

## THE STATE OF JUVENILE DIVERSION IN KOSOVO

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### ABSTRACT

*Through original, in-country interviews and research, this Article will introduce Kosovo’s current juvenile diversion system and the need for its continued improvement. Kosovo—Europe’s youngest country—has instituted juvenile diversion, mediation, and educational alternatives to the traditional criminal justice system. This is positive progress, since research shows that children are developmentally more susceptible to reform and reeducation than adults. Thus, rehabilitating a child instead of punishing him lessens the chance the child will recommit a crime. However, there is evidence—informed by interviews with national and local stakeholders—that there is still room for procedural and statutory changes to expand the adoption, use, and impact of this child-friendly measure.*

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## I. INTRODUCTION AND METHODOLOGY

Kosovo has the foundation to create a child-centered juvenile justice system. Since the inception of the Juvenile Justice Code in 2004, Kosovo has embraced the tenets of a child-first criminal justice system as envisioned by the Convention on the Rights of the Child, which means Kosovo is adopting laws and norms and promoting institutional change that reinforce rehabilitative approaches that help the child, as opposed to retributive approaches that merely punish the child for a criminal infraction.

This Article focuses on Kosovo’s juvenile diversion system—namely, its creation, growth, and need for continued improvement. Kosovo has instituted diversion, mediation, and educational alternatives to the traditional criminal justice system, which is positive, as research shows that children are developmentally more susceptible to reform and reeducation than adults.<sup>1</sup> Thus, rehabilitating a child instead of punishing him lessens the chance the child will recommit a crime.<sup>2</sup> This Article specifically provides insight into the current state of juvenile diversion in Kosovo and makes numerous

<sup>1</sup> *Youth in the Justice System: An Overview*, JUVENILE LAW CENTER, <https://jlc.org/youth-justice-system-overview> (last visited Nov. 29, 2019).

<sup>2</sup> NATIONAL RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* (2013), available at <https://doi.org/10.17226/14685>.

recommendations to promote the system's child-centered design and evolution.

To assess Kosovo's diversion system and recommend a path forward, Part II discusses the interviews and methodology used for the research. Part III discusses international and European standards and norms concerning juvenile diversion. Part IV offers background on the historic and current use of laws and practices regarding Kosovo generally and juvenile diversion specifically. Finally, Part V discusses its findings and proposes process and statutory improvements to Kosovo's young diversion system.

The research for this Article comes from an eight-month period that the author spent in Kosovo interviewing local stakeholders and collecting data. The interviews conducted for this research took place between November 2012 and May 2013, thanks to a grant from the U.S. Fulbright Commission and the Kosovar government. In all, twenty-four interviews were conducted with system stakeholders throughout the criminal justice system and country. These interviews included prosecutors in five of Kosovo's seven regions,<sup>3</sup> one district and one appeals level judge, the director and three social workers at the Lipjan Juvenile Detention Facility, the director of Alternative Sanctions for the Probation Service of Kosovo, the director of the Kosovo Judicial Institute and his aid, the director of the Chamber of Advocates, a Senior Officer on Children's Rights for the Office of the Prime Minister, the Kosovo Ombudsman's executive director and the office's children's rights expert, the director of the Kosovo Ministry of Justice's Department on European Integration and Policy Coordination, and the lead child protection officer at UNICEF Kosovo. Without these individuals and their generosity, this research would not have been possible.

These interviews were conducted to capture a broad cross-section of juvenile justice system stakeholders in Kosovo with a specific focus on the diversion process. The missing system stakeholders in these interviews include those from the regions of Gjakova and Mitrovica. The stakeholders in Gjakova proved difficult to schedule a formal interview, and those in Mitrovica were difficult to connect with due to the ad hoc nature of the region's court.<sup>4</sup>

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<sup>3</sup> The seven regions are: Pristina, Gjilan, Prizren, Peja, Mitrovica, Gjakova, and Ferizaj. Interviews do not represent Gjakova and Mitrovica.

<sup>4</sup> Interview with John Smibert, Resident Legal Advisor, United States Department of Justice, in Pristina, Kos. (Mar. 15, 2013).

Most of the interviews were conducted in English; however, translators were sometimes used. During these interviews there were discrepancies between what the interviewee perceived to be taking place in their region and what the Ministry of Justice Office of Statistics and Analysis officially released. With that being said, government statistics in Kosovo are often non-standardized and incongruent with other similar data released by different Kosovar ministries.<sup>5</sup> Accordingly, this Article provides necessary caveats, acknowledges this shortcoming, and merely does the best with what data is available.

Even with the difficulty around data collection, themes appear both in the data and the interviews. These themes are used to demonstrate and make sense of Kosovo's current juvenile diversion system and make recommendations for improving it.

## II. INTERNATIONAL AND EUROPEAN STANDARDS AND NORMS REGARDING JUVENILE DIVERSION

This section discusses international standards and norms pertaining to juvenile diversion and specific standards for European Union member states and aspiring member states. Both provide a framework for assessing Kosovo's juvenile diversion system later in this Article.

### A. *International Standards and Norms*

Internationally, there is one binding convention regarding the rights of children: The Convention on the Rights of the Child ("CRC"),<sup>6</sup> which has been ratified by 194 nations.<sup>7</sup> The CRC and the Universal Declaration of Human Rights ("UDHR") both note that, due to a child's unique developmental place in society, children are not

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<sup>5</sup> For instance, there were 130 diversions in 2008, according to the Office of Prosecutor's data book. For that same year, the Probation Service reported 167.

<sup>6</sup> Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC].

<sup>7</sup> *Somalia to Join Child Rights Pact: UN*, REUTERS (Nov. 20, 2009), <http://af.reuters.com/article/topNews/idAFJ0E5AJ0IT20091120>; *South Sudan Parliament Discusses Child Rights*, SUDAN TRIBUNE (Nov. 21, 2012), <http://www.sudantribune.com/spip.php?article44591>.

only accorded similar rights to adults, but are also given extra protection to account for their vulnerability.<sup>8</sup>

Because of the unique developmental needs children have in all societies, it is important to develop justice systems around those needs. The CRC sets standards and norms for juvenile justice, and is supplemented by non-binding agreements, rules, and guidelines that clarify the parameters as to what the international community deems are the proper human and procedural rights of a child.<sup>9</sup>

The CRC, *inter alia*, emphasizes the need for diversion programs to create a rehabilitative and developmentally appropriate juvenile justice system.<sup>10</sup> These documents require that diversion programs gain consent from the child or parent/guardian;<sup>11</sup> give parents the ability to participate in proceedings, unless it is determined that exclusion is in the best interest of the child;<sup>12</sup> make an effort to provide community programs;<sup>13</sup> and decrease recidivism.<sup>14</sup>

A juvenile diversion program should attempt to meet the procedural standards and rights outlined in Articles 37, 39, and 40 of the CRC. This includes a presumption of innocence;<sup>15</sup> the right to not self-incriminate, confess, or acknowledge guilt;<sup>16</sup> the right to have all matters be determined by a competent, independent, and impartial

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<sup>8</sup> CRC, *supra* note 6, at preamble; *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice*, U.N. Doc. A/C.3/69L.5, 4 (Sept. 25, 2014).

<sup>9</sup> G.A. Res. 40/33, U.N. Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) (Nov. 29, 1985); G.A. Res. 45/113, U.N. Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990) [hereinafter the Havana Rules]; Economic and Social Council Res. 1997/30, U.N. Guidelines for Action on Children in the Criminal Justice System (July 21, 1997) [hereinafter The Vienna Guidelines]; G.A. Res. 45/110, U.N. Standard Minimum Rules for Non-Custodial Measures (“The Tokyo Rules”) (Dec. 14, 1990).

<sup>10</sup> CRC, *supra* note 6, at art. 40(3)(b); The Beijing Rules, *supra* note 9, ¶¶ 6, 11.1, 11.2; The Vienna Guidelines, *supra* note 9, ¶ 15.

<sup>11</sup> The Beijing Rules, *supra* note 9, ¶ 11.3.

<sup>12</sup> CRC, *supra* note 6, at art. 40(2)(b)(iii); The Beijing Rules, *supra* note 9, ¶ 15.2.

<sup>13</sup> The Beijing Rules, *supra* note 9, ¶ 11.4; The Tokyo Rules, *supra* note 9, ¶ 2.5.

<sup>14</sup> The Beijing Rules, *supra* note 9, commentary to ¶ 11.4; The Vienna Guidelines, *supra* note 9, ¶ 15.

<sup>15</sup> CRC, *supra* note 6, at art. 40(2)(b)(i); International Covenant on Civil and Political Rights art. 14(2), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; The Beijing Rules, *supra* note 9, ¶ 7.1 (further explaining this rule may not be applicable depending on the design of the youth court system).

<sup>16</sup> CRC, *supra* note 6, at art. 40(2)(b)(iv); ICCPR, *supra* note 15, at art. 14(3)(g).

authority;<sup>17</sup> the right to be heard in any judicial proceedings and to effectively participate and be informed of the process;<sup>18</sup> the right to have the matter determined quickly;<sup>19</sup> the right to confidential proceedings;<sup>20</sup> the right to an appeal;<sup>21</sup> that the process be non-discriminatory;<sup>22</sup> and the right to an interpreter when necessary.<sup>23</sup> All of these individual procedural rights and protections coalesce into a developmentally-appropriate administration of juvenile diversion.

These conventions, rules, and guidelines also lay out a list of acceptable diversion program measures that include, but are not limited to, the following: verbal sanction, such as admonition, reprimand, and warning; fines; restitution; and community service.<sup>24</sup> These punishments can be combined in any way, but they are not an exhaustive list of sanctions.<sup>25</sup> The open-ended options and permutations of sanctions provide flexibility to create diversion programs that reflect local community standards and culture.

In total, diversion programs in adherence with international standards must incorporate community programs, create a clear standard to apply diversion, train stakeholders, and be used where appropriate. At the same time, procedural safeguards must exist to protect the child's substantive and procedural rights.

### *B. European Union Standards and Norms*

Beyond the applicability of international standards and norms, Kosovo recently began the stabilization and ascension process into the European Union ("EU"),<sup>26</sup> rendering EU standards and norms relevant

<sup>17</sup> CRC, *supra* note 6, at art. 40(2)(b)(iii); ICCPR, *supra* note 15, at art. 14(1); The Beijing Rules, *supra* note 9, ¶ 14.1.

<sup>18</sup> CRC, *supra* note 6, at art. 12, 40(2)(b)(ii); The Beijing Rules, *supra* note 9, ¶ 14.2.

<sup>19</sup> CRC, *supra* note 6, at art. 40(2)(b)(iii); The Beijing Rules, *supra* note 9, ¶ 20.1.

