-%20Versioni%20ne%20Gjuhen%20Angleze.pdf> (accessed 2 February 2021).

46 Article 15 (1) (1.1) (1.20), Law No. 03/L-199 on Courts, 24 August 2010, abolished by the Law No. 06/L-054 on Courts, 18 December 2018.

47 Article 42, Article 13 (1) (1.1) in conjunction to Article 18 (1) (2), Law No. 06/L-054 on Courts, 18 December 2018.

48 Seven men and three women judges.

The European Commission Report on Kosovo 2020 (the EC Report)⁴⁹ considered that progress had been made in the fight against terrorism, in line with the objectives set out in the EU-Kosovo implementing arrangement for the Joint Action Plan on counter-terrorism for the Western Balkans, especially with regard to the rehabilitation and reintegration of foreign terrorist fighters and their families. However, weaknesses were identified in tackling money laundering. Also, Kosovo remains without a structured arrangement with Europol. This was commented upon in some of the OSCE interviews for this report. The Joint Action Plan will constitute the basis for enhanced co-operation between Kosovo Police, Europol and EU Member States, in particular in addressing terrorism and extremism as well as organised crime. It found that “*confiscation of assets remains low*”.

In addition, the EC Report found that the administration of justice in Kosovo remains slow and inefficient. The roll-out of an electronic case-management system and the establishment of a central criminal records system are reported to have advanced well. The Kosovo Judicial Council and Kosovo Prosecutorial Council have made efforts to implement the legislation relevant to their functioning of the electronic case management system and the establishment of central criminal records.

However, the OSCE did not find evidence to support efficient practical use of an electronic system to serve case papers with examples given of material being copied onto disc without any formalised system for security of storage. This is particularly important in cases of great sensitivity and those which might have wider security implications.

4.2. International Legal Framework

A number of international legal instruments related to human rights and fundamental freedoms are directly applicable in Kosovo and, in the case of conflict, have priority over all local laws and legal acts of public institutions.⁵⁰ Moreover, institutions have a constitutional duty to interpret human rights and fundamental freedoms in light of and in accordance with the jurisprudence of the European Court of Human Rights.⁵¹

In terms of the international legal framework for the fight against terrorism, the 19 Universal Anti-terrorism Instruments (UATI) remain key international legal instruments.⁵² Although these instruments are not directly applicable in Kosovo, they provide an important guide against which to assess Kosovo law in this field.⁵³ The following summary

49 Commission Staff Working Document - Kosovo 2020 Report, Brussels, 06.10.2020 SWD (2020) 356 final https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/kosovo_report_2020.pdf (accessed 4 February 2021).

50 Kosovo Constitution, Article 22, 15 June 2008.

51 *Ibid.* Article 53.

52 United Nations, Office of Counter Terrorism, International Legal Instruments. Available at <https://www.un.org/counterterrorism/international-legal-instruments> (accessed 29 August 2020).

53 According to the OSCE, the ratification rate of UATI among OSCE participating States remains at approximately 75 per cent and amongst OSCE Partners for Co-operation, these ratification rates stand at approximately 77 per cent and 70 per cent respectively. Status in the OSCE Area of the Universal Anti-terrorism Conventions and Protocols, pg. 4 (OSCE, 01 August 2018). Available at <https://www.osce.org/atu/17138> (accessed 29 August 2020).

of significant points in key international legal instruments are included as a guide that can help to inform policy and practice in Kosovo.

In 2005, the Council of Europe adopted a new Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, updating and widening its 1990 Convention, taking into account the fact that the financing of terrorism also can come from legal activities, not only from money laundering and other illegal activities. This new international treaty, for the first time, addresses both the prevention and control of money laundering and financing of terrorism.⁵⁴ The approach encompasses the reality of terrorist financing not being totally divorced from money laundering; this is reflected on later in this report.⁵⁵

The same year, 2005, the Council of Europe adopted the Convention on the Prevention of Terrorism which aimed to increase the effectiveness of international legal instruments on combating terrorism. This Convention specifies, *inter alia*, that certain acts such as public provocation, recruitment and training, which may lead to the commission of terrorist offenses, constitute criminal offences. It calls on each party to undertake adequate measures to ensure such criminal offences are adopted into domestic legislation.⁵⁶ In 2015, the Council of Europe then adopted an Additional Protocol to supplement this Convention (the Protocol) in relation to the criminalisation of the acts of participation in an association or group for terrorism purposes; receiving terrorism trainings; travelling abroad for terrorism purposes and funding and organising travel; for terrorism purpose.⁵⁷ In addition to this, for the purpose of facilitating the rapid exchange of information amongst the Parties, the Protocol also foresees designation of contact points on a 24-hour, seven-days-a-week basis.⁵⁸ Further the protocol extends the scope of the Convention to cover all the offences contained in the United Nations Anti-Terrorist Convention and its Protocols. It also incorporates new provisions allowing the refusal of extradition to a country, where the person subject to extradition is at risk of being subject to death penalty or of being subject to torture.⁵⁹

In 2015, the European Parliament and the Council jointly adopted the Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive

54 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005, CETS No.198. Available <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198> (accessed 02 September 2020).

55 *Ibid.* See Chapter II - Financing of Terrorism.

56 Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16.V.2005, CETS No.196. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196> (accessed 02 September 2020).

57 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Riga, 22.X.2015, CETS No. 217. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168047c5ea> (accessed 4 February 2021).

58 *Ibid.* Article 7.

59 Protocol amending the European Convention on the Suppression of Terrorism, Strasbourg, 15.V.2003, ETS No.190. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/190> (accessed 02 September 2020).

2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance).⁶⁰

In addition, the United Nations Convention against Transnational Organized Crime⁶¹ together with other treaties within the framework of the Council of Europe make up further international legal instruments in the field of co-operation in criminal investigations and prosecution of suspected terrorists. The United Nations Convention against Transnational Organized Crime “calls upon all states to recognise such links between transnational organised crime and terrorist crime”.

The European Convention on Extradition and its Four Additional Protocols provide a means by which governments can interact with Kosovo on a range of offences including terrorism.⁶² The OSCE was informed by a number of interviewees recently there that was a successful extradition case between Kosovo and Germany. This was raised as a positive evidence of greater co-operation with Kosovo in Europe.

The European Convention on Mutual Assistance in Criminal Matters with its two additional protocols is aimed at advancing co-operation amongst the parties with a view to gathering evidence, hearing witnesses, experts and prosecuted persons, etc.⁶³ One additional Protocol also advances judicial co-operation in the area of exchanging judicial protocols.⁶⁴ The Second Additional Protocol simplifies procedures of co-operation.⁶⁵ In preparing this report the OSCE noted a lack of familiarity with these treaties among some of the stakeholders interviewed.

The European Convention on the Transfer of Proceedings in Criminal Matters allows parties to request that criminal proceedings be instituted on their behalf by another party.⁶⁶ Furthermore, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime improves international legal co-operation in the area of crime investigation, asset seizures and freezing as well as confiscation.⁶⁷

60 Directive (EU) of the European Parliament and the Council of 20 May 2015; (Official Journal of the European Union 5.6.2015, L141/73). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=EN> (accessed 4 February 2021).

61 United Nations Convention against Transnational Organized Crime Adopted by the UN General Assembly: 15 November 2000, by resolution 55/25, Entry into force: 29 September 2003, available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (accessed 30 August 2020).

62 Council of Europe, European Convention on Extradition, Paris, 13.XII.1957, ETS No.024. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024> (accessed 30 August 2020).

63 Council of Europe, European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959, ETS No.030. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030> (accessed 2 September 2020).

64 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters Strasbourg, 17.III.1978, ETS No.99. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/099> (accessed 2 September 2020).

65 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters Strasbourg, 8.XI.2001, ETS No.182. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/182> (accessed 2 September 2020).

66 Council of Europe, European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15.V.1972, ETS No.73 Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/073> (accessed 2 September 2020).

67 Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.XI.1990, ETS No.141 Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141> (accessed 2 September 2020).

The Convention on Cybercrime is the first international treaty on crimes committed through the internet and other computer networks. This Convention aims to create a common policy with a focus on issuing adequate legislation and promoting international co-operation in order to protect citizens from cybercrime.⁶⁸

4.2.1. The European Convention on Human Rights and Terrorism

The core provision governing actions in relation to arrest and detention is Article 5 of the European Convention on Human Rights (ECHR)⁶⁹, which protects the liberty and security of the person. The European Court of Human Rights (ECtHR) has consistently emphasised that it is one of the fundamental principles of a democratic society that the State must strictly adhere to the rule of law when interfering with the right to personal liberty. International law makes it clear that counter-terrorist activity by the State must occur within the international law framework.

Article 3 of the ECHR prohibits torture or inhuman or degrading treatment. For the prevention of torture and ill treatment, representatives of the Kosovo Preventive Mechanism against Torture regularly visit places of detention in Kosovo.⁷⁰ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment made recommendations in relation to treatment of those in detention in Kosovo.⁷¹ It appears that implementation is ongoing. However, the European Commission found that the prison system complies broadly with the UN Standard Minimum Rules for the Treatment of Prisoners and with the European Prison Rules.⁷² That said it found that conditions varied widely and there was a need for uniformity in establishing minimum conditions are being met.

Article 9 of the ECHR, states: “[e]veryone has the right to ... manifest his religion or belief, in worship, teaching, practice and observance”.⁷³ Freedom to manifest one’s religion is not absolute, but it can only be limited to such limitations as are “prescribed by law” and “necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”⁷⁴

Article 9 of the ECHR protects a person’s freedom to manifest their religion. It is not absolute, but it can only be limited to such limitations as are “prescribed by law” and “necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” In the case of *Eweida v United Kingdom* the European Court of Human Rights stated that Article 9 is one of the “foundations of a ‘democratic society’ within the meaning of the

68 Council of Europe, Convention on Cybercrime, Budapest, 23.XI.2001, ETS No.185. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185> (accessed 2 September 2020).

