

# **TRIAL MONITORING PROJECT REPORT**

**June 2009 – August 2010**

**General Conclusions and Recommendations**

## ***General Conclusions and Recommendations***

On the basis of the detailed findings and considerations presented in the various sections of the Trial Monitoring Project Report for June 2009 – August 2010, the following main conclusions and recommendations can be presented:

### **CRIMINAL PROCEEDINGS**

#### ***To the Courts:***

- Considering the practices of having *ex-parte* communication with the parties to the proceedings, Judges must strictly apply the rule that the parties to the proceedings must not be present in the court office/courtroom before the official court invitation for the start of trial. When the hearing is taking place in a judge office, appropriate measures should also be taken to avoid such situation. It is suggested to the Supreme Court to issue a decision or a recommendation to all Courts on this matter.
- **With respect to the right to appeal and impartiality of the Court**, if a judge has participated in rendering a first instance decision, he/she has to be disqualified from the panel reviewing an appeal on this first instance decision.
- Considering the observed practise that **few Basic Courts still do not place the schedule of hearings on their public boards** it is recommended to ensure that the lists of the **scheduled trials are posted on the respective public boards and update them on regular basis on weekly basis** in accordance with the newly established practice of the other Courts. The nomination of focal points should be considered for collecting the information on scheduled trials and submit it to the Head of the Court's Registry to post it on weekly basis on respective public boards and on Courts' websites.
- **The publication of verdicts should also be envisaged** by following the exemplary practice of the Supreme Court and the Administrative Court of Montenegro as well as the two Higher Courts.
- **It is recommended to provide all Basic Courts in Montenegro with an official website** as it is the case in the first instance courts in neighbouring countries, where case law, publications, reports, schedules of trials and statistics are posted and available to public.
- With regard to the issue of insufficient space and should the possible building of new Court premises and/or the refurbishment of current premises be considered, it should be reiterated that **particular attention should be paid to the aspects that will ensure adequate working conditions and full respect of the right to a public hearing**. Adequate Courtrooms shall also enable proper interaction between the defendants and their attorneys.
- Considering the observed **insufficient space** and the influence on the right to a public hearing, as mentioned in the previous report, possibilities should be considered to **limit conducting hearings in the Court's offices by improving the organization and coordination when scheduling the trials**.
- Despite the recommendations of the previous year, there is still no much progress of **security matters in the Courts**. It is recommended to establish **a harmonized practice of**

**security checks for all Courts in Montenegro.** This could be done through introducing specialized police units that would be only in charge of the security of the Court buildings, the Court's staff and the Judges. Also, it is suggested to organize regular meetings of Chiefs of Security services from all Courts in Montenegro in order to exchange experiences and good practices and to evaluate the results of their work. Interested public should continue to be enabled to monitor hearings without presenting a reason or obtaining an approval by the Court.

- Considering the practise that **the interested public, especially relatives of the defendants, is still partially restricted from attending** the pronouncement of verdicts due to insufficient space, it is recommended when high public attendance is expected to the pronouncement of the verdicts, to take adequate measures to ensure equal conditions for **relatives of the accused, public and media to attend** the pronouncement of verdicts.
- Considering the observed example that a Court trainee served as interpreter in a main hearing although he/she is not officially appointed by the Ministry of Justice, the Court is reminded to continue to respect defendant's right to an interpreter in all phases of a criminal case and in accordance with the Court rules.
- **About 22% of all monitored hearings were delayed** and the most frequent reasons for the delay of the hearings were: unjustified absence witnesses (22.64%); **absence of the defendants (20.76%); absence of attorneys (20.76%), and absence of Public Prosecutor (13.26%)**. In this regard, the use one of substitute Judge/Lay Judge is further recommended as illustrated in one case before the Higher Court of Bijelo Polje. It is also recommended to **better plan and schedule the hearings** in order to avoid overlapping of trials and **apply stricter sanctions (such as fine) towards the irresponsible parties** to the proceedings. Presidents of Panels should **pay particular attention to all elements that may cause unnecessary delays** and ensure that the right procedure is followed in case of delays such as reporting the reasons to the President of the Courts. **Communication and cooperation** between the Courts and other State authorities in charge of executing the Court orders should also be improved in order to avoid delays that result from the non-execution of the Court orders by those authorities.
- Considering the **sensitiveness of certain cases** such as war crime cases, **the use of video link** for witnesses' testimonies should be encouraged, especially when witnesses are located outside of Montenegro.
- Considering the **good practice** that was previously observed with regard to delivering adequate **support to victims/witnesses**, the **further implementation of this practice** is strongly encouraged to other relevant cases for which support to victims would be required as well as **the production and dissemination of informative booklets for victims/witnesses** in all Courts.
- Despite the lack of appropriate building facilities, Presidents of Panels are encouraged to take appropriate measures to prevent communication between witnesses and/or other parties to the procedure.
- Considering the observed practice in this regard, it is further recommended to **strengthen and resort to means of regional and international judicial cooperation in criminal matters, especially transfer of proceedings when extradition issues may arise**, in order to refrain from conducting trials *in absentia* and reduce delays in the proceedings.