<sup>20</sup> CRC, *supra* note 6, at art. 40(2)(b)(vii); The Beijing Rules, *supra* note 9, ¶ 8; The Tokyo Rules, *supra* note 9, ¶¶ 3.11–3.12.

<sup>21</sup> CRC, *supra* note 6, at art. 40(2)(b)(v); ICCPR, *supra* note 15, at art. 14(5).

<sup>22</sup> CRC, *supra* note 6, at art. 2; The Beijing Rules, *supra* note 9, ¶ 2.1; The Havana Rules, *supra* note 9, ¶ 4; The Tokyo Rules, *supra* note 9, ¶ 2.2.

<sup>23</sup> CRC, *supra* note 6, at art. 40(2)(b)(vi); ICCPR, *supra* note 15, at art. 14(3)(f).

<sup>24</sup> The Tokyo Rules, *supra* note 9, ¶ 8.2.

<sup>25</sup> *Id.* ¶ 8.2(1)-(m).

<sup>26</sup> See Council Decision (EU) 2015/1993 of Oct. 22, 2015 O.J. (L 290) 14, approving the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the Stabilization and Association Agreement between the European Union and the European Atomic Energy Community, on the one part, and Kosovo, on the other part (explaining that the "Stabilisation and

to the considerations of this Article, pending Kosovo's relationship with and status in relation to the EU.

The EU, the European Council ("EC"), and the European Court of Human Rights ("ECHR") all set standards, similar to those set by the CRC, regarding juvenile justice systems. Primarily, these institutions support a preventative and rehabilitative approach that focuses on the best interests of the juvenile offender.<sup>27</sup> In 2007, the Treaty of Lisbon created a specific focus on juvenile rights.<sup>28</sup> This treaty included the Charter of Fundamental Rights of the European Union,<sup>29</sup> which outlined that the juvenile's "best interests must be a primary consideration."<sup>30</sup>

Ten years before the CRC was ratified by any signatory, the Council of Europe released a resolution on Juvenile Delinquency and Social Change, which set the tone for the Council of Europe and, later, the EU regarding juvenile justice and diversion.<sup>31</sup> This resolution encouraged its members to use community-based programs and alternative and educational measures that keep children from entering the justice system.<sup>32</sup> The Council of Europe continued to promote this vision of juvenile justice in 1987,<sup>33</sup> 2003,<sup>34</sup> and 2006<sup>35</sup> by reaffirming

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Association Agreement" negotiations were successfully completed at the European Union Office in Luxembourg).

<sup>27</sup> See Eur. Consult. Ass., *Recommendation of the Comm. of Ministers*, Rec. No. 20 (2003); Charter of Fundamental Rights of the European Union, art. 24, 2010 O.J. (C 83) 2; Council of Europe Committee of Ministers, *Opinion of the European Economic and Social Committee on the Prevention of Juvenile Delinquency, Ways of Dealing with Juvenile Delinquency and the Role of the Juvenile Justice System in the European Union*, Feb. 28, 2005 O.J. (SOC 202).

<sup>28</sup> See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 2.3, 2.5, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

<sup>29</sup> See *id.* at art. 6.

<sup>30</sup> Charter of Fundamental Rights of the European Union, *supra* note 27, at art. 24.

<sup>31</sup> See Council of Europe Committee of Ministers Resolution on Juvenile Delinquency and Social Change, 1978 O.J. (C 78) 62.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> Council of Europe Committee of Ministers, *Resolution of the Commission Members to Member States on Social Reactions to Juvenile Delinquency*, Sept. 17, 1987 O.J. (87) 20, <https://rm.coe.int/16804e313d>.

<sup>34</sup> Council of Europe Committee of Ministers, *Recommendation of the Committee of Ministers to Member States Concerning New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice*, Sept. 24, 2003, Rec (2003) 20, <https://rm.coe.int/168070ce24>.

<sup>35</sup> Council of Europe Committee of Ministers, *Opinion of the European Economic and Social Committee on the Prevention of Juvenile Delinquency, Ways of Dealing with Juvenile Delinquency and the Role of the Juvenile Justice System in*

its commitment to alternative measures and developmentally appropriate justice.

More recently, and for the first time, the Council released guidelines on child-friendly justice.<sup>36</sup> The purpose of the guidelines was to help members increase the participation and protection of children in the criminal justice system and to improve access to alternatives when a child is in conflict with the law.<sup>37</sup> The Deputy Secretary General of the Council of Europe declared that child-centered justice should neither “walk in front of” children nor “walk behind [them].”<sup>38</sup>

These guidelines were produced by experts in the field who collected 3,721 surveys given to children with previous system involvement from twenty-five different Council of Europe member states, including the Republic of Serbia.<sup>39</sup> The surveys found themes—regardless of country—of mistrust of authority, a desire to be heard, and a need to be respected by the juvenile justice process.<sup>40</sup> The guidelines are clear in demonstrating that children need to be made part of the justice process and not merely be processed by the adults administering the justice system.<sup>41</sup>

Beyond these guidelines, the European Economic and Social Committee (“EESC”), which consults EU bodies, sets standards for what juvenile justice should ideally look like for EU members, and it envisions a juvenile justice system built with an intent towards prevention, educational measures, and social reintegration.<sup>42</sup> The EESC has made its position clear that juvenile justice need not be beholden merely to the “judicial sphere,” and it has encouraged that social service providers and civil society be proactive stakeholders in the juvenile justice system to reinforce the tenants of rehabilitation and reintegration.<sup>43</sup>

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*the European Union*, May 9, 2006 [hereinafter *Opinion of the European Economic and Social Committee*] O.J. (C 110) 13, <https://rm.coe.int/168070ce24>.

<sup>36</sup> Council of Europe Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, (Nov. 17, 2010), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9>.

<sup>37</sup> *Id.* pt. 1, § I, ¶ 3, at 16.

<sup>38</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, *supra* note 36, at 10.

<sup>39</sup> *Id.* at 40.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 40–41.

<sup>42</sup> *Opinion of the European Economic and Social Committee*, *supra* note 35, § 1.1.

<sup>43</sup> *Id.* § 7.1.4.1.

Collectively, the international and European standards and norms provide guidelines and recommendations to create a developmentally appropriate juvenile justice system. Both rely heavily on the desire to see children receive rehabilitative alternatives as opposed to formal court processing, all the while incorporating children into the process. Collectively, these documents set a framework that Kosovo, and all nations, should aspire to meet.

### III. KOSOVO'S LEGAL HISTORY

Before utilizing the above framework to analyze the Kosovar juvenile diversion system, this section introduces the reader to three foundational background considerations: Kosovo's legal and national history, that history's effect on the evolution of its juvenile justice laws, and the application of juvenile justice laws today. Kosovo's legal history during the post-war era helps explain the patchwork of laws and processes upon which today's juvenile justice system is based and the impetus for its reformation.

#### *A. A Brief History and Evolution of Kosovo's Legal System and Juvenile Justice Laws*

Kosovo's relevant legal history can be grouped in three main consecutive stages, starting first with the Yugoslav period, then the the United Nations Mission to Kosovo ("UNMIK") and Provisional Institutions of Self-Government ("PISG") administration period, and finally the period following Kosovo's independence.

From 1943 to 1974, Kosovo was the Autonomous Province of Kosovo and Metohija, located in the Socialist Republic of Yugoslavia.<sup>44</sup> While the name indicates otherwise, Kosovo did not have economic and political autonomy like the republics in Yugoslavia during this period.<sup>45</sup> It was not until the 1974 Yugoslav constitution that Kosovo became, in some respects, autonomous.<sup>46</sup> The changes made in the 1974 constitution allowed for governance in Kosovo to be locally administered, which included the creation of a

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<sup>44</sup> NOEL MALCOLM, KOSOVO: A SHORT HISTORY 307-08, 314, 327 (N.Y.U. Press 1998). Like Vojvodina, Kosovo was treated as a vassal state of Serbia and did not receive the legal autonomy of states like Croatia and Bosnia.

<sup>45</sup> *Id.* at 314.

<sup>46</sup> *Id.* at 327.

local parliament and judiciary for the first time.<sup>47</sup> This meant that the statutory framework and economic policy governing Kosovo became a mix of the existing Yugoslav system and the new Kosovar system.<sup>48</sup>

Throughout the 1970s and 1980s, with the increase in autonomy, Kosovo was “Albanianized,” meaning that the Serb minority—about thirteen percent of Kosovo’s population in 1981—had been pushed out of leadership and state positions.<sup>49</sup>

The decision to make Kosovo autonomous did not, however, mean that Kosovo or the Kosovar Albanians were given the legal distinction of a republic, whereas such legal distinction was given to the Croats, Slovenes, Serbs, Montenegrins, Macedonians, and, as of 1971, the Bosnian Muslims.<sup>50</sup> The Kosovar Albanians were, by law, a nationality and not a nation,<sup>51</sup> a distinction that became important during the Yugoslavian secessions of the 1990s, as nationalities did not have a legal right to secede from Yugoslavia, but nations did.<sup>52</sup>

Ultimately, Kosovo’s autonomy as a part of the Socialist Republic of Yugoslavia was relatively short lived. After the death of Marshall Josip Tito—Yugoslavia’s founder, dictator, and keeper of the peace—in 1980, ethnic tension began to rise between the Serb and Albanian communities in Kosovo.<sup>53</sup> By March of 1981, there were student-led protests in Pristina that evolved into calls for Kosovo to be fully independent of Serbia and Yugoslavia.<sup>54</sup> This reinforced Kosovar Serbs feeling disenfranchised and increased the tension between the majority Albanians and minority Serbs.

Serb frustration over Kosovo was articulated in 1986 when the Memorandum of the Serbian Academy of Sciences and Arts (“the Memorandum”) was leaked to the press. The Memorandum—a document written by sixteen Serbian academics—stated that since 1981 the Serbs living in Kosovo were being subjected to a “physical,

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<sup>47</sup> USTAV SOCIJALISTICKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [CONSTITUTION OF YUGOSLAVIA] Feb. 21, 1974.

<sup>48</sup> MALCOLM, *supra* note 44, at 327.

<sup>49</sup> TIM JUDAH, *KOSOVO: WAR AND REVENGE* 44 (Yale Univ. Press, 2d ed. 2002). Kosovo’s Albanian population was 77.4 percent in 1981. *See Demographic Changes of the Kosovo Population 1948-2006*, STAT. OFF. OF KOSOVO (SOK) 18 (Feb. 2008), <http://ask.rks-gov.net/media/1835/demographic-changes-of-the-kosovo-population-1948-2006.pdf>.

<sup>50</sup> JUDAH, *supra* note 49, at 37.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> MALCOLM, *supra* note 44, at 334-40.