69 Article 5 (Right to liberty and security), European Convention on Human Rights (ECHR).

70 Article 17, paragraph 2.2, Law no. 05/L-019 on Ombudsperson defines the Ombudsperson Institution of Kosovo as the Kosovo Mechanism for the Prevention of Torture.

71 EC Kosovo Report *fn. 40* at page 30.

72 *Ibid.*

73 *Ibid.* Article 9.1 (Freedom of thought, conscience and religion).

74 *Ibid.* Article 9.2 (Freedom of thought, conscience and religion).

[European Convention on Human Rights] ... The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."⁷⁵

ECHR enshrined the right for respect to private life and family. It is a qualified right⁷⁶. Further, the ECHR protects the right to freedom of expression⁷⁷. Again, it is qualified. In other words, the exercise of these freedoms, since they carry with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary⁷⁸. However, these restrictions must be within a legal framework and proportionate.

During the research, we found that there does not appear to be specific consideration within the institutions or by lawyers of the extent of interference with Article 8 and 10 rights of the ECHR. The European Commission Kosovo Report 2020 in its analysis of compliance does note that freedom of expression is embedded in the Kosovo Constitution and that the society in Kosovo is pluralistic but alerts to the need to keep this supported; particularly referring to support of journalists. A specific recommendation is to improve this "through better inter-institutional cooperation", is a theme that runs through the Kosovo Report.⁷⁹

The systematic collation of personal information by public authorities engages Article 8 of the ECHR.⁸⁰ Telephone conversations and emails fall within the definition of "*private life*" and "*correspondence*" protected by Article 8 of the ECHR.⁸¹

A person will suffer an interference with their Article 8 rights not merely through the collection of the content of their communications, but also through the collection of data relating to their communications, and the storage of that data for access by public authorities.⁸²

The threat of secret surveillance also necessarily strikes at the freedom of communication of users of telecommunications services, which engages Article 10 of the ECHR.⁸³

75 *Eweida v United Kingdom* (2013) 57 EHRR 9, §79.

76 *Ibid.* Article 8 (Right to respect for private and family right).

77 *Ibid.* Article 10 (Freedom of expression).

78 *Ibid.* Article 10.2.

79 Commission Staff Working Document - Kosovo 2020 Report, Brussels, 06.10.2020 SWD (2020) 356 final. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/kosovo_report_2020.pdf (accessed 4 February 2021)

80 See, amongst other authorities, *Rotaru v Romania* 8 BHRC 449; *Shimovolos v Russia* 31 BHRC 506, at paragraph 65; *PG and JH v United Kingdom* (2008) 46 EHRR 51, at paragraph 57

81 See, by way of example, *Malone v United Kingdom* (1985) 7 EHRR 14, at paragraph 64, *Weber v Germany* (2008) 46 EHRR SE5, at paragraph 77; *Liberty v United Kingdom* (2009) 48 EHRR 1; *Kennedy v United Kingdom* (2011) 52 EHRR 4, at paragraph 118.

82 *Malone v United Kingdom* (1985) 7 EHRR 14.

83 *Weber v Germany* (2008) 46 EHRR SE5 at paragraphs 144-145.

By parity of reasoning, any interference with and storage of individuals' web history, internet usage, or internet communications engages Articles 8(1) and 10(1) of the ECHR. That is because such communications and/or data are personal and private. They may reveal highly personal material about their family life, sexuality, political beliefs, or litigation activity. The European Court of Human Rights has held that there is no need to treat information derived from the monitoring of internet usage differently to telephone calls for the purposes of Article 8.⁸⁴

There is, identified through interviews for the purpose of this report, a need for greater examination on whether methods of covert surveillance used during the investigation stage are meeting these standards, with adequate checks and safeguards at every stage. Also, storage of personal material and length of time of storage does not appear to have practical safeguards to ensure that it complies with Article 8 of the ECHR.

Article 6 of the ECHR guarantees a person the right to fair trial. Many of the guarantees are reflected in the CPC. However, rights to unfettered access to a lawyer and private communication between client and lawyer need to be kept under review; this was a theme that emerged from our interviews.

⁸⁴ *Copland v United Kingdom*, (2007) 45 EHRR 37, at paragraph 41.

5. TERRORISM RELATED CASES IN KOSOVO 2018 - 2020

From December 2020 to January 2021, qualitative interviews were conducted with representatives of the criminal justice system in Kosovo, involved in dealing with terrorism cases. This included interviews between the drafters and judges of the Basic Court of Prishtinë/Priština; Court of Appeals judges; prosecutors from the Special Prosecution Office; senior members of the KP; senior representatives from the FIU; defence lawyers representing individuals charged with terrorism offences.

In addition to this, between 2018 and 2020, the OSCE trial monitors observed a total of 220 court sessions in 54 cases.⁸⁵ The team critically analysed quantitative data obtained by trial monitors, to support and inform the findings within this report. The OSCE monitored terrorism cases from the initial hearing stage through the final disposition of the cases and retrials, as outcomes of the legal remedies filed at the Court of Appeals. Paying particular attention to the compliance of the judiciary with fair trial rights, such as the right to be heard by a competent, independent and impartial tribunal; the right to a public hearing; the right to a trial within a reasonable time; the right to effective counsel; the right to interpretation of proceedings where necessary, as well as related rights guaranteed by both the Kosovo and international legal framework as already outlined.

The observations and key findings are presented through a data-focused quantitative assessment of trends in prosecution between 2018 and 2020, correlated with the extraction of key themes from qualitative case studies and trial monitoring notes and interviews for the same time period to demonstrate level of performance.

5.1. Key Findings

Criminal justice institutions in Kosovo are led by a legal framework which broadly guarantees the protection of human and fundamental rights in line with European standards. The introduction of a revised Criminal Code in 2019 led to significant progress, increasing particularisation of offences and broadening the spectrum of possible offences.

However, the implementation of human rights legislation and strategies often is undermined by inadequate financial and other resources, particularly at local level, limited political prioritisation and lack of co-ordination. The existing mechanisms for co-ordination and implementation of human rights within the criminal justice system are ineffective and this is exhibited within the prosecution of terrorism related cases in three specific ways:

- i. There remains a lack of clarity of the evidence underpinning the charging of indictments, with insufficient clarity on which elements of the offence are being applied under which Code (CC 2012/ CC 2019), and a preference for Article 143,*

⁸⁵ This involves both, inherited cases as well as new cases.

CC 2012 (relating to participation), over and above all other Articles within the Code;

- ii. Pre-trial detention is routinely ordered before any evidence underpinning the indictment has been served, with insufficiently detailed disclosure being served upon the defence in the early stages to justify an accused's detention;*
- iii. Judgments issued on conviction and sentence lack transparency and detailed reasoning on the elements of the offence and burdens being applied, evidential analysis and particularisation to the defendant. Sentences, particularly when suspended, lack specificity in references to the case against the defendant and are too general in nature.*

The following key themes emerge from the interviews and data obtained:

- Despite an increased range and particularisation of terrorist offences between the 2012 and 2019 Criminal Codes, the Articles on *participation and organisation* (Articles 143/136) are significantly overused and represented in indictments issued by the prosecution over the last two years, in circumstances where additional or alternative charges may have been appropriate;
- Terrorist financing is under-prosecuted. There has only been one conviction for financing terrorism in 2019 despite the FIU having referred 16 cases to the police in 2019;⁸⁶
- At the investigation stage, little if any recorded consideration appears to be given to conducting rights-balancing exercise when using covert intelligence methods;
- There appears to be a paucity of evidence of checks by lawyers that the appropriate application had been made to authorise on certain investigation activities;
- Pre-trial detention is routinely exercised in particular for male suspects (with female suspects being placed on house arrest), when the evidential basis to justify the deprivation of liberty is lacking;
- It was reported that, at the pre-trial stage, disclosure to the defence is deficient;
- At the pre-trial stage, applications by the defence for disclosure appear to be deficient; trial monitoring data shows that the defence rarely apply to the court to force additional disclosure.
- It was reported that there is a high turnover of defence representation in the Basic Courts impacting negatively upon adequacy of representation;
- Guilty pleas often are entered by women even in cases where there is insufficient evidence of wrongdoing and with the implicit understanding that a suspended sentence will be offered in return for a guilty plea;⁸⁷

⁸⁶ Kosovo Financial Intelligence Unit statistics.

⁸⁷ In 2020, the OSCE monitored 21 cases in which verdicts were announced. These cases involved 29 defendants, six men and 23 women. Of the 23 women, 19 (83 per cent) entered guilty pleas. Of the six men, one (17 per cent) entered a

- It was reported that convictions by judges in the Basic Court are frequently overturned by the Court of Appeals due to lack of evidence; sent back to the Basic Court and the defendant then acquitted;⁸⁸
- Judicial inexperience as to the admissibility and weight of third-party evidence risks inadvertently lowering burdens of proof;
- Judgments issued on conviction and sentence lack detailed reasoning on the tests and burdens being applied relating to the particular Articles, with insufficient evidential analysis;
- Sentences, particularly when suspended, lack specificity in references to the case against the defendant and are too general in nature;
- Sentences lack adequate reasoning so as to assess parity of treatment of co-defendants (circumstances of defendants and differences of level of offending are not transparently analysed);
- There appears to be little or no utilisation of opportunities for intelligence gathering from suspects or convicted defendants;
- There is inadequate consideration of links between evidence in different cases and between different defendants and of joining individual defendants in one trial;
- The creation of the Special Prosecution appears to have positively impacted a reduction in the number of wasted hearings;
- The creation of the Special Prosecution and court has made the task of police in making applications to court easier as there is no requirement to travel outside Prishtinë/Priština and the special prosecutors are easily identifiable.
- There is a good relationship between the institutions; particularly the police and the FIU.