<sup>54</sup> JUDAH, *supra* note 49, at 40.

political, legal and cultural genocide.”<sup>55</sup> “The Memorandum directly addressed the underlying tension and sentiments of some Serbs in the region, which were the same sentiments that led to Slobodan Milošević’s rise to power in 1989 and his termination of Kosovar autonomy in the same year.<sup>56</sup>

Incensed at Milošević’s power grab, Kosovar Albanians began to organize politically and move closer to independence. Led by Ibrahim Rugova and the Democratic League of Kosovo (“LDK”), Kosovars voted for independence in 1991, which went unrecognized by any nation; however, this local momentum led to the creation of parallel state structures like a parliament, police force, and schools.<sup>57</sup> Later, a group of Kosovar Albanians banded together to form the Kosovo Liberation Army (“KLA”) as a militant alternative to Rugova’s pacifist movement.<sup>58</sup> While the LDK and KLA struggled over whether a political or militant resolution was the right path forward, Kosovo and Yugoslavia were charting a course for war.<sup>59</sup>

Thus, began a lost decade for Kosovo that ended in 1999 with the Kosovo War, a NATO bombing, and Serbia’s ouster from the region. As violence grew in the Yugoslav region, the West, namely the U.S. and U.K., threatened Milošević with sanctions and NATO airstrikes.<sup>60</sup> After a number of failed negotiations, NATO began bombing targets in Yugoslavia in March of 1999,<sup>61</sup> which was followed by the UN Security Council’s passage of Resolution 1244 (“UNSCR 1244”), creating the United Nations Mission in Kosovo (“UNMIK”).<sup>62</sup> UNMIK administered the government of Kosovo until 2001 when the Provisional Institutions of Self-Government (“PISG”) was created and worked alongside the UNMIK administration.<sup>63</sup> PISG was tasked with creating local governing capacity.<sup>64</sup> While Kosovo remained legally

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<sup>55</sup> *Id.* at 49.

<sup>56</sup> MALCOLM, *supra* note 44, at 343-44.

<sup>57</sup> JUDAH, *supra* note 49, at 65-66.

<sup>58</sup> STACY SULLIVAN, BE NOT AFRAID, FOR YOU HAVE SONS IN AMERICA: HOW A BROOKLYN ROOFER HELPED LURE THE U.S. INTO THE KOSOVO WAR (St. Martin’s Press: New York, 1st ed. 2004).

<sup>59</sup> *Id.*

<sup>60</sup> JUDAH, *supra* note 49.

<sup>61</sup> *Id.* at 228.

<sup>62</sup> S.C. Res. 1244 (June 10, 1999). *See also Mandate*, UNITED NATIONS INTERIM ADMINISTRATION MISSION IN KOSOVO (UNMIK), <https://unmik.unmissions.org/mandate> (last visited Nov. 29, 2019).

<sup>63</sup> S.C. Res. 1244, *supra* note 62, ¶¶ 10 & 11.

<sup>64</sup> Carsten Stahn, *Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government*, 14 LEIDEN J. INT’L L. 531 (2001).

and territorially a part of the Federal Republic of Yugoslavia (“FRY”), the FRY government had relinquished control over the province to the international civil administration and NATO.<sup>65</sup>

Between the end of the conflict in 1999 and 2008, Kosovo was under international civilian administration and security was provided by a NATO force called the Kosovo Force (“KFOR”).<sup>66</sup> During this time, a significant effort was put into developing local capacity and government structures with the passage of provisional laws and elections for a provisional government.<sup>67</sup> UNSCR 1244, however, created the contradictory and impossible situation that obligated Kosovo was to remain a part of FRY, yet also obligated it to develop independent structures of governance.<sup>68</sup>

In February 2008, the inevitable fracture occurred with Kosovo declaring unilateral independence from the Republic of Serbia.<sup>69</sup> Since 2008, Kosovo has not been recognized by the United Nations as a country; however, continued support from nations like the U.S. and Germany and international organizations like the European Union Rule of Law Mission in Kosovo (“EULEX”), the Organization for Security and Co-operation in Europe (“OSCE”), and the UN have helped Kosovo continue to develop as an independent country. Kosovo is currently recognized by over 110 of the 193 UN member states.<sup>70</sup>

*B. The Evolution and Use of Laws and Systems Controlling  
Kosovo’s Juvenile Justice System*

This history of socialism, autonomy, conflict, and international stewardship that shaped Kosovo into the nascent and still controversial country that it is today also created the patchwork that is the Kosovar

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<sup>65</sup> S.C. Res. 1244, *supra* note 62, ¶¶ 10 & 11. The Federal Republic of Yugoslavia consisted of Serbia and Montenegro, which existed from 1992 to 2003. It subsequently became the State Union of Serbia and Montenegro in 2003, which lasted until 2006 when the two became separate countries.

<sup>66</sup> JUDAH, *supra* note 49, at 296-97.

<sup>67</sup> *Id.* at 298.

<sup>68</sup> *Id.*

<sup>69</sup> Dan Bilefsky, *Kosovo Declares Its Independence from Serbia*, N.Y. TIMES (Feb. 18, 2008), <https://www.nytimes.com/2008/02/18/world/europe/18kosovo.html>.

<sup>70</sup> Fatos Bytyci, *Former Guerillas to Testify before Hague Court*, REUTERS (Jan. 11, 2019), <https://www.reuters.com/article/us-kosovo-court-idUSKCN1P51M6>.

legal system. After the war, juvenile criminal law was an amalgamation of Kosovar and Yugoslav laws.<sup>71</sup>

In 1991, when Kosovo made its first and unsuccessful claim of independence, the Criminal Code and the Code of Criminal Procedure of the former Yugoslavia controlled Kosovo's juvenile justice system.<sup>72</sup> A juvenile judge and two lay people adjudicated cases for fourteen to eighteen-year-olds.<sup>73</sup> This was the only mandated form of specialization in juvenile criminal law at that time, as the police and the prosecutors were not specialized in juvenile matters.<sup>74</sup> Notably, there was no diversion system<sup>75</sup> until 2004, when the provisional government and UNMIK passed the Kosovar provisional Juvenile Justice Code ("provisional JJC"), replacing the patchwork of Yugoslav, socialist era laws.<sup>76</sup> In 2008, when Kosovo declared independence from Serbia, the constitution included a provision to enforce the CRC in its entirety.<sup>77</sup>

In 2010, the Republic of Kosovo passed a subsequent iteration of the Juvenile Justice Code that added to and superseded the 2004 provisional code lending stability to the criminal law system and allowing for more nuanced and substantive analysis; this was followed by updates to the Juvenile Justice Code in 2018 ("2018 JJC"), after this research took place.<sup>78</sup> Except where it is explicitly stated otherwise, this Article focuses on the 2018 JJC. While substantive changes were made to the law in 2018, the changes to the diversion system were minimal, but noted throughout this Article. The research used in this paper remains applicable when understanding juvenile diversion in Kosovo.

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<sup>71</sup> Assessment of Juvenile Justice Reform Achievements in Kosovo, UNICEF 10 (Jan. 2010).

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 10; PROVISIONAL JUVENILE JUSTICE CODE [PROVISIONAL JUV. JUST.] (Kos.).

<sup>77</sup> KUSHETUTËS SË REPUBLIKËS SË KOSOVËS [CONSTITUTION OF THE REPUBLIC OF KOSOVO] Mar. 26, 2013, art. 22 (Kos.) [hereinafter CONSTITUTION OF KOSOVO]; UNICEF, *supra* note 71, at 7. While Kosovo is not a recognized state by the United Nations and therefore cannot be a state party to a UN treaty, Kosovo has de facto ratified the Convention on the Rights of the Child by including it in its Constitution. Further, some have argued that, through the transitive properties of international law, Kosovo remains a part of the CRC because Yugoslavia signed the convention in 1991 while Kosovo was still a province of the then disintegrating nation.

<sup>78</sup> 2010 JUVENILE JUSTICE CODE [JUV. JUST.] art. 161 (Kos.) [hereinafter 2010 JJC]; 2018 JUVENILE JUSTICE CODE [JUV. JUST.] (Kos.) [hereinafter 2018 JJC].

This section will first discuss the relevant statutory framework, including the reshuffling of prosecutorial and judicial posts, and then focus on the diversion procedure and its application. Criminal law in Kosovo is centralized through the national government. The courts, prosecutors, probation offices, and police are all employed by the national government of the Republic of Kosovo. The statutes relevant to children allegedly in conflict with the law are the 2018 JJC,<sup>79</sup> the Law on Courts,<sup>80</sup> the Criminal Code,<sup>81</sup> the Criminal Procedure Code,<sup>82</sup> the Law for Protection of Witnesses,<sup>83</sup> Law on Police,<sup>84</sup> and the Law on Mediation.<sup>85</sup> Diversion is primarily created through the 2018 JJC, which makes up the bulk of the section's discussion.<sup>86</sup>

The portions of these laws that pertain to juveniles were written to reflect international standards and norms, with the explicit incorporation of the Convention on the Rights of the Child in the Kosovo Constitution.<sup>87</sup> The laws also pull heavily from the Minimal Rules of the United Nations for Administration of Justice of Minors ("the Beijing Rules"), United Nations Instructions on Prevention of Delinquency of Minors ("the Riyadh Guidelines"), and United Nations Rules on Protection of Minors Deprived of Liberty.<sup>88</sup>

The 2018 JJC meets, if not exceeds, the expectations of the CRC in regard to diversion. Chapter IV of the 2018 JJC makes clear that diversion measures should be used "whenever possible" to promote rehabilitation and reintegration, which is language directly copied from CRC General Comment 10.<sup>89</sup> Further, as envisioned by the CRC, the law clearly delineates what charged offenses are divertible,<sup>90</sup>

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<sup>79</sup> 2018 JJC, *supra* note 78.

<sup>80</sup> LAW ON COURTS [L. CTS.] (Kos.).

<sup>81</sup> CRIMINAL CODE [CRIM.] (Kos.).

<sup>82</sup> CRIMINAL PROCEDURE CODE [CRIM. PRO.] (Kos.).

<sup>83</sup> LAW FOR PROTECTION OF WITNESSES [L. PROT. WITNESSES] (Kos.).

<sup>84</sup> LAW ON POLICE [L. POLICE] (Kos.).

<sup>85</sup> LAW ON MEDIATION [L. MEDIATION] (Kos.).

<sup>86</sup> 2018 JJC, *supra* note 78, at art. 21.

<sup>87</sup> CONSTITUTION OF KOSOVO, *supra* note 77 at art. 22(7); UNICEF, *supra* note 71, at 7.

<sup>88</sup> Qëndresa Ibra-Zariqi, *Summary of Laws that Protect Children's Rights in the Republic of Kosovo*, OAK FOUNDATION—MARIO PROJECT 23 (Jan. 2012), [http://tdh-europe.org/upload/document/5123/1411\\_Summary\\_Of\\_Laws\\_That\\_Protect\\_Children\\_original.pdf](http://tdh-europe.org/upload/document/5123/1411_Summary_Of_Laws_That_Protect_Children_original.pdf) (last visited Aug. 26, 2019).