5.1.1. Discussion of findings

The year 2020 saw a dramatic increase in the number of terrorism cases being prosecuted in Kosovo; returned and repatriated persons who had been living in conflict zones in Syria were for the most part prosecuted on their return in this year and are still being processed through the criminal justice system.⁸⁹ This very sudden rise in terrorism cases challenged the newly formed prosecution unit and tested its abilities.

Immediately prior to this, in 2018, and to date, instances of terrorism within Kosovo were relatively low. Police investigations and prosecutions, from 1 January 2018 to date, are also comparatively few, with just 19 terrorism cases within Kosovo being instigated in

guilty plea. Analysis of the sentences imposed for terrorism offences in 2020 shows that all women defendants entering guilty pleas received suspended prison sentences.

88 See also EU Rule of Law Mission Justice Monitoring Report Findings and Recommendations September 2019 – Mid-March 2020 (October 2020) at page 12. Available at https://www.eulex-kosovo.eu/eul/repository/docs/19102020_EU%20Rule%20of%20Law%20Mission%20Justice%20_EN.pdf (accessed on 5 December 2021).

89 This number includes four men, 32 women and 74 children, including nine orphans (Kosovo Police Report, August 2020).

2018.⁹⁰ In this context, the police arrested⁹¹ 14 suspects in total,⁹² 12 men and two women. The age of the suspects varies from 19 to 52.

Number of terrorism related cases monitored in Kosovo courts

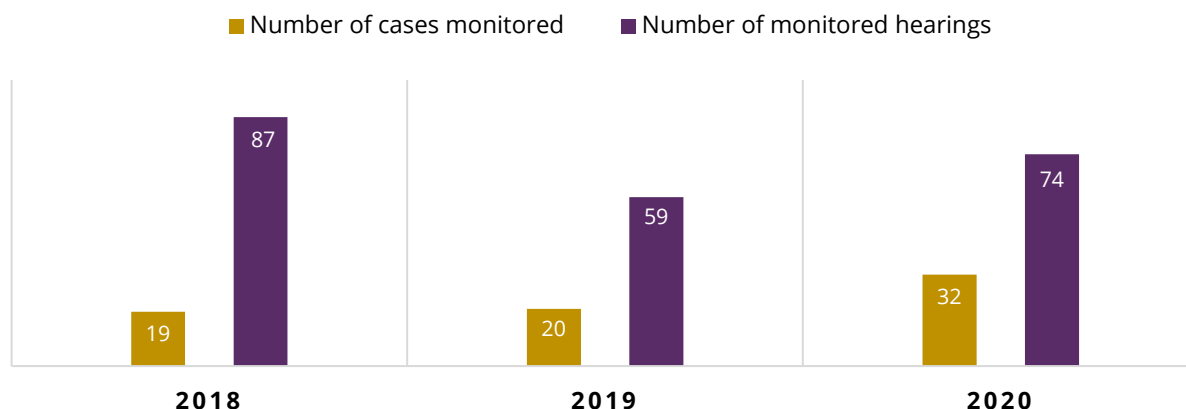


Figure 3: Number of terrorism cases monitored by the OSCE in Kosovo courts

Since April 2019, 110 people were repatriated with the assistance from the United States (U.S.) from the conflict zone in Syria to Kosovo.⁹³ All 32 women returning from conflict zones in Syria are Kosovo Albanians varying in age from 18 to 50.

The immediate response of the Kosovo authorities was to place the women under house arrest, and the men in pre-trial detention.⁹⁴

5.1.2. Pre-trial detention

Whilst as of December 2020, no official complaints were recorded against the Police Counter-Terrorism Directorate relevant to pre-trial rights violations, it was clear through the qualitative research conducted that in many cases individuals were being remanded in pre-trial detention with minimal evidence being disclosed to the defendant or their lawyers.

In May 2019, it was reported to the OSCE that between 20 and 26 April 2019,⁹⁵ a pre-trial judge of the Special Department in the Prishtinë/Priština Basic Court approved prosecution requests and issued 31 decisions on house detention against 31 female suspects, including two juveniles, and four decisions on detention on remand in custody

90 13 cases are related to Criminal Code No. 04/L-82, 13 July 2012, Articles 136 – 145; while six other cases are related to new Criminal Code No.06/L074 14 January 2019, Articles 129 – 139.

91 Article 72, Criminal Procedure Code, Police Right to Briefly Detain.

92 12 suspects, 11 men and one woman were arrested under terrorism suspicion from Articles 136 – 145, Criminal Code No. 04/L-82, 13 July 2012; while two other suspects, one man and woman, under terrorism suspicion persons from Article 129 – 139 – Criminal Code - No.06/L074, 14 January 2019.

93 Four men, 32 women and 74 children, including nine orphans.

94 Article 183, Criminal Procedure Code No. 04/L-123.

95 On 08 May 2019, OSCE arranged a meeting with representatives of Special Departments in the Prishtinë/Priština Basic Court in order to get updates for further trial monitoring purposes about the status of the procedural stage of the repatriated women. This information was received during that meeting.

against four male suspects, including one juvenile. The alleged charges were organisation and participation in a terrorist group,⁹⁶ and joining or participation in a foreign army, police, paramilitary organisation, in groups or individually, outside of Kosovo.⁹⁷

5.1.3. Indictments and adequacy of charges

In 2018, the OSCE trial monitors recorded the instigation of six new terrorism related cases,⁹⁸ with the prosecution filing charges against 21 persons (19 men and two women).

In 2019, 11 new terrorism related cases were monitored, involving five men and six women.⁹⁹

In 2020, 11 new cases were monitored, involving six men and eight women.¹⁰⁰

Men and women charged with terrorism offences in cases at Prishtinë/Priština basic court during the period 2018 - 2020

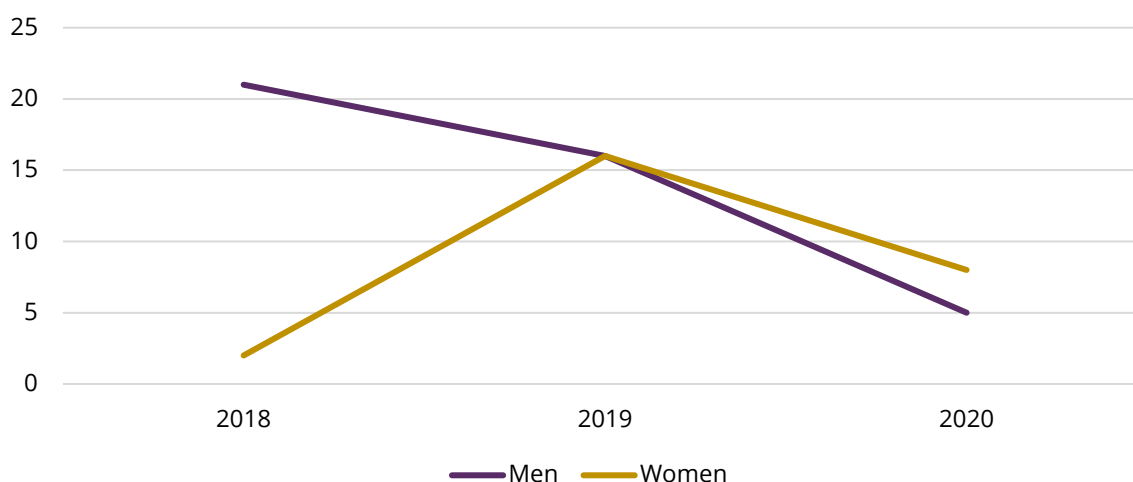


Figure 4: Men and women charged with terrorism offences in the period 2018 to 2020¹⁰¹

A noticeable trend emerged of defendants being charged under Article 143 of the Criminal Code of 2012 for the specific offence of “organisation and participation in a terrorist group”.¹⁰²

96 Article 143 (2), Criminal Code, No. 04/L-82, 13 July 2012.

97 Article 3 (3), Law No. 05/L -002, on Prohibition of Joining the Armed Conflicts Outside State Territory, 2 April 2015.

98 In addition to this number, 13 cases were inherited from previous year(s).

99 In addition to this number, nine cases were inherited from previous year(s).

100 In addition to this number, 21 cases were inherited from previous year(s).

101 Figures obtained from the court registry.

102 Article 136 “Commission of the offense of terrorism”; Article 137 “Assistance in the commission of terrorism”; Article 138 “Facilitation of the commission of terrorism”; Article 139 “Recruitment for terrorism”; Article 140 “Training for terrorism”; Article 141 “Incitement to commit a terrorist offense”; Article 142 “Concealment or failure to report terrorists and terrorist groups”; Article 143 “Organization and participation in a terrorist group”; Article 144 “Preparation of terrorist offenses or criminal offenses against the constitutional order and security of the Republic of Kosovo”, Criminal Code, No. 04/L-82, 13 July 2012.

Comparison between numbers of defendants charged with terrorism offences according to indictments filed at Prishtinë/Priština basic court during 2018, 2019 and 2020

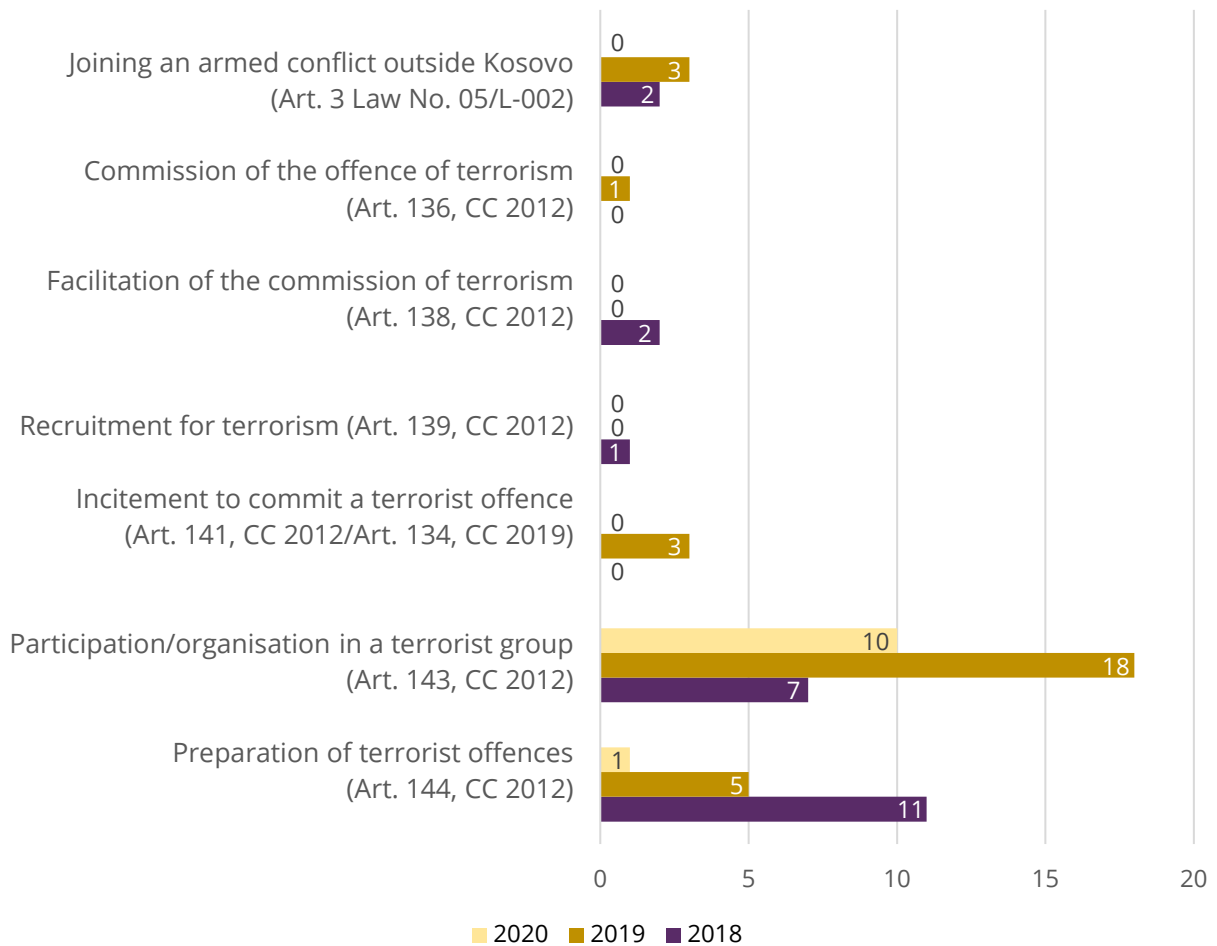


Figure 5: Comparison between numbers of defendants charged with terrorism offences in 2018, 2019 and 2020¹⁰³

¹⁰³ Figures obtained from the court registry.

Number of defendants charged with terrorism related offences in indictments filed at Prishtinë/Priština Basic Court during 2018

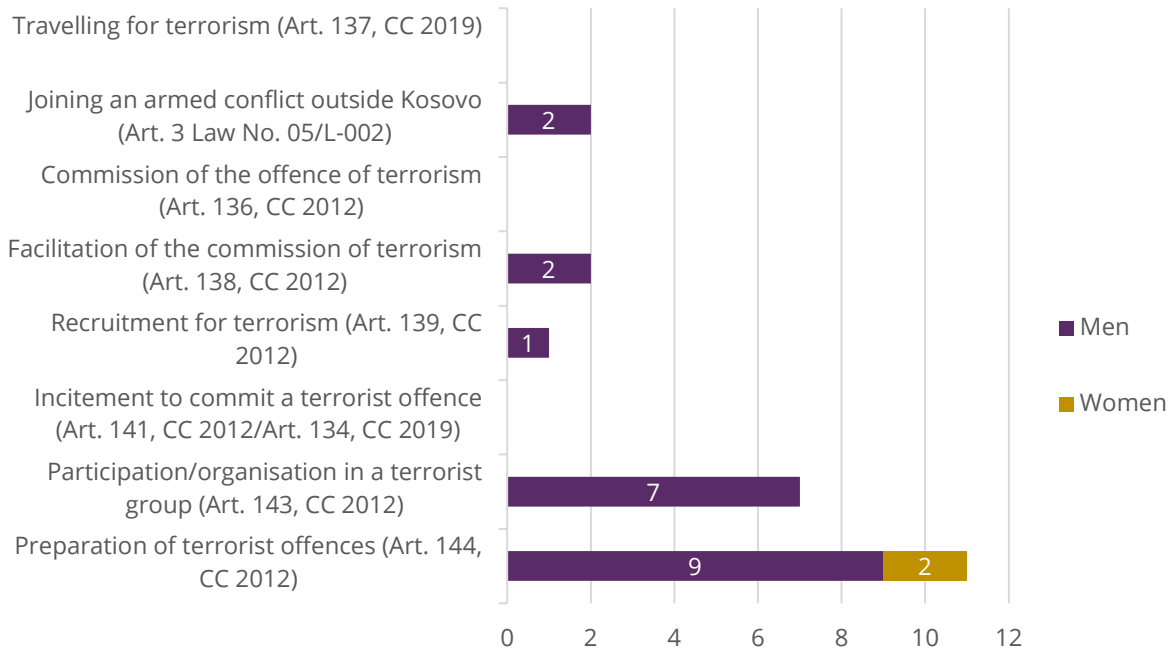


Figure 6: Number of defendants charged with terrorism related offences in indictments filed at the Prishtinë/Priština Basic Court during 2018¹⁰⁴

In 2018, most defendants were charged with preparation of terrorist offences (nine men and two women) or participation and organization in a terrorist group (seven defendants, all men). 2018 also saw two defendants charged with joining or participation in an armed conflict outside of Kosovo.¹⁰⁵

The Law on Prohibition of Joining the Armed Conflicts Outside State Territory came into force in 2015 to address concerns regarding the number of people who had left Kosovo to fight with 'Islamic State'.¹⁰⁶ However, the findings of this report suggest that prosecutors continue to charge the less specific provision of 'organization and participation in a terrorist group' when prosecuting those returned or repatriated from conflict zones outside of Kosovo.¹⁰⁷ One notable consequence of this preference for charging returning fighters under Article 143, Criminal Code is that the maximum sentence under that provision is 10 years' imprisonment whereas the maximum sentence under the relevant sections of Article 3, Law on Prohibition of Joining the Armed Conflicts Outside State Territory is 15 years' imprisonment.

¹⁰⁴ Figures obtained from the court registry.

¹⁰⁵ Law No. 05/L-002 on Prohibition of Joining the Armed Conflicts Outside State Territory, Article 3, "Joining or participation in a foreign army or police, in foreign paramilitary and parapolic formations, in organized groups or individually, outside the territory of the Republic of Kosovo".

¹⁰⁶ See <https://balkaninsight.com/2015/03/13/kosovo-law-to-punish-fighting-in-foreign-conflicts/> (accessed on 1 December 2021).

¹⁰⁷ Code No. 04/L-082 Kosovo Criminal Code 2012, Article 143, "Organization and participation in a terrorist group".

Number of defendants charged with terrorism related offences in indictments filed at Prishtinë/Priština Basic Court during 2019

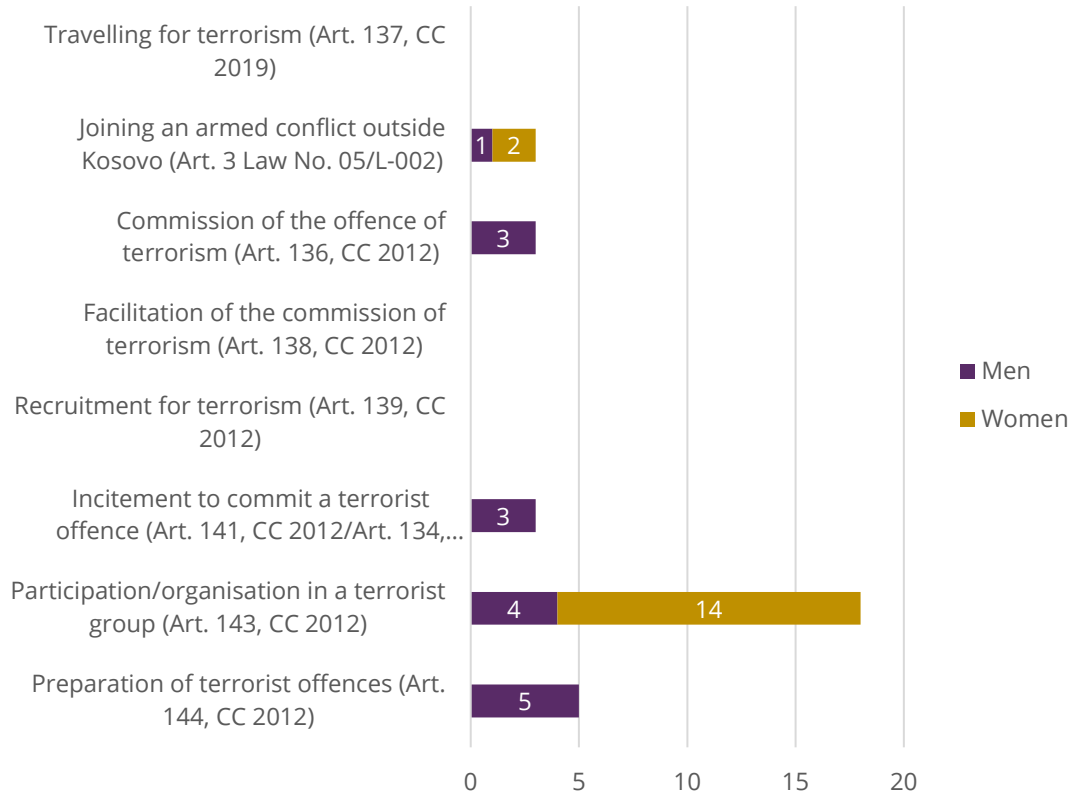


Figure 7: Number of defendants charged with terrorism related offences in indictments filed at the Prishtinë/Priština Basic Court during 2019¹⁰⁸

In 2019, three defendants were charged with Article 3 of the Law on Prohibition of Joining the Armed Conflicts Outside State Territory¹⁰⁹ and three defendants faced the criminal offence of incitement to commit a terrorist offense.¹¹⁰ The large majority of defendants (four men and 14 women), were charged with participation and organization in a terrorist group.