<sup>89</sup> U.N. Comm. on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, ¶ 23, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007), available at: <https://www.refworld.org/docid/4670fca12.html> [hereinafter Comment 10].

<sup>90</sup> 2018 JJC, *supra* note 78, at art. 21.

giving the prosecutor or judge seeking diversion standards for when diversion applies.<sup>91</sup> The international standards are also reflected in the following ways: setting the minimum age of criminal responsibility at fourteen;<sup>92</sup> not discriminating legislatively against recidivists;<sup>93</sup> allowing for the child to admit responsibility;<sup>94</sup> having a range of measures, including social services and diversion;<sup>95</sup> requiring consent from the child or the parent;<sup>96</sup> and having any record of a criminal proceeding against a child—including diversion—kept confidential and automatically expunged at the age of twenty-one.<sup>97</sup> These protections make clear that the 2018 JJC was written with international and European standards and norms in mind.

Further, the 2018 JJC discerns between measurements and punishments based on age.<sup>98</sup> For children under the age of sixteen at the time the alleged crime is commissioned, only a “measure” may be enforced against them.<sup>99</sup> Measures include mediation,<sup>100</sup> education,<sup>101</sup> admonition by judge,<sup>102</sup> committal to a disciplinary center,<sup>103</sup> or intensive supervision.<sup>104</sup> Between the ages of sixteen and eighteen, juveniles can have a criminal punishment levied against them.<sup>105</sup> Punishments include fines, community work service, and incarceration.<sup>106</sup> The 2018 JJC even envisions some aspects of the code as applicable to those under the age of twenty-three.<sup>107</sup>

The legal structure of Kosovo’s juvenile diversion system is found in Articles 19, 20, and 21 of the 2018 JJC.<sup>108</sup> Article 19 merely

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91 CRC, *supra* note 6, at art. 40(3)(b); Comment 10, *supra* note 89, ¶ 27.

92 2018 JJC, *supra* note 78, at art. 8; CRC, *supra* note 6.

93 Comment 10, *supra* note 89, at ¶ 23; 2018 JJC, *supra* note 78, at art. 19.

94 2018 JJC, *supra* note 78, at art. 21; Comment 10, *supra* note 89, ¶ 27.

95 2018 JJC, *supra* note 78, at art. 20; CRC, *supra* note 6, at art. 40(3)(b); Comment 10, *supra* note 89.

96 2018 JJC, *supra* note 78, at art. 21; Comment 10, *supra* note 89, ¶ 27.

97 2018 JJC, *supra* note 78, at art. 18; CRC, *supra* note 6; Comment 10, *supra* note 89, ¶ 27.

98 *See generally* 2018 JJC, *supra* note 78, at ch. III.

99 2018 JJC, *supra* note 78, at art. 12.

100 *See generally id.* at ch. II.

101 *Id.* at art. 17.

102 *Id.* at art. 24.

103 *Id.* at art. 29.

104 *Id.* at art. 25-28.

105 2018 JJC, *supra* note 78, at art. 12.

106 *Id.*

107 *Id.* at art. 15, 16 and 100.

108 2018 JJC, *supra* note 78, at art. 141.

states that the purpose of diversion is to rehabilitate juveniles in conflict with the law to lower the chance of future recidivism,<sup>109</sup> while Article 21 sets the conditions for the use of diversion. There are four obligations that need to be met for a minor to be accepted into diversion: that the criminal offense for which the juvenile is convicted be punishable by a fine or imprisonment of less than three years, or that the crime was committed through negligence and death was not a result of the crime;<sup>110</sup> that the juvenile accepts responsibility;<sup>111</sup> that the juvenile is ready to “make peace” with the victim;<sup>112</sup> and that consent to diversion is given by the juvenile, parent, or guardian.<sup>113</sup> The decision to divert a juvenile offender is discretionary and may be made by either the prosecutor or a police officer (with the latter ability of the police officer being a recent addition in the 2018 JJC). At the time of research, judges were also allowed to divert a youth, but it was the norm that only the prosecutors recommended juveniles for diversion in Kosovo.<sup>114</sup> This Article does not consider the role of police in diversion, because there was not a procedure for this at the time of research.

Once a juvenile has consented to diversion, the prosecutor has sixteen enumerated diversion options from which to choose: (1) reconciliation between the juvenile and the victim; (2) reconciliation between the juvenile and his family; (3) monetary compensation; (4) compulsory school attendance; (5) acceptance of employment or professional training; (6) community work service; (7) traffic school; (8) psychological counseling; (9) charity activities; (10) charitable donation; (11) compulsory recreation activities; (12) counseling between families of juveniles; (13) refrained contact with people that are bad influences; (14) refrain from locations that are a bad influence; (15) abstaining from drugs and alcohol; or (16) a police warning.<sup>115</sup> These sixteen options can be used in any permutation, and they are administered by the Probation Service. If the juvenile fails to comply

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<sup>109</sup> *Id.* at art. 19.

<sup>110</sup> *Id.* at art. 21(1).

<sup>111</sup> *Id.* at art. 21(4.1).

<sup>112</sup> *Id.* at art. 21(4.2).

<sup>113</sup> *Id.* at art. 21(4.3).

<sup>114</sup> The only jurisdiction for which this was not true is Prizren. Interview with Kymete Kicaj, Judge, and Nazam Shero, Prosecutor, Prizren Mun. Court, in Prizren, Kos. (May 10, 2013).

<sup>115</sup> 2018 JJC, *supra* note 78, at art. 20(1.1)-(1.16). It is notable that the art. 20(1.9)-(1.16) are recent additions to the 2018 JJC, while art. 20(1.1)-(1.8) were all present in the 2010 iteration.

with his diversion sentence, then the prosecutor or judge is informed, and the criminal prosecution of the juvenile's case will continue.<sup>116</sup>

Beyond the 2018 JJC, judges and prosecutors saw structural changes to their role in the juvenile criminal system with the passage of the Law on Courts, effective December 2012. Specifically, the courts are now structured to have at least one judge and one prosecutor that deal solely with the juvenile criminal docket,<sup>117</sup> which is the first time that this type of specialization has been required by law. Previously, judges and prosecutors would either have dockets mixed with civil, adult criminal, and juvenile criminal cases, or some judges and prosecutors would, on their own volition, take as many juvenile cases as possible, creating a de facto specialized position.<sup>118</sup> At the time of field research, there were ten judges specializing in juvenile criminal issues throughout the country,<sup>119</sup> and at least one prosecutor had been given the juvenile docket in each of the regions; however, the Pristina region already had multiple prosecutors handling mostly juvenile cases,<sup>120</sup> and some regions, like Gjilan and Gjakova, were actively waiting for additional juvenile prosecutors.<sup>121</sup>

This restructuring has led to more juvenile-specific training of legal professionals. Starting in 2007, the Kosovo Judicial Institute ("KJI"), a private institution charged by the government to train mostly judges and prosecutors, started to work with the United Nations Children's Fund ("UNICEF") to create local trainers that would focus on juvenile criminal law.<sup>122</sup> In December 2012, eight trainers were officially certified to train other justice sector actors, like prosecutors,<sup>123</sup> and at the time of the author's research, there were only

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<sup>116</sup> *Id.* at art. 21(5).

<sup>117</sup> L. CTS., *supra* note 80, at art. 12, ¶ 4 ("The President Judge of the Basic Court shall also assign judges to departments to ensure the efficient adjudication of cases, and may temporarily reassign judges among branches and departments as needed to address conflicts, resolve backlogs, or ensure the timely disposition of cases.").

<sup>118</sup> Interview with Lire Morina, Prosecutor, in Peja, Kos. (Mar. 22, 2013).

<sup>119</sup> Kosovo Judicial Institute, *Të Dhënat Për Gjyqtarë Të Republikës Së Kosovës* (Kos.), May 2013 (on file with author). For the courts of first impression, there are two juvenile criminal justice-focused judges in Pristina and one in each of the six other regions. There are also two of these judges at the nation's sole appeals court, which has its seat in Pristina.

<sup>120</sup> Interview with Eliz Blakaj, Prosecutor, in Pristina, Kos. (May 8, 2013).

<sup>121</sup> Interview with Lavdim Krasniqi and Valon Jupa, Kosovo Judicial Institute, in Pristina, Kos. (Mar. 13, 2013).

<sup>122</sup> *Id.* This not only includes judges and prosecutors, but also probation services, social workers, and police.

<sup>123</sup> Kosovo Judicial Institute Conference on Juvenile Justice (Dec. 19, 2012).

eight prosecutors nation-wide certified by KJI on the topic of juvenile justice.<sup>124</sup>

There is one training session offered twice a year that discusses juvenile justice issues run by KJI, and it is attended by judges, prosecutors, and probation officials.<sup>125</sup> In 2013, this curriculum went through its first rewrite based on input from past participants and updates in the law.<sup>126</sup> This curriculum includes a focus on diversion and other alternatives to traditional prosecution.<sup>127</sup> In addition to the ongoing revisions to this curriculum, at the time KJI wanted to develop a second supplemental training curriculum for individuals that would build on the current training offered.<sup>128</sup> The new training is being created at the behest of prosecutors, who have expressed a need for more nuanced and hands-on training that is currently lacking in the KJI training.<sup>129</sup> These trainings must continue to evolve to meet the ever-growing demand from prosecutors for heightened specificity to practicing juvenile law in Kosovo.<sup>130</sup>

Once a prosecutor or judge diverts a child, the case is handed to the probation service, which administers all aspects of diversion from finding sites for community service and training, to orchestrating reconciliations, and to enforcement of those diversion measures.<sup>131</sup>

In all regions, the probation service works with local government agencies to create community work sites. However, some regions do not have the capacity to place children in traffic schools or psychological counseling due to a lack of funding and institutional options in those regions.<sup>132</sup> Prizren has had the most success in establishing partnerships with public and private entities to create

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<sup>124</sup> There are three such prosecutors in Pristina, two of them stationed in Gjilan and Prizren, and one in Peja. There used to be one juvenile justice specialized prosecutor in Ferizaj, but he had been moved to the serious crimes docket when the research for this article was conducted. There are currently no juvenile-specialized prosecutors in Mitrovica or Gjakova. *See supra* note 119 and accompanying text.

<sup>125</sup> *See* Interview with Eliz Blakaj, *supra* note 120.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See* Interview with Kymete Kicaj and Nazam Shero, *supra* note 114; Interview with Eliz Blakaj, *supra* note 120.

<sup>130</sup> Kosovo Judicial Institute, *Working Program 2013*, (Kos.), 2012.

<sup>131</sup> Interview with Armen Mustafa, Director of Alternative Sanctions, Probation Service, in Pristina, Kos. (Mar. 8, 2013).

<sup>132</sup> *See* Interview with Kymete Kicaj and Nazam Shero, *supra* note 114; Interview with Lire Morina, *supra* note 118; Interview with Eliz Blakaj, *supra* note 120. *See also* Interview with Sahide Gashi, Prosecutor, in Peja, Kos. (Mar. 22, 2013).

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diversion sites for community work service and traffic school.<sup>133</sup> Similarly, in Ferizaj, the Probation Service worked with a local driving school to provide traffic school as a diversion measure free of charge.<sup>134</sup> Both in Prizren and Ferizaj, these relationships were created at the local level, where the Probation Service actively pursued organizations with which to partner. Peja, by comparison, has struggled to create diversion sites and opportunities, leaving many possible diversion options unused.<sup>135</sup>

There is great hope regarding the growth and evolution of the laws and practices of juvenile diversion. While the laws are developmentally appropriate to the needs of the child and many stakeholders are showing improved capacity, the data reflects that there is still room for improvement to create better outcomes for juveniles in conflict with the law.

*C. Data Shows Improvement and Room for Growth*

During the process of developing a robust framework for juvenile criminal law, Kosovo has increased its use of juvenile diversion not only as a punitive measure, but also as a strategy of intervention. Even with this increased use of diversion programs, the data shows that diversion is not being used uniformly in type or by jurisdiction. This section also argues that diversion could and should be used more across the country.

Kosovo is increasing its use of diversion, which is reflected in both the number of total youth diverted and the percentage of youth diverted after arrest. Since 2008, the percentage of the arrested youth that are diverted has jumped from six percent of cases to fifteen percent.

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<sup>133</sup> Interview with Kymete Kicaj and Nazam Shero, *supra* note 114.

<sup>134</sup> Interview with Burim Cerimi, Prosecutor, in Ferizaj, Kos. (Mar. 2013).

<sup>135</sup> Interview with Lire Morina, *supra* note 118.

*Figure 1*

<b>Prosecuted vs. Diverted Cases</b>			
Year	Total Cases Resolved <sup>136</sup>	Total Cases Diverted <sup>137</sup>	Percent Diverted
2013	2,131 <sup>138</sup>	321 <sup>139</sup>	15.06%
2012	2,438 <sup>140</sup>	317 <sup>141</sup>	13.00%
2011	1,740 <sup>142</sup>	255 <sup>143</sup>	14.65%
2010	2,033 <sup>144</sup>	243 <sup>145</sup>	11.95%
2009	2,553 <sup>146</sup>	234 <sup>147</sup>	9.16%
2008	2,757 <sup>148</sup>	167 <sup>149</sup>	6.05%

<sup>136</sup> This number for 2008 through 2013 represents the total number of cases resolved by the municipal and district prosecutor offices, not the number of new proceedings received by them. The reason for this distinction is due to the backlog of cases. For example, in 2008, the prosecution service received 2,059 criminal reports, yet there were 1,268 cases left unresolved by the end of 2007. This means that of 3,327 disposable cases, 2,757 of them were duly disposed by the prosecution service in 2008 through any means available. The diversion numbers collected for 2008 would reflect the total cases disposed of during 2008, whether or not the case was originally brought in 2007.

<sup>137</sup> This number is less ambiguous and cited directly from the Probation Service's numbers for that given year. That being said, the Probation and Prosecution Services differ on the number of the youth diverted in any given year. For the sake of consistency, this Article relies on the Probation Service's numbers, except for 2011.

<sup>138</sup> Prosecution Service of Kosovo, *Prosecutor Annual Report 2013* (Kos.) 2014, at 73.

<sup>139</sup> *Id.*

<sup>140</sup> Prosecution Service of Kosovo, *Prosecutor Annual Report 2012* (Kos.) 2013, at 5.

<sup>141</sup> Kosovo Probation Service, *Bulletin No. 8* (Kos.) 2013, at 85.

<sup>142</sup> Prosecution Service of Kosovo, *Prosecutor Annual Report 2011* (Kos.) 2012, at 53.

<sup>143</sup> *Id.* at 54. This number is in drastic conflict with the Kosovo Probation Service, *Bulletin No. 7* (Kos.) 2012, at 21, which puts the number at 458 (or 26.32% of cases). This Article utilizes the Prosecution Service's number for 2011, because it reflects the incremental increase of the use of diversion in Kosovo. There was no reason given for why the two agencies' numbers were so divergent.

<sup>144</sup> Prosecution Service of Kosovo, *Prosecutor Annual Report 2010* (Kos.) 2011, at 51.

<sup>145</sup> Kosovo Probation Service, *Bulletin No. 6* (Kos.) 2011, at 44.

<sup>146</sup> Prosecution Service of Kosovo, *Prosecutor Annual Report 2009* (Kos.) 2010, at 43.

<sup>147</sup> Kosovo Probation Service, *Bulletin No. 5* (Kos.) 2010, at 37.

<sup>148</sup> Prosecution Service of Kosovo, *Prosecutor Annual Report 2008* (Kos.) 2009, at 37.

<sup>149</sup> Kosovo Probation Service, *Bulletin No. 4* (Kos.) 2009, at 33.

However, the eight enumerated types of diversion are applied selectively.<sup>150</sup> By and large, juvenile-victim reconciliation is the most popular form of diversion, which accounts for 46% of all diversions between 2008-2011. In a distant second place is community work service, making up nearly 25%. The remaining six options, as discussed in the next section, constitute between 1% and 10% of total diversions.<sup>151</sup> The selective use of these other six options is largely due to the dearth of sites, interest from stakeholders, and funding.

Moreover, diversion is not used equally across Kosovo. Although the available data does not include a regional breakdown for every year of available data, regional data was collected in 2012.<sup>152</sup> Prizren made up 173 of the 317 total diversions in Kosovo, or 54.5% of all diversions.<sup>153</sup> This illustrates Prizren's commitment to the diversion process, while other jurisdictions, notably Pristina with 67, lagged behind by proportion of population and caseload the same year.<sup>154</sup> In 2012, Peja had more diversions than Pristina with 71.<sup>155</sup>

Figure 2.1<sup>156</sup>

Year	Reconciliation: Juvenile- Victim	Reconciliation: Juvenile- Family	Restitution	Mandatory School Attendance
2013	N/a	N/a	N/a	N/a
2012	N/a	N/a	N/a	N/a
2011 <sup>157</sup>	298	2	19	26
2010 <sup>158</sup>	59	0	18	21
2009 <sup>159</sup>	81	3	15	11

<sup>150</sup> See *infra* Figures 2.1 & 2.2.

<sup>151</sup> See *infra* Figures 2.1 & 2.2.

<sup>152</sup> Kosovo Probation Service, *Bulletin No. 8, supra* note 141, at 85.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Note that Figure 2.1 and 2.2 have been divided for formatting reasons.

<sup>157</sup> Kosovo Probation Service, *Bulletin No. 8, supra* note 141, at 83. The total of diversion measures provided this year is different than the total number from 2011 used in the preceding chart. This discrepancy is discussed in footnote 143. The Prosecution Service does not publish data regarding the type of diversion measure used, just whether or not a diversion measure was used.

<sup>158</sup> Kosovo Probation Service, *Bulletin No. 8, supra* note 141, at 44.

<sup>159</sup> *Id.* at 37.

2008 <sup>160</sup>	68	6	44	29
Total	506	11	96	87

*Figure 2.2*

Year	Employment or Training	Traffic School	Psychological Counseling	Community Work Service
2013	N/a	N/a	N/a	N/a
2012	N/a	N/a	N/a	N/a
2011 <sup>161</sup>	0	17	11	85
2010 <sup>162</sup>	2	48	8	87
2009 <sup>163</sup>	3	13	8	100
2008 <sup>164</sup>	2	10	4	4
Total	7	88	31	272

Beyond how diversion is currently being applied, diversion can and should be used more generally. While the data backs up this conclusion as discussed below, anecdotally, one of the social workers at the Lipjan Detention Facility, Kosovo's only child detention facility, opined that 20% of their incarcerated population could be better suited in the community and not incarcerated.<sup>165</sup>

The overall data (as shown in Figures 1 and 2 above) shows the growing use of diversion in Kosovo by prosecutors. However, the numbers also reflect that the types of diversion used and where they are being used varies. Additionally, they also show that the number of diversion measures given in the past five years may fall short of the number of possibly divertible cases prosecutors received.

According to prosecutors, they would not use diversion measures because of a lack of resources and sites,<sup>166</sup> a personal belief that the

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<sup>160</sup> *Id.* at 33.

<sup>161</sup> Kosovo Probation Service, *Bulletin No. 8*, *supra* note 141, at 83.

<sup>162</sup> *Id.* at 44.

<sup>163</sup> *Id.* at 37.

<sup>164</sup> *Id.* at 33.

<sup>165</sup> Interviews with Social Workers, Lipjan Detention Facility, Kos. (Mar. 25, 2013).

<sup>166</sup> Interview with Sahide Gashi, *supra* note 132; Interview with Kymete Kicaj and Nazam Shero, *supra* note 114.

measure was the wrong choice,<sup>167</sup> or concern that the measure would increase the youth's contact with the outside world.<sup>168</sup>

A lack of resources, including funding and sites dedicated to diversion, was cited as a hurdle to utilizing community work service, such as in Peja and Ferazaj, where there was a lack of diversion program sites for children to carry out their community work service.<sup>169</sup> Other jurisdictions lamented the lack of mental health services. As discussed earlier, Prizren and Ferazaj have worked to overcome these hurdles with public-private partnerships.<sup>170</sup> However, this model has not been replicated in all jurisdictions.

Beyond having sites for diversion, there are also concerns regarding the access to diversion for poor and rural children. Many children outside of city centers struggle to get to the court, social and educational services, or work sites. The average income of a Kosovar citizen in 2012 was €431 a month, with even lower figures in the rural regions.<sup>171</sup> In multiple regions, it was considered cost prohibitive to require juvenile diversion program participants to purchase a bus ticket to get to court or sanction sites, like community work service.<sup>172</sup> At the time of the author's research, no jurisdiction was using bus tokens or other coupon mechanisms to defray these costs.

Prosecutors also cited personal beliefs as why they do not utilize certain diversion measures. Monetary restitution and community work service were seen as more harmful than beneficial. For example, prosecutors in Ferazaj and Gjilan voiced concern over the morality of obligating uncompensated labor.<sup>173</sup> It seemed irrelevant to these prosecutors that the restitution was theoretically a repayment to society for the child's action. Restitution was avoided because

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<sup>167</sup> Interview with Rasim Rasimi, Appeals Judge, in Pristina, Kos. (Mar. 27, 2013); Interview with Burim Cerimi, *supra* note 134; Interview with Lire Morina, *supra* note 118.

<sup>168</sup> Interview with Isuf Sadiku, Prosecutor, in Gjilan, Kos. (Dec. 15, 2013).