It appears that the prosecution offices have not changed entirely to the Criminal Code of 2019 because of the outstanding cases, including the 2019 repatriated persons. It is anticipated that this will resolve itself over time, but a conscious effort should be made to bring clarity to the use of criminal codes and seamlessly transfer to charging under the breadth of offences under the 2019 Criminal Code when appropriate.

¹⁰⁸ Figures obtained from the court registry.

¹⁰⁹ Law No. 05/L-002, on Prohibition of Joining the Armed Conflicts Outside State Territory, 2 April 2015.

¹¹⁰ *Ibid.* Article 134.

Number of defendants charged with terrorism related offences in indictments filed at Prishtinë/Priština Basic Court during 2020

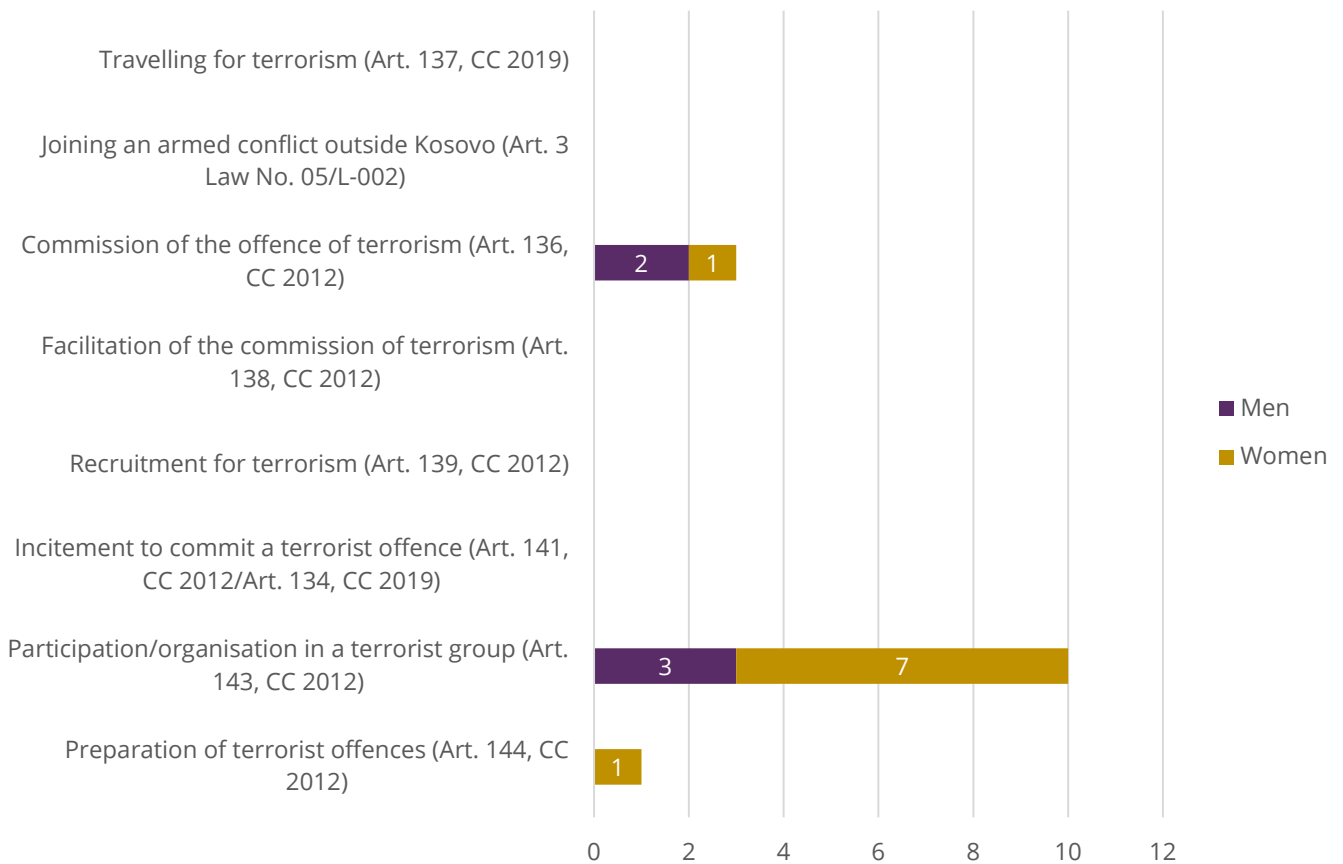


Figure 8: Number of defendants charged with terrorism related offences in indictments filed at the Prishtinë/Priština Basic Court during 2020¹¹¹

5.1.4. Financing of Terrorism

Terrorism financing is criminalised as a separate offence in Article 131 of CC 2019 in the framework of facilitation of terrorism. Additionally, the following provisions of CC 2019 are applicable to the terrorism financing offence: Article 138, (Preparation of terrorist offences or criminal offences); Article 130, (Assistance in the commission of terrorism); and Article 132 (Recruitment for terrorism as well as of financiers of terrorism). The definition of “terrorism, act of terrorism or terrorist offence” are provided in Article 128 of the CC 2019.

The Law on Prohibition of Joining the Armed Conflicts Outside State Territory also creates a separate offence for, “[w]hoever in any direct or indirect manner, offers, requests, gathers or conceals funds or other material means intentionally, knowingly or [where] there are reasonable grounds to believe that will be used entirely or partially” for the

¹¹¹ Figures obtained from the court registry.

commission of an offence under the paragraph one of the article i.e. organizing, recruiting, leading or training people to join conflicts outside of Kosovo.¹¹²

Despite the general capacity of the Kosovo investigating authorities to undertake financial investigations specifically in terrorism related cases, no prosecutions were carried out in relation to terrorism financing offences in a number of cases where the funding aspects seemed to be clearly identified. Further focus should be made on stand-alone terrorism financing prosecution. For the period between 2018 and 2020, there was only one final terrorism financing conviction of a series of 16 cases referred to the police by the FIU.¹¹³

The legislative framework for prosecuting various aspects of the terrorism financing offence has deficiencies and needs to be clarified and strengthened. Despite some understanding of the terrorist financing risks in Kosovo and the region and some mitigating measures, authorities have not implemented a comprehensive system of targeted financial sanctions. This lack of strategic oversight and ineffectual communication is worsened by the lack of a solid legal framework for targeted sanctions. Kosovo institutions are seeking to address this area by the imposition of a draft law, lowering the burdens of proof to allow freezing orders to be imposed in cases where a “reasonable suspicion” can be shown, instead of “reasonable grounds for belief” currently required under Article 131 of CC 2019.

The divorced relationship between terrorism financing investigations and money laundering is another source for concern. Whilst they may be distinct offences, there is certainly room for overlap and a requirement for better communication between the two investigating units. The lack of a targeted approach to non-profit organisations (NPOs) was determined, on the one hand, by the deficiencies in assessing the terrorism financing risks in the sector but also stems from the involvement of certain NPOs in the informal economy and tax evasion.

Not a single person has been successfully charged and convicted of Article 57 of the Law on the Prevention of Money Laundering and Combating Terrorist Financing,¹¹⁴ in the reporting period between 2018 and 2020. According to 2019 EU Kosovo Progress Report, the law enforcement and judicial institutions in Kosovo “continue to respond robustly to terrorism”, however “[t]he fight against money laundering and terrorist financing is not effective enough to produce convincing results.”¹¹⁵ The 2018 Council of Europe findings¹¹⁶ provide that additional trainings are needed, particularly in the judicial system on the specific focus on the financial investigation and prosecution of the terrorist financing, including the funding of foreign fighters and local persons joining paramilitary or terrorist groups in the conflict zones. In meetings with the FIU members in December 2020 and

112 Law No. 05/L-002 on Prohibition of Joining the Armed Conflicts Outside State Territory, Article 3, paragraph 2

113 Interview with FIU, 11 January 2021.

114 Law No. 05/L-096, on the Prevention of Money Laundering and Combating Terrorist Financing, 15 June 2016.

115 Commission Staff Working Document Kosovo 2019 Report, European Commission, Brussels, 29.5.2019.

SWD(2019) 216 final, pg. 38. Available at <https://ec.europa.eu/neighbourhood-enlargement/sites/nea/files/20190529-kosovo-report.pdf>

116 Assessment Report on compliance of Kosovo with international anti-money laundering and combating the financing of terrorism standards, June 2018 COE [Project against Economic Crime in Kosovo (PECK II)], pg. 75. Available at <https://rm.coe.int/assessment-report-on-compliance-of-kosovo-with-international-anti-mone/16809381e1>

January 2021, staff reiterated the need for training on the specific strategy and law on terrorist financing both within their unit, within the Special Prosecution in Prishtinë/Priština, and for the judiciary.