<sup>169</sup> Interview with Lire Morina, *supra* note 118; Interview with Isuf Sadiku, *supra* note 168.

<sup>170</sup> *See supra* Part III, Section B.

<sup>171</sup> KOSOVO AGENCY OF STATISTICS, LEVEL OF WAGE IN KOSOVO, 2012-2016 (Nov. 2017), <http://ask.rks-gov.net/en/kosovo-agency-of-statistics/add-news/level-of-wage-in-kosovo-2012-2016> (explaining that the average monthly income increased about 20% between 2012 and 2016 to €519).

<sup>172</sup> *See* Interview with Kymete Kicaj and Nazam Shero, *supra* note 114; Interview with Lire Morina, *supra* note 118; Interview with Eliz Blakaj, *supra* note 120; Interview with Sahide Gashi, *supra* note 132; Interview with Burim Çerimi, *supra* note 134.

<sup>173</sup> Interview with Burim Çerimi, *supra* note 134; Interview with Isuf Sadiku, *supra* note 168.

prosecutors believed either that it was compounding the high level of poverty in the nation,<sup>174</sup> or that it was an unfair to burden an already struggling family.<sup>175</sup>

In Peja and Ferazaj, interviewees declined to use community work service because it would ostensibly increase the child's contact with the community.<sup>176</sup> In fact, some Kosovar prosecutors believe that international standards and norms require fewer people involved in the child's criminal proceeding or measure.<sup>177</sup> These views are more restrictive regarding viable diversion measures than international standards and norms intend. Community work service does not contravene international standards in regard to the amount of social contact that the child has on account of their delinquent act, as international standards clearly name community work service and vocational training as suitable diversion measures.<sup>178</sup> As it complies with accepted international standards, the practice of community work service should be considered for inclusion in the updated KJI training, so long as reasonable efforts are made to protect and rehabilitate the child.

Beyond the anecdotal reasons to not use a particular measure, disparity in the frequency of the measures used is reflected in the data. As already discussed in relation to the table above,<sup>179</sup> juvenile-victim reconciliation is the most utilized diversion measure at about 50% of all applied measures; community work service makes up 25%. The rest fall between 10.5%—restitution 8.7%, traffic school 8%, mandatory school attendance 7.9%, psychological counseling 2.8%, juvenile-family reconciliation 1%, and employment or training 0.6%.

While community work service is the second most commonly used measure, it is a distant second from the favored measure of reconciliation. Restitution is ranked usually in the bottom half of utilized measures in regard to frequency, which is surprising because three of the top four divertible offenses charged against Kosovar youth

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<sup>174</sup> Interview with Burim Çerimi, *supra* note 134; Interview with Isuf Sadiku, *supra* note 168.

<sup>175</sup> Interview with Lire Morina, *supra* note 118.

<sup>176</sup> Interview with Sahide Gashi, *supra* note 132; Interview with Burim Çerimi, *supra* note 134; Interview with Isuf Sadiku, *supra* note 168.

<sup>177</sup> Interview with Sahide Gashi, *supra* note 132; Interview with Burim Çerimi, *supra* note 134; Interview with Isuf Sadiku, *supra* note 168.

<sup>178</sup> CRC, *supra* note 6, at art. 40(3)(b); The Beijing Rules, *supra* note 9, ¶ 11.

<sup>179</sup> See *supra* Figures 2.1 & 2.2.

are property crimes,<sup>180</sup> which tend to create direct monetary damage to the victim. This indicates a clear area where diversion could be better utilized.

To overcome the underutilization and lack of institutional support of both restitution and (less so) community work service, KJI, trainers, and practitioners should promote restitution and community work service as alternatives to one another, as is the current process utilized in Peja.<sup>181</sup> For example, if a child steals €20 worth of a goods from a store and is caught and charged with theft and subsequently offered diversion, the prosecutor could offer reconciliation and obligate €20 in restitution (assuming the stolen product was not recovered) or alternatively offer a number of community work service hours that would be equivalent to €20 at a market rate. At this juncture, the child and his family would have the opportunity to decide what is best for their situation.

Incorporating this process would yield multiple benefits, one of them being incorporation of the child into the sentencing process as desired by the Council of Europe and the CRC.<sup>182</sup> Furthermore, this arrangement would mesh with the locally held beliefs that labor should not go uncompensated. Additionally, no one besides the manager of the community work service site needs to know the reason the child is working, which would diminish the concern that community work service increases negative contact with the community. Using restitution and community work service as alternatives to one another would both increase the use of each diversion program and maximize participation of the diverted youth.

Although this is just a single example, it illustrates that creativity in using certain diversion measures as alternatives to other diversion measures can overcome many of the concerns regarding both restitution—such as indigence of the offender's family—and community work service—such as working for free or increasing negative community contact. By employing tactics of this kind, there is a greater chance that these measures will be utilized by prosecutors and judicial officers, and thus will create better outcomes for participating youth.

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<sup>180</sup> See Kosovo Probation Service, *Bulletin No.5*, *supra* note 147, at 9; Kosovo Probation Service, *Bulletin No.4*, *supra* note 149, at 11; Kosovo Probation Service, *Bulletin No.6*, *supra* note 145, at 30; Kosovo Probation Service, *Bulletin No.7*, *supra* note 143, at 18.

<sup>181</sup> Interview with Lire Morina, *supra* note 118.

<sup>182</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, *supra* note 36.

Due to the unequal use of diversion across Kosovo, increasing the use of diversion will require a focus on local jurisdictions that require extra help to implement and operate programs. The region of Mitrovica is a particularly helpful example, as it has not diverted a single case. This could be for a number of reasons: prosecutors not believing in diversion as an approach to juvenile justice;<sup>183</sup> transfer of locations due to threats of violence in the more politically-turbulent north of Kosovo;<sup>184</sup> the Kosovar government's tenuous grasp over the contested north of the country;<sup>185</sup> or because their current courthouse lacks space for even basic functions, like holding trials.<sup>186</sup> Whatever the case, more should be done to ascertain the reason or reasons for the failure to adopt juvenile diversion programs in the Mitrovica region, and the region's case backlog alone should be enough motivation to start using diversion. Only once those problems are accurately known can solutions begin to hatch for the Mitrovica region.

#### IV. RECOMMENDATIONS TO CONTINUE IMPROVING JUVENILE DIVERSION

Using international standards and norms, local laws, the interviews conducted, and government data, this article evaluates and provides recommendations to Kosovo's juvenile diversion system. This article makes two specific recommendations to accomplish these goals: (1) expand Article 20 to allow for growth and local ownership over the diversion process; and (2) create a higher standard for a judge or prosecutor to offer a diversion measure.

##### *A. Update the Juvenile Justice Code to Improve Diversion Options*

As discussed in the preceding section, the 2018 JJC reflects modern, international standards and norms envisioned by United Nations and European frameworks; however, there are opportunities for improvement that should be considered during the legislative

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<sup>183</sup> Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121.

<sup>184</sup> *District and Municipal Court moved from Mitrovica North to Vushtrri*, New Kosova Report (Mar. 5, 2008), <http://newkosovareport.com/20080305701/Society/district-and-municipal-court-moved-from-mitrovica-north-to-vushtrri.html>.

<sup>185</sup> *Clashes in Kosovo's Mitrovica over Bridge Blockade*, BBC (June 23, 2014), <https://www.bbc.com/news/world-europe-27969297> [<https://perma.cc/57JJ-UJ8U>].

<sup>186</sup> Interview with John Smibert, *supra* note 4.

update to the JJC to increase local ownership of the diversion process and enhance protection of children in conflict with the law.

1. Proposal to Broaden Article 20 to Allow for More Types of Diversion Measures

In its current form, Article 20 limits the scope of diversion options available. The Article's first recommended statutory change would create flexibility in the type of diversion measures that can be offered, which will ostensibly provide better-tailored outcomes for children and increase local ownership over diversion.

Currently, Article 20's enumeration of diversion measures is an exhaustive list. This list includes reconciliation, monetary compensation, school attendance, employment or training, community work service, traffic school, and psychological counseling.<sup>187</sup> All of these options provide a rehabilitative approach that will help a child facilitate his post-arrest integration into Kosovar society; however, Article 20, while expanding the types of diversion offered in 2018, is a finite list and does not allow for the creation of new types of diversion measures offered.

The interviews conducted for this research demonstrate mixed feelings on whether the eight enumerated options in the 2010 JJC were sufficient for diversion in Kosovo, with the most illustrative interview from a judge and prosecutor in Prizren.<sup>188</sup> It is generally accepted in Kosovo that the region of Prizren has the most developed diversion system in the country,<sup>189</sup> and this belief is reinforced by empirical data, as over half of the country's diversions in 2012—the most recent year of regional data—were from the Prizren region.<sup>190</sup> In Prizren, more than elsewhere, the interviewees felt restrained by having only eight enumerated diversion options at their disposal.<sup>191</sup> Further research is needed to know current sentiments after the expansion of diversion options in the 2018 JJC.

Even so, Prizren's experience remains important due to the sheer number of diversion cases that it has processed. Through Prizren's experimentation, it was the first region to challenge the restraints of the current statute. It would allow jurisdictions to evolve and expand

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<sup>187</sup> 2018 JJC, *supra* note 78, at art. 20.

<sup>188</sup> See Interview with Kymete Kicaj and Nazam Shero, *supra* note 114.

<sup>189</sup> Interview with Ardian Klaiqi, Children Protection Officer, UNICEF, Kos. (Dec. 9, 2013).

<sup>190</sup> Kosovo Probation Service, *Bulletin No. 8*, *supra* note 141, at 85.

<sup>191</sup> Interview with Kymete Kicaj and Nazam Shero, *supra* note 114.

diversion options based on local need, which can improve outcomes. To increase the flexibility of the statute, the recommendation could look like the following (note that additions are in *italics*):

### **Article 20**

#### Types of Diversity Measures

1. The diversity measures that may be imposed on a minor offender are: [ . . . ]

*1.17 A community-based program that is based on best practices and incorporates rehabilitative and pro-social processes that help the minor participant learn from their contact from the criminal justice system and lower the likelihood that the minor will recommit a crime.*

This addition to Article 20 of the 2018 JJC would allow the statute to evolve for local stakeholders to take ownership of diversion. This is what the Tokyo and Beijing Rules, alongside the European Economic and Social Committee, envision.<sup>192</sup>

First, this change allows for evolution of Kosovo's diversion system. As diversion gains popularity and acceptance within Kosovar juvenile jurisprudence, it is foreseeable that other regions will naturally agree with the restriction felt in Prizren. In taking Prizren's experience into consideration, the next logical step to advance Kosovo's diversion system is to allow more local discretion in developing and applying new diversion measures. Narrowly prescribing the eight enumerated options will not allow the development of new diversion mechanisms, which will stagnate positive advancement of the juvenile justice system. In exemplifying a missed opportunity, the current law does not allow for substance abuse treatment as a diversion measure that could provide a juvenile offender with treatment—even if that child would be better suited by treatment than a full criminal proceeding.