Representatives of the FIU considered a lack of specialised training in the prosecution of terrorism financing, shortages of staff and the absence of an overarching strategy to be largely responsible for the strikingly low numbers of prosecutions in this area. With reports of 16 cases of terrorism financing being referred to police but only one single case leading to conviction,¹¹⁷ the lack of confidence in prosecuting financial terrorism within the Kosovo criminal justice institutions, needs addressing.

This is the case despite FIU staff reporting high levels of co-operation between Kosovo institutions and providing examples of successful international co-operation.

5.1.5. Trials

It was observed that courts generally complied and were cognisant of fair trial rights standards but noted issues regarding the number of unproductive hearings,¹¹⁸ non-observance of legal deadlines,¹¹⁹ hearings where defendants were represented by ex-officio defence counsel¹²⁰ and closed hearings.¹²¹

117 A specific time frame for these referrals was not provided. Statistics recording the number of referrals from the FIU to police/ Special Terrorism Prosecution Unit for offences involving terrorist financing allegations were not available and instances of referrals were not recorded from 2018 onwards. There was a distinct lack of recording of statistics analysing the instances of alleged terrorism financing cases overall.

118 In an “unproductive hearing” nothing of any value or substance occurred (no evidence taken, motions heard or decided, case management issues discussed, etc.) Source: OSCE Justice Monitor 2018, available at: <https://www.osce.org/files/f/documents/4/b/446836.pdf>

119 Criminal Procedure Code No. 04/L-123; Article 314 Time to complete main trial and 242 (4)(5) Procedure to file an indictment, namely deadline to schedule initial hearing.

120 *Ibid.* Article 57 and 58.

121 *Ibid.* Article 294.

2018 - 2020 Trial Monitoring Observations

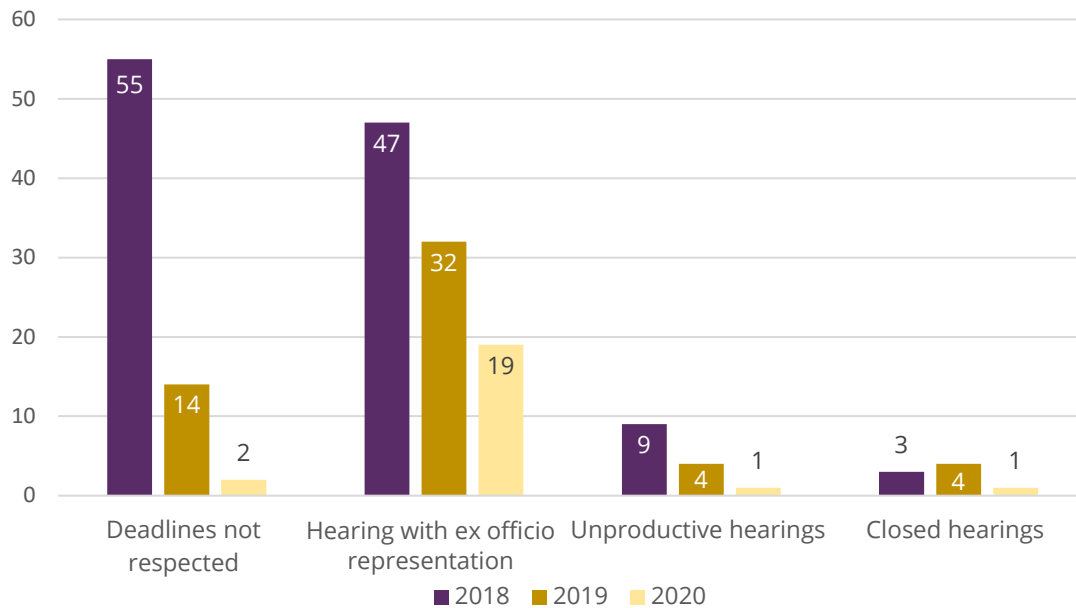


Figure 9: 2018 – 2020 Trial Monitoring Observations

As indicated above, the courts have made significant progress over the last two years specifically with regards to meeting deadlines. For example, in 2018, out of 87 hearings in total monitored by the OSCE, 55 deadlines were not respected. In 2019, the number of hearings where deadlines had not been respected totalled 14 out of 59 hearings. However, by comparison, in 2020, out 74 hearings monitored by the OSCE, only two deadlines were not respected. We surmise, through views taken in interviews with both prosecutors and defence counsel, that this improvement is attributable to the establishment of the Special Department within the Basic Court of Prishtinë/Priština. This appears to have had a positive impact on improving the efficiency and case management in terrorism related cases.

5.1.6. Verdicts and Sentencing

The principal punishments¹²² for the terrorism related offences are both financial penalties,¹²³ and imprisonment with variations from a minimum of six-months' imprisonment to a maximum of life imprisonment.

122 The Kosovo Criminal Code, No.06/L074 (14 January 2019) (CC), provides the types of the punishments as follows: principal punishments, alternative punishments and accessory punishments. Within the principal punishments, CC provides life imprisonment, punishment of imprisonment and punishment of a fine, whilst within the alternative punishments of the CC provides suspended punishment, semi-liberty and order for community service work.

123 See Article 46.1 Kosovo Criminal Code (CC), CODE NO. 04/L-082 reads "The punishment of a fine may not be less than one hundred (100) European Euros (hereinafter "EUR"). The punishment of a fine may not exceed twenty-five thousand (25,000) EUR or, in the case of criminal offenses related to terrorism, trafficking in persons, organized crime or criminal offenses committed to obtain a material benefit, it may not exceed five hundred thousand (500,000) EUR."

During the reporting period 2018 to 2020, records from the Prishtinë/Priština Basic Court show that verdicts were announced against a total of 54 defendants (25 women and 29 men).

Gender breakdown in terrorism verdicts at Prishtinë/Priština Basic Court from 2018-2020

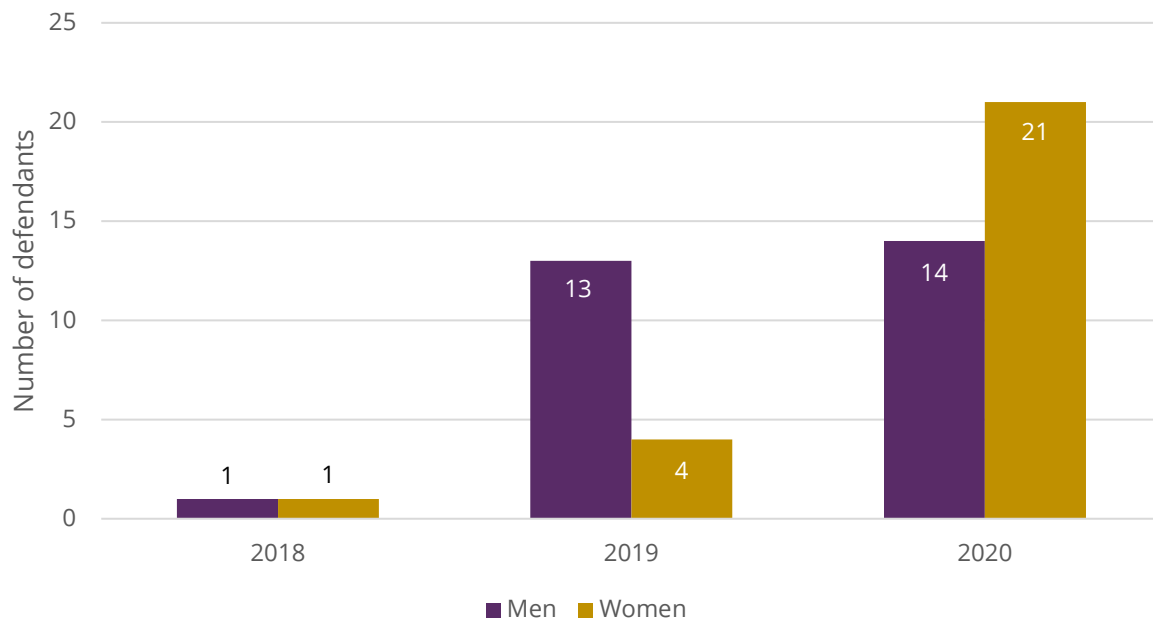


Figure 10: Gender breakdown in terrorism verdicts at the Prishtinë/Priština Basic Court from 2018-2020¹²⁴

Court judgements in terrorism related cases at Prishtinë/Priština Basic Court 2018 - 2020

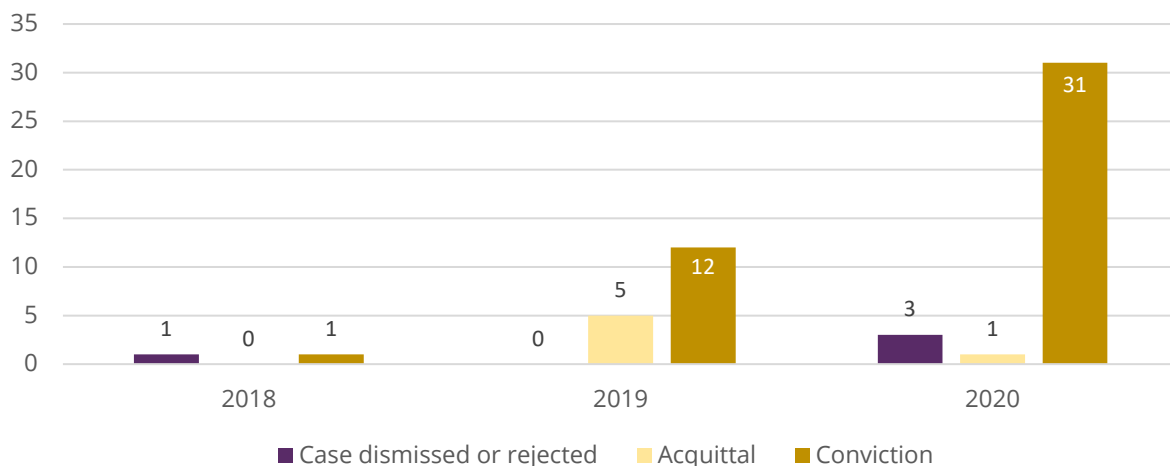


Figure 11: Court judgements in terrorism related cases at the Prishtinë/Priština Basic Court 2018 - 2020¹²⁵