Furthermore, Article 20, even after its expansion in 2018, does not incorporate the participation of the youth community's involvement in solving juvenile delinquency, contrary to existing movements calling for youth involvement in the juvenile justice process and arguing that lower recidivism can be achieved by utilizing

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<sup>192</sup> See The Tokyo Rules, *supra* note 9; The Beijing Rules, *supra* note 9; *Opinion of the European Economic and Social Committee*, *supra* note 35.

positive peer pressure.<sup>193</sup> The Council of Europe Guidelines<sup>194</sup> discussed earlier in this article favor these peer methods, and actively advocate for member states to move in this direction.<sup>195</sup> Currently, the prohibitive statutory framework in Kosovo does not provide any form of peer-to-peer diversion, as it is limited to the eight circumscribed measures.

As discussed in the Council of Europe's Guidelines for Child Friendly Justice, the goal of a child-friendly justice system should be to incorporate criminal justice system-involved youth into the process, not merely pull them along or exclude them, and this ethos is reflected in statements by the European Economic and Social Committee.<sup>196</sup> The proposed language to Article 20 would open the door for youth to be involved in the justice system, thus enhancing the potential effectiveness of diversion programs generally and aligning Kosovo's diversion system more closely with international guidelines.

Second, the addition to Article 20 could allow for local ownership over the diversion process. As reflected in multiple interviews, there was frustration over the fact that international organizations and foreign "experts" would parachute into Kosovo, offer up an aspect of their home legal system, and then leave, with these "experts" subsequently returning to Kosovo or receiving updates astounded that certain concepts ubiquitous in their domestic legal system did not take root in Kosovo.<sup>197</sup> During these interviews, this phenomenon took on the phrase "cut and paste fatigue."<sup>198</sup> For a specific legal doctrine to take root, there must be local ownership over the laws by those affected by and those expected to enforce them. This addition to Article 20 could allow for local ownership in a way the statute currently does not. Instead of Kosovo's diversion system being cut and pasted by international actors,<sup>199</sup> this provision will offer local

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<sup>193</sup> Jason Tashea, *Youth Courts International: Adopting an American Diversion Program Under the Convention on the Rights of the Child*, 15 OR. REV. INT'L L. 141 (2013).

<sup>194</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, *supra* note 36.

<sup>195</sup> Eur. Consult. Ass., *supra* note 27.

<sup>196</sup> *Opinion of the European Economic and Social Committee*, *supra* note 35, at C 110/75.

<sup>197</sup> Interview with Qerim Qerimi, Law Professor, Univ. of Pristina, in Pristina, Kos. (2013).

<sup>198</sup> *Id.*

<sup>199</sup> The irony of the author, being American and recommending this idea to the Kosovars, is not lost on the author; however, the lack of specificity of this

stakeholders, like the judge and prosecutor in Prizren, the opportunity to work with local organizations like the Peer Education Network based in Pristina or UNICEF Kosovo, to create programs and alternatives that are distinctly Kosovar while still rehabilitating children in conflict with the law. This is important for the development of the juvenile criminal justice system and its actors, and it is simultaneously congruent with international standards.<sup>200</sup>

Last, this addition to Article 20 would allow for more experimentation from juvenile justice actors in Kosovo. One complaint from those tasked with training judges and prosecutors was the lack of creativity among prosecutors in regard to using diversion measures.<sup>201</sup> In real terms, this meant that, at the time of research, the eight options already available in the 2010 JJC were not being used to their full extent, a phenomenon that is supported by empirical data (see section III(C)). More research must be done following the expansion to sixteen options under the 2018 JJC to determine if these new options are also being used to their full extent. Victim-offender reconciliation is by far the most used, while other options are not used to the same degree for a number of reasons including funding (traffic school), access (counseling), and culture clash (community work service).<sup>202</sup> Allowing for a greater level of flexibility for judicial officials and state prosecutors to craft diversionary remedies will bolster local ownership, thus creating a more robust and effective diversion system that is generally more accepted by the local population and allowing juvenile rehabilitation to begin sooner by avoiding the long waits in Kosovo's backlogged courts.<sup>203</sup> This

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recommendation does not codify his views as an American in Kosovo, but is rather meant to initiate discussion and allow local views on diversion to take root.

<sup>200</sup> The Tokyo Rules, *supra* note 9, ¶ 8.2.

<sup>201</sup> Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121.

<sup>202</sup> Similar to work the author did in post-communist Armenia, prosecutors were hesitant to make people work for free due to cultural issues relating to their communist "hangover," where government-imposed labor had a different context. Interview with Valon Murati, Dir., Univ. of Pristina Human Rights Ctr., in Kos. (March 27, 2013); Interview with Lulzim Beqiri, Dir., European Integration and Pol'y Coordination for the Ministry of Justice in Kos. (Dec. 26, 2012). Further, due to the high poverty and unemployment level, prosecutors are weary to impose further economic hardship on the families of these child offenders. The problems discussed in this footnote are tied back to the idea that the JJC is not a Kosovar document, but is rather an international document, and this lack of local ownership hinders the implementation of options already available to prosecutors and judges.

<sup>203</sup> One of Prizren's expressed reasons for utilizing diversion was due to court backlog, especially amongst juvenile cases. *See* Interview with Lire Morina, *supra* note 118.

addition coupled with the heightened standard discussed below in subsection two would better protect children and increase system efficiency and local ownership.

## 2. Limiting the Phenomena of Net-Widening

Currently, prosecutors need not intend to prosecute a child before recommending a diversion measure, which could lead to an inappropriate use of diversion. The standard for seeking diversion should be contingent upon whether a prosecutor intends to initiate a criminal prosecution, which would protect youth from the net-widening effect that diversion can sometimes create.<sup>204</sup>

Broadly speaking, net-widening is a phenomenon where informal measures, like diversion, are used at a higher rate without a simultaneous decrease in the rate of formal charging, thus creating a net increase in system contact for children. Diversion should not be treated as the alternative to doing nothing; without the intent to prosecute, diversion should not be considered. In such cases, release should be favored to diversion. This standard would both crimp net-widening, as well as meet the expectations of the CRC, Beijing Rules, and Chapter IV of the 2018 JJC, which, as discussed earlier, aim to limit children's contact with the juvenile justice system.<sup>205</sup> As the use of diversion continues to grow, it will be important to create a standard that ensures diversion programs are being used for children that otherwise would face a trial. Without such a standard, there is no check on prosecutors or judges from using diversion inappropriately.

Currently, Kosovar law allows for diversion, but the law does not require the prosecutor to have a valid case against the youth before recommending diversion. The existing statutory criteria for diversion in Kosovo evaluate the age of the child, the type of offense charged, acceptance of responsibility by the child, and the child's consent.<sup>206</sup> None of these standards take into account whether or not the prosecutor has an intent to formalize the child's proceedings by charging him or her.

The reason this standard may be necessary in Kosovo is reflected most clearly by the modus operandi of a prosecutor in Gjilan, who stated that he would apply a formal diversion procedure by having a

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<sup>204</sup> Peter Carrington & Jennifer Schulenberg, *Structuring Police Discretion: The Effect of Referrals to Youth Court*, 19 CRIM. J. POL'Y REV. 349, 357 (2008).

<sup>205</sup> CRC, *supra* note 6; The Beijing Rules, *supra* note 9; 2018 JJC, *supra* note 78, at ch. IV.

<sup>206</sup> 2018 JJC, *supra* note 78, at art. 21.

diversion-eligible juvenile write down an apology to the victim.<sup>207</sup> The 2018 JJC does not require this, nor is there a defense advocate present during the child's decision to admit guilt and apologize.<sup>208</sup> Where diversion is used even though the prosecutor had no intention of prosecuting is an example of net-widening, and raises procedural justice questions by not having defense counsel present. Avoiding outcomes as described in Gjilan would be in line with the CRC and best practices; an ideal juvenile justice system should not be looking to increase its contact with children, but to minimize it.<sup>209</sup>

Creating such a standard would require the prosecution to show they intend to engage in a formal criminal proceeding in lieu of diversion. An example of additional language could be formulated in a similar way to the italics in 2.1 below:

#### **Article 21(2)**

##### **Conditions for the Imposition of Diversity Measures**

2. The conditions for the imposition of a diversion measure are:

*2.1 That the prosecutor or judge proposing the diversity measure intends to formalize the proceeding in the alternative to diversion;*

2.2 Acceptance of responsibility by the minor for the criminal offense;

2.3 Expressed readiness by the minor to make peace with the injured party; and

2.4 Consent by the minor, or by the parent, adoptive parent or guardian on behalf of the minor, to perform the diversion measure imposed.<sup>210</sup>

This addition to the JJC would improve procedural protections for children that may have been offered diversion even though the prosecutor never felt the need to prosecute. As the use of diversion alternatives increases in Kosovo, a provision like this protects diversion from being a dumping ground for imperfect cases or, even worse, innocent children.

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<sup>207</sup> Interview with Isuf Sadiku, *supra* note 168.

<sup>208</sup> *Id.*

<sup>209</sup> The Beijing Rules, *supra* note 9, ¶ 1 (Commentary).

<sup>210</sup> JUV. JUST., *supra* note 78, at art. 21.

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*B. Improve Training of Defense Advocates and Judges to Increase the Use of Diversion*

Beyond making the 2018 JJC more flexible, it is important that Kosovo continue to increase the core competencies of advocates and judges in regard to juvenile justice and diversion. While there have been huge strides made by advocates around Kosovo, there is a clear need to include defense advocates into trainings and increase the judiciary's awareness of their statutory role in regard to diversion.

*1. Defense Advocates are Falling Behind in Training, Raising Doubts about Competency*

The increased use of diversion in Kosovo is primarily a prosecutor-driven phenomenon, which can be partially attributed to better trainings and greater job stability and role continuity amongst prosecutors tasked with the juvenile docket.<sup>211</sup> Although major strides have been made by prosecutors regarding juvenile diversion, defense advocates are being left out of the trainings and this needs to change.<sup>212</sup>

Diversion measures as a percent of youth offenses processed in Kosovo have increased since 2008, and some stakeholders interviewed by the author agreed that the increased training offered by the KJI led to a better understanding of the law and thus a wider application of diversion.<sup>213</sup> In all of the interviews conducted by the author for this article, prosecutors, judges, and court administration officials spoke about juvenile justice reflecting a rehabilitative approach. This increased acceptance of diversion and international standards suggests the success and reach of KJI's trainings and others offered to advocates in Kosovo. One sign of this growing reach was in the winter of 2012 when the first eight trainers of trainers were certified,<sup>214</sup> marking the first time Kosovo has had institutional, domestic trainers for juvenile justice legal issues. Having domestic trainers, as opposed to international experts that have not practiced in Kosovo, is a major boon to new child advocates, as they can rely on

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<sup>211</sup> See Interview with Burim Cerimi, *supra* note 134; Interview with Rasim Rasimi, *supra* note 167; Interview with Isuf Sadiku, *supra* note 168; Interview with Ardian Klaiqi, *supra* note 189; Interview with Armen Mustafa, *supra* note 131.

<sup>212</sup> See Interview with Yli Zekaj, Executive Director of the Kosovo Chamber of Advocates, in Pristina, Kos. (Apr. 10, 2013).

<sup>213</sup> See Interview with Armen Mustafa, *supra* note 131; Interview with Burim Cerimi, *supra* note 134; Interview with Ardian Klaiqi, *supra* note 189; Interview with Isuf Sadiku, *supra* note 168.

<sup>214</sup> See Kosovo Judicial Institute Conference, *supra* note 123.

the trainers' in-depth knowledge of the Kosovar criminal justice system in tandem with highly-specialized knowledge of international juvenile justice standards.

Beyond institutionalizing trainers, there is opportunity for greater continuity amongst the practitioners themselves. One complaint voiced by juvenile justice stakeholders in Kosovo was the high turnover among prosecutors focusing on children in conflict with the law.<sup>215</sup> In different regions, individuals would provide anecdotes of prosecutors garnering a few years' experience before being transferred to a different practice area or simply quitting the prosecution sphere and finding different work.<sup>216</sup> The new Law of the Courts will create stability and need for prosecutors with a juvenile focus, and many believe this will increase retention and thus increase the prosecutors' ability to gain expertise in the area of juvenile criminal law.<sup>217</sup> These prosecutors, and the justice system generally, will ostensibly benefit from the more in-depth training discussed as their job positions would be institutionalized and made stable.

On account of these and other changes, both the data collected and interviews conducted show that prosecutors are making great strides in regards to the development of juvenile justice in Kosovo. By comparison, defense advocates are less aware of those reforms, in part because they are not being included in trainings.<sup>218</sup> This leaves defense advocates well short of the competency standards envisioned by the CRC.

At the 2012-2013 KJI juvenile justice trainings, not a single delegate attended from the defense community or the Chamber of Advocates.<sup>219</sup> While KJI says they have invited the defense advocate community—in the form of the Chamber of Advocates—to trainings on juvenile justice, they have never attended.<sup>220</sup> This was contrary to direct informal testimony made by the director of the Chamber of Advocates, who stated that his office had never received an invitation

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<sup>215</sup> Interview with Armen Mustafa, *supra* note 131; Interview with Qëndresa Ibra-Zuriqi, Senior Office of Children's Rights, Office of the Prime Minister (Kos.) (Dec. 18, 2012); Interview with Yli Zekaj, *supra* note 212.

<sup>216</sup> Interview with Armen Mustafa, *supra* note 131; Interview with Qëndresa Ibra-Zuriqi, *supra* note 215; Interview with Yli Zekaj, *supra* note 212.

<sup>217</sup> L. CTS., *supra* note 80, at art. 2(1.3); Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121.

<sup>218</sup> Interview with Burim Çerimi, *supra* note 134; Interview with Rasim Rasimi, *supra* note 167.

<sup>219</sup> See Kosovo Judicial Institute Conference, *supra* note 123.

<sup>220</sup> Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121.

to these trainings.<sup>221</sup> Improvement needs to be made to train and involve defense advocates in reform and increase the use of diversion generally.

Including the defense community in juvenile justice and diversion trainings is a necessity. The consequences of this shortcoming is well-illustrated by an anecdote given to the author by a prosecutor: during one informal proceeding, the juvenile defense attorneys were so poorly trained in juvenile justice proceedings that when the prosecutor in question had proposed an educational diversion measure so that the child could avoid criminal prosecution, the child's defense advocate countered the proposal with a harsher punitive measure.<sup>222</sup>

At the time of the author's research, the Chamber of Advocates was in the midst of creating a specialization certificate in juvenile justice for defense advocates.<sup>223</sup> This certificate will consider general and specific criteria when declaring whether or not a local advocate is in fact a juvenile specialist.<sup>224</sup> This certification process began in 2014, and will hopefully result in improvements.

The defense attorneys' poor training is a significant issue, especially as the prosecution is becoming better trained and nuanced in juvenile law. This chasm in competency means the children are proportionally receiving worse and worse representation as the gap between prosecution and defense widens. As the official interpretation of the CRC notes, "[t]he child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities . . . ."<sup>225</sup> If defense attorneys continue to fall behind in their training and understanding of current juvenile law and alternative mechanisms like diversion, their assistance, if even provided, may contravene basic human rights standards regarding appropriate and competent legal assistance.

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<sup>221</sup> Interview with Armen Mustafa, *supra* note 131; Interview with Yli Zekaj, *supra* note 212; Interview with Qëndresa Ibra-Zuriqi, *supra* note 215.

<sup>222</sup> Interview with Burim Çerimi, *supra* note 134.

<sup>223</sup> Interview with Yli Zekaj, *supra* note 212.

<sup>224</sup> Interview with Yli Zekaj, *supra* note 212. Those considerations include: (1) the number of cases the advocate has complete in the area of juvenile justice; (2) the types of qualifications that advocate has; (3) the types and number of trainings the advocate has attended and completed regarding juvenile justice; and (4) a test on issues relating to juvenile justice law written by the Chamber.

<sup>225</sup> Comment 10, *supra* note 89, ¶ 27.

2. *Judges Need to Take a More Active Role in the Diversion Process*

While the defense community requires more specialized attention, the judiciary is also lagging behind its system counterparts. While training and institutionalized positions for juvenile judges are creating stability and increased specialized knowledge of the juvenile justice system, the Courts generally seem to be taking a hands-off approach to diversion. The law is in part to blame. While the 2010 JJC allowed judges to divert a juvenile, the 2018 JJC does not.<sup>226</sup>

Broadly speaking, the judges in Kosovo tasked with juvenile criminal cases are being trained by the same trainers that train juvenile criminal prosecutors. The interviews conducted for this Article illustrated that judges, in a manner similar to prosecutors, are adopting a rehabilitative rhetoric around juvenile justice.<sup>227</sup> However, interviews around the nation were common in reporting that individuals within the judiciary are not utilizing the state's diversion statutes.<sup>228</sup> While Article 52 of the 2010 JJC did allow a judge to divert a child, interviewed judges believed it was not their place to divert a child even if the case would qualify under Article 17 of the 2010 JJC. Prizren was the only jurisdiction in which a single prosecutor reported that a judge decided to divert a juvenile as a result of a formal proceeding.<sup>229</sup> All other prosecutors interviewed could not recall one case being moved to diversion on account of a judge's motion.

Except in Prizren, the judges interviewed all felt that a proceeding should go forward once a prosecutor decided to decline diversion and start a formal proceeding.<sup>230</sup> While the 2010 JJC explicitly did not envision this outcome, judges interviewed seemed to be of the same mindset. According to some judges, bringing a child in front of the court increased the harm of public contact.<sup>231</sup> If a child came in front

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<sup>226</sup> 2018 JJC, *supra* note 78, at art. 52(2).

<sup>227</sup> See Kosovo Judicial Institute Conference, *supra* note 123; Interview with Kymete Kicaj and Nazam Shero, *supra* note 114.

<sup>228</sup> See Interview with Kymete Kicaj and Nazam Shero, *supra* note 114; Interview with Eliz Blakaj, *supra* note 120; Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121; Interview with Burim Çerimi, *supra* note 134; Interview with Isuf Sadiku, *supra* note 168.

<sup>229</sup> Interview with Kymete Kicaj and Nazam Shero, *supra* note 114.

<sup>230</sup> Interview with Kymete Kicaj and Nazam Shero, *supra* note 114; Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121; Interview with Rasim Rasimi, *supra* note 167.

<sup>231</sup> Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121; Interview with Rasim Rasimi, *supra* note 167.

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of their court, these judges believed that diversion's confidentiality benefits were diminished and therefore offering diversion held less value for the youth. Whether or not this logic holds up is beside the point. The fact is that some judges used this logic to explain why they did not exercise their ability to apply diversion measures when they could.

The Beijing Rules, the European Union, and the 2010 JJC all envisioned that judges should act as one of the potential parties deciding the use of diversion.<sup>232</sup> This established standard needs to be reinforced in the Juvenile Justice Code, and subsequently trainings for judges handling juvenile criminal cases. It was never clear through the interviews why this had become the bench's prevalent view of its role during preliminary motions; however, if the law were to allow judges to be more active at applying diversion, it would be beneficial for the children involved. Judicial intervention would be one way to increase the use of diversion and to increase the judge's role in promoting diversion more broadly amongst the advocates in their court. It would also help courts tackle backlog, which has been one motivating factor for Prizren's increased use of diversion.<sup>233</sup>

It should be emphasized that advocates and judges alike are making strides and showing improvement in their understanding of diversion. What Kosovo is doing now does seem to be moving in the right direction to improve children's outcomes. However, the law will need to allow judges to become more proactive in the diversion process.

The use of diversion in Kosovo has made leaps and bounds since its inception in 2004. The law is written to international standards, only requiring a few modest changes to increase protection for youth and allow for more local ownership and tailoring of the measures offered. The prosecutors have improved their knowledge and use of diversion, but defense advocates are being left behind. The judges need to be given back their statutory role in the diversion process. There is room to use data to inform trainings, and a need to incorporate the defense advocates into the on-going trainings and updates. Last, while diversion use has increased, it could still be utilized in more cases. The recommended changes in this Article will complement the

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<sup>232</sup> The Beijing Rules, *supra* note 9, ¶ 11 (Commentary); *Opinion of the European Economic and Social Committee*, *supra* note 35; 2010 JJC, *supra* note 78, at art. 50(2).

<sup>233</sup> Interview with Kymete Kicaj and Nazam Shero, *supra* note 114; Interview with Lavdim Krasniqi and Valon Jupa, *supra* note 121.

work already being done by the stakeholders in Kosovo, strengthen Kosovo's juvenile diversion system, and continue to move Kosovo closer to a juvenile justice system envisioned by the CRC, Beijing Rules, and the Council of Europe.

#### V. CONCLUSION

Kosovo has the foundation and opportunity to create a child-centered juvenile justice system. Their laws currently meet the highest international standards; however, there is continued work to be done to make sure all stakeholders are trained and that the diversion system is used fully and reflects the local culture. With the support Kosovo receives from the international community, it seems realistic that the recommendations can come to fruition. However, to avoid these recommendations runs the risk of providing inadequate representation to youth and underutilizing diversion alternatives to the criminal justice system.