124 Figures obtained from the court registry.

125 Figures obtained from the court registry.

Convictions in terrorism related cases at Prishtinë/Priština Basic Court 2018 - 2020

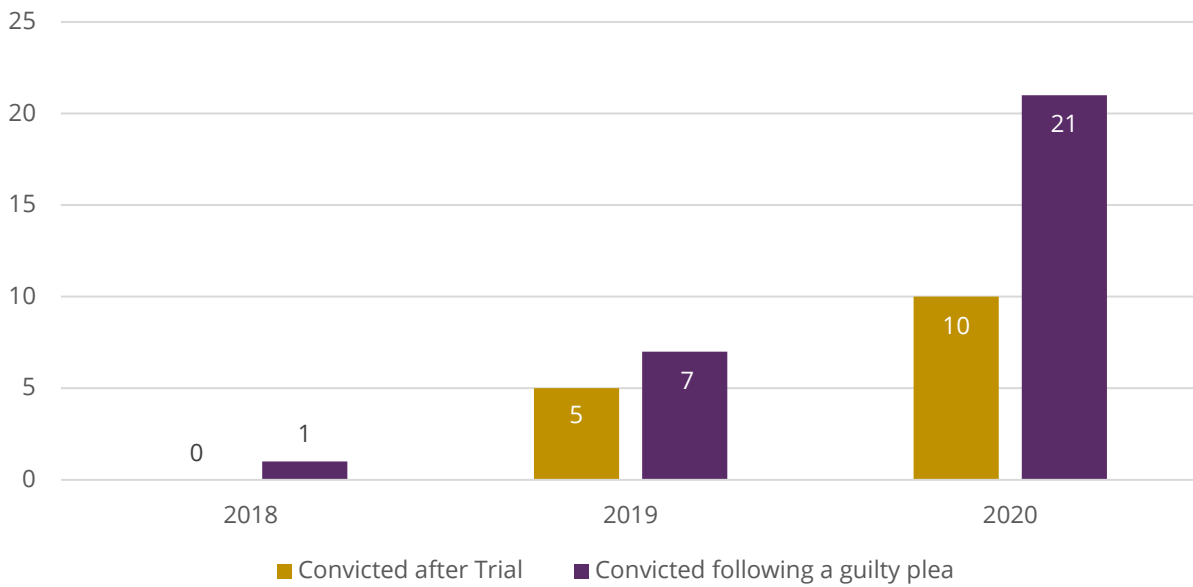


Figure 12: Convictions in terrorism related cases at the Prishtinë/Priština Basic Court 2018 - 2020¹²⁶

Of note, in 2020, of the 21 convictions following guilty pleas, 20 were entered by women defendants.¹²⁷

¹²⁶ Figures obtained from the court registry.

¹²⁷ Code No. 04/L-082 Kosovo Criminal Code 2012, Article 143, "Organization and participation in a terrorist group".

Outcome of terrorism related cases in 2019



Figure 13: Outcome of terrorism related cases in 2019

Outcome of terrorism related cases in 2020

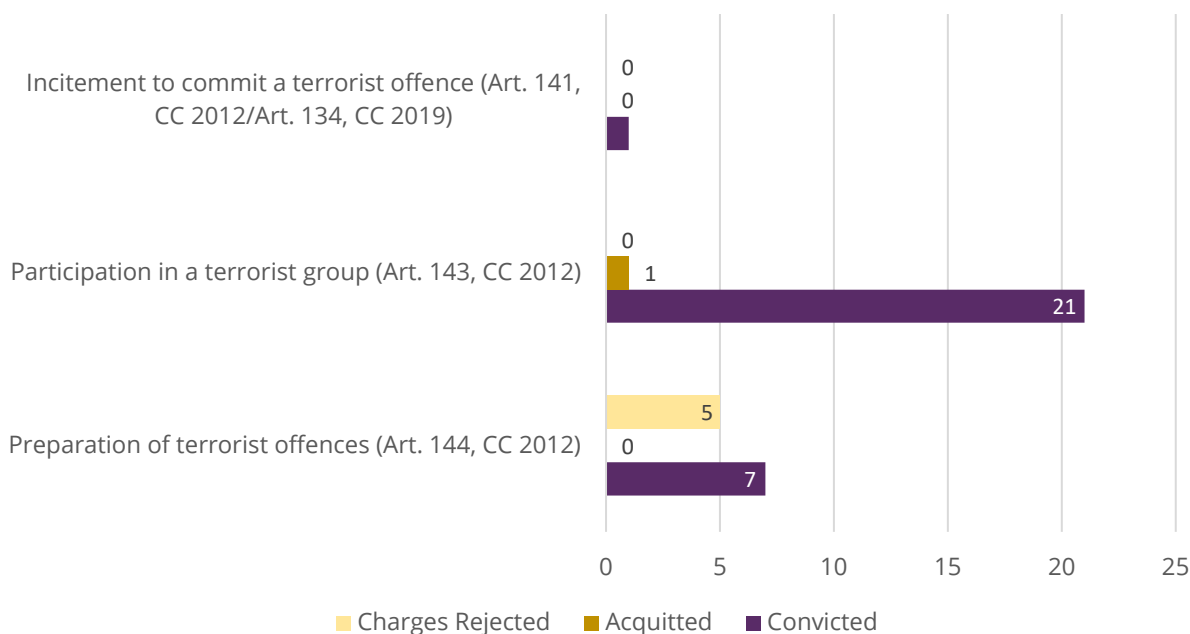


Figure 14: Outcome of terrorism related cases in 2020

There has been a dramatic increase in the number of convictions under Article 143(2) of CC 2012, relating to organisation and participation in a terrorist group. Prior to 2019, there had been no recorded convictions under this Article. Of those returned and repatriated in 2019, five people were convicted for offences relating to participation in a terrorist group, with the vast majority pleading guilty.

In 2020, the OSCE observed that the individuals offering guilty pleas were largely women with only a single man being convicted following a guilty plea.¹²⁸ All convicted women received suspended sentences of two years imprisonment, with a verification period of between two to three years. In 2018, the Kosovo Supreme Court issued *Sentencing Guidelines*, according to which criminal offences where punishment varies from five to 10 years imprisonment are still eligible for suspended sentences, if mitigating factors apply.¹²⁹ During this research, defence counsel raised that there often is inadequate assessment of mitigating and aggravating circumstances during the sentencing exercise. This issue has been raised on previous occasions but there was no evidence of improvement.¹³⁰ OSCE trial monitors also raised concerns that sentences were not transparent and the failure of the courts to clearly explain their reasoning when passing sentence might give rise to a false impression of bias or unequal treatment.

A cyclical issue was identified through qualitative interviews, whereby convictions in the Basic Courts are appealed to the Court of Appeals; the conviction is overturned, and the case sent back to the relevant Basic Court for a retrial. In a multi-handed case, the Court

¹²⁸ See footnote 95.

¹²⁹ See *Sentencing Guidelines – First Edition*, Kosovo Supreme Court, 2018, pg. 200, available at https://supreme.gjyqesori-rks.org/wp-content/uploads/legalOpinions/Sentencing%20Guidelines_February%202018.pdf.

¹³⁰ OSCE Report, *Inadequate Assessment of Mitigating and Aggravating Circumstances by the Courts*, Issue 5, (July 2010). Available at <https://www.osce.org/files/f/documents/9/5/70907.pdf>.

of Appeals considered the judgment of the first instance court and determined it lacked clarity, did not present complete and clear reasoning and did not meet the evidential tests foreseen by Article 361(1 and 2) CPC (Basis of Judgment). The judgment contained only a restatement of the minutes from the sessions but no analysis of evidence in support of the finding of guilty.¹³¹

Interviews conducted with Basic Court Judges on this issue in December 2020 described challenges in determining weight to be given to third party evidence obtained from the battlefield in Syria. There are no Kosovo investigators on the ground to verify the material being relied upon, how it was obtained and whether there exist differing opinions to those being offered by third parties. Much of the material was obtained by co-operation among jurisdictions. The evidential weight to be afforded to this material often led to discrepancies in approach between the Basic Courts and the Court of Appeals.

Judges interviewed, also raised a lack of specific training on evidential weight to be given to third party material and cited a need for legal training in how to approach this material in trials.

Regarding the sentencing of returned and repatriated persons, namely women from conflict zones, in April 2019, a judge stated that Kosovo was one of the first to accept those returned and repatriated from Syria. In relation to sentencing policies, the following circumstances were taken into account for returned and repatriated women: mental state, logistics, supervision, reintegration, role/contribution to the act of terrorism and economic conditions. A judge expressed the view that the vast majority, if not all, returned or repatriated women had been convicted of some kind of participation and logistical support rather than active participation in combat. As a result, the judge's perception was that the returned or repatriated females do not bear any risk to society. Therefore, the judge stated that sentences imposed were adequate for protection of the public and for punishment.

The imposition of psychological treatment on women as part of their sentencing order seemed to be imposed arbitrarily without considering whether there was a specific need for this measure; monitoring adherence to this order is delegated to offender managers. Once the order was complete (usually after a period of two years), there was little further support available. Centres for Social Work do not have adequate resources and conditions to facilitate care of children or support mothers facing such orders.¹³² In interviews, queries were raised as to whether psychological treatment was effective when dealing with a person's ideology.

In another meeting in August 2020, a prosecutor from the Special Prosecution Office indicated that prosecutors sometimes faced challenges in terrorism related cases involving jurisdiction outside of Kosovo and, in these cases, the gathering of evidence was

131 Atdhe Arifi et al.

132 In this regard, OSCE recently published a report recommending to the Ministry of Health 'to provide sufficient logistical support and facilities to the CSWs, in order for them to fulfil their obligations as required by law [...]'. See *CHILDREN FIRST: The Role of Centres for Social Work in Judicial Proceedings*, Recommendations, available at <https://www.osce.org/files/f/documents/b/3/453780.pdf>.

difficult due to issues with diplomatic channels/international legal co-operation. In this regard, he emphasised that the U.S. Embassy in Prishtinë/Priština [USA/Department of Justice, FBI] is playing a supportive role.

In interviews, judges consistently raised the challenge of lack of support staff including legal advisors. There is the risk that lack of proper infrastructure will impact negatively on the quality of judgments.

6. RECOMMENDATIONS

In light of these findings the following recommendations are made:

Legal Reform on terrorist financing

- Amendment to the Law on the Prevention of Money Laundering and Combatting Terrorist Financing is needed to bring it in line with EU and international standards.

Appropriateness of indictments and disclosure

- Prosecutors to ensure indictments are sufficiently evidenced, brought under the latest or appropriate CC, with full disclosure to the defence at the pre-trial stage.
- Defence to be alert to challenging cases where there is no or insufficient evidence underpinning detention and/or indictment.
- A formal system of disclosure be developed; the prosecutors being focused upon the requirement to disclose material that may assist the defence.
- Greater consideration of treatment of those with mental health issues and fitness to plead.
- Rigorous application of bail and removal of perceived link between a guilty plea and release from detention.

Training and greater co-operation

- Judges' skills would be enhanced by specific training on admissibility and weight to be given to third party evidence in criminal trials.
- Develop suitable de-radicalisation programs that are culturally appropriate for the Kosovo context with the help of organizations or experts.
- Kosovo Police and the FIU consider intensification of co-operation with prosecution in investigation of terrorism financing; a joint taskforce overseeing work in this area alongside specific training prosecuting terrorism financing could lead to greater co-operation and confidence in using these provisions within CC 2019.
- Police training on evolving technology used by those engaged in terrorist activity.
- Training prosecutors on ECHR standards in the areas of detention, covert surveillance evidence, charging, indictments and duty of disclosure.
- Training defence lawyers on ECHR standards in the areas of their client's right to bail, fitness to plead, sufficiency of evidence to support their detention, charge, indictment, client's mental health, disclosure and admissibility of evidence.

Handling of **Terrorism Cases** by the Kosovo Criminal Justice System

- Greater consideration by prosecutors of where cases should be joined rather than individually tried; prosecuting terrorist groups rather than individuals.
- Use of statutory powers to gather intelligence and co-operation from terrorist suspects and/or those who have been convicted.
- Closer working between counter terrorism and serious crime institutions.

Resources

- Allocation of legal advisors to judges and prosecutors to improve efficiency and quality of judgments.

7. CONCLUSION

Criminal justice institutions play a crucial role in combating terrorism; eradicating terrorism through investigation, effective prosecution and fair adjudication of such cases.

Recent developments, namely establishment of two departments, Terrorism Department in the Prosecution Office and the Special Department in the Basic Court of Prishtinë/Priština, are key success indicators that Kosovo institutions are committed to a firm and effective response to terrorism.

The Kosovo legislation on anti-terrorism broadly complies with International and European standards. However, the Law on the Prevention of Money Laundering and Combatting Terrorist Financing needs to be amended and harmonised with EU legislation.

Positive trends are noted in the area of court case management, where the number of hearings beyond court established deadlines in 2020 have decreased, compared to the previous two years.

Also, based on the conducted interviews, there is a good level of inter-institutional co-operation. However, the lack of oversight and joint task force in the area of terrorist financing remains a substantial barrier to successful prosecutions.

In conclusion, criminal justice institutions and participants in Kosovo are committed and highly motivated in terrorism related cases. Focused and strategic capacity building of key institutions will promote human rights compliance as well as effective prosecutions of terrorist offences.

ANNEX I

Definition of Terrorism and Discussion.

- The “Kosovo Strategy against Terrorism and Action Plan 2018-2022”¹³³ states that “terrorism remains one of the major threats to national and global security by threatening not only life and property but also the democratic values and societies way of life. Effective response to terrorism requires the involvement and cooperation of all public institutions, civil society, international organizations and citizens”.
- Although the international community has adopted a number of international treaties that are designed to combat specific types of terrorism, such as the hijacking of aircraft, at the United Nations level to date there has been no agreement on a definition of terrorism.
- There is no settled definition of terrorism in international law, despite many attempts to achieve one by intergovernmental organizations, governments, and academics. One International Court of Justice judge has observed: “*Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.*”¹³⁴
- However, the correct use of the word “terrorism” is important as legal consequences flow in relation to co-operation between states, such as intelligence sharing, mutual legal assistance, asset freezing and confiscation and extradition.
- The first attempt to define terrorism in an international instrument was in the 1937 League of Nations Convention for the Prevention and Punishment of Genocide, which defined terrorism as, “*all criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.*”¹³⁵ The Convention definition was criticised for being too vague and it never entered into force. It received insufficient support from governments.
- However, from an overview of international jurisprudence, elements of terrorism can be considered to include the following features:
 - its organized nature (whether the organization involved is large or small);

133 Kosovo Strategy against Terrorism and Action Plan 2018-2022, September 2017, page 4. Available at: https://wb-iisg.com/wp-content/uploads/bp-attachments/6125/2-anglisht-National-Strategy-Against-Terrorism-and-Action-Plan-2018-2022_12-October_without-action-plan-1.pdf

134 R. Higgins, *The General International Law of Terrorism* in R. Higgins/M. Flory, *International Law and Terrorism* (1997).

135 Article 1(2), League of Nations Convention for the Prevention and Punishment of Genocide, available at https://legal.un.org/avl/pdf/ls/RM/LoN_Convention_on_Terrorism.pdf (accessed on 19 May 2021).

- its dangerousness (to life, limb and property);
 - its attempt to undermine government in particular (by seeking to influence policy and lawmakers);
 - its randomness and consequential spreading of fear/terror among a population.
- Ultimately, terrorist acts are criminal acts and are subject to the normal rigours and safeguards of criminal law. It does not make a difference to the applicability of human rights standards whether the issue under review is deemed to be a terrorist act as opposed to any other serious criminal act.¹³⁶
 - The United Kingdom, the United States and France have legal systems that are familiar to Kosovo and have engaged in ongoing development of their legal frameworks around terrorism in recent years.
 - Looking at England and Wales, the definition of terrorism developed through its history into codification in the law of England and Wales in the Terrorism Act 2001:

*“the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause”.*¹³⁷
 - The definition is broad and was considered by the UK Supreme Court in *R v Gul*:

*“In his second report, Mr. Anderson¹³⁸ mentioned the ‘potential application of the Terrorism Acts even to UK forces engaged in conflicts overseas’ and referred to the fact that a recent Australian report ‘recommend[ed] that Australian law be changed so as to provide that the relevant parts of the Criminal Code, as in Canada, do not apply to acts committed by parties regulated by the law of armed conflict.”*¹³⁹
 - In the United States, the Code of Federal Regulations defines terrorism.¹⁴⁰ The Patriot Act 2001¹⁴¹ re-defined the Code’s definition of terrorism and expanded it to cover ‘domestic terrorism.’¹⁴² In France, it is the French Penal (Criminal) Code which

136 Countering Terrorism, Protecting Human Rights, *A Manual*, OSCE ODIHR 2007.

<https://www.osce.org/files/f/documents/d/6/29103.pdf>

137 Terrorism Act 2001 s 1(1)(b); see also ss 1(2), (3).

138 Then Independent Reviewer of Terrorism Legislation in the United Kingdom.

139 Considered the case of F [2007] EWCA Crim 243.

140 US Code of Federal Regulations, Title 18, Ch 113B.

141 Stands for U.S.A P.A.T.R.I.O.T. ‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism’.

142 US Code of Federal Regulations, Title 18, Ch 113B, s 2331: ‘A person engages in domestic terrorism if they do an act

lists the offences which constitute acts of terrorism.¹⁴³

- We note that in England and Wales, offences also are not charged under terrorist legislation but are determined to be acts of “terrorism.” The Judge may be invited to determine whether the offence in the case has a “terrorist connection.”¹⁴⁴ At the sentencing hearing, the Judge can be required to make a similar determination in the context of sentencing an offender.¹⁴⁵ Where the defendant is convicted of murder, the trial Judge may consider whether the murder was committed “for the purpose of advancing a political, religious, racial or ideological cause.”¹⁴⁶ Therefore the unlawful killing can be sanctioned as a terrorist murder without using specific offences under the Terrorism Act 2000.
- Modern human rights standards are rooted in the following four simple values namely freedom from want; freedom from fear; freedom of belief; and freedom of expression.
- These freedoms form the core principles of the Universal Declaration of Human Rights (UDHR), which sets out the fundamental elements of international human rights accepted by United Nations member states and elaborated in many subsequent human rights treaties. The UDHR is accepted as “a common standard of achievement for all peoples and all nations.”¹⁴⁷

“dangerous to human life” that is a violation of the criminal laws of a state or the United States, if the act appears to be intended to: (i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping’.

143 Penal Code (France), arts 421-1, 421-2-2.

144 Criminal Procedure and Investigations Act 1996.

145 Counter Terrorism Act 1996 section 30.

146 Criminal Justice Act 2003 Schedule 21 paragraph 4(2)(c).

147 Countering Terrorism, Protecting Human Rights, *A Manual*, OSCE ODIHR 2007.
<https://www.osce.org/files/f/documents/d/6/29103.pdf>