- Recent initiatives for **conclusion of bilateral agreements on mutual legal assistance in criminal matters and extradition** are welcomed and should be further encouraged.
- **The framework of international judicial cooperation in criminal matters should be further strengthened** in order to have more efficient and effective international legal assistance service to prevent additional delays in Court proceedings and improve the implementation of the main principles of the right to a trial within a reasonable time. In this regard, further specialised training for the judiciary should be considered and the various handbooks and tools produced in this area further distributed.
- In all cases in which defendants are in detention, the Courts have to pay particular attention to act with exceptional urgency and ensure compliance with Article 147(2) of the CPC.
- Considering the observed **frequency of ordering detention and the lack of sufficient justification, each reason** foreseen by the law to order detention **shall be carefully examined and explained by the Court**; when possible **Courts should resort to other legal measures** provided by the CPC to ensure the presence of the defendant during the trial, especially **guarantee measures**.
- It is recommended **to translate into local language and disseminate the Rules on the use of remand in custody**, the conditions in which it takes place and the provision of safeguards against abuse as contained in the mentioned Recommendation of 27 September 2006 of the Committee of Ministers of the Council of Europe.

#### ***To the Bar Association:***

- Considering the observed examples when defence lawyers **failed to act in accordance with the principles of professionalism, competence, diligence and respect for the Court**, it is recommended **to sanction accordingly attorneys who failed to comply with the provisions of the relevant Code of Conduct and the established standards for attorneys**.
- Considering the limited involvement of **defence attorney appointed *ex officio*** with regard to the defence of defendants especially during the hearings, **adequate measures should be undertaken to remedy to this situation**. The Bar Association should continuously monitor the activities of *ex officio* appointed lawyers.
- Considering that one of the **main reasons of delayed trials is the absence of attorneys**, it is recommended that, when they are prevented to attend the main hearing and when this is possible and agreeable to the defendant, **lawyers delegate the authority to their deputies** so that trials can take place as scheduled.
- According to the noticed **lack of awareness and information on relevant recent legal provisions** pertaining to the length of trial such as the Law on Protection of the Right to a Trial within Reasonable Time, it is recommended to ensure that lawyers are aware of these provisions. Further briefing or training in this area should be considered.

#### ***To the State Prosecution:***

- Considering that the absence of the State Prosecutor is also a reason of delay for the conduct of hearings, it is recommended to better organise their professional commitments in order to ensure presence at the hearings and avoid further delays.

- The Prosecution should pay attention to consciously prepare all elements of the indictment related to the presentation of evidences in order to avoid mistakes during the trial and ensure adequate professionalism.

#### *To the legislator:*

- As the previous suggestion to include sanction related to the non respect of the presumption of innocence in the amendment of the Criminal Code was not followed, it is suggested to **review the article 25 of the Media Law so that a clearer reference to the presumption of innocence is made.**
- Considering the sensitiveness of certain cases, especially for victims/witnesses, the use of video link for these testimonies should be encouraged and further legislative measures could be developed to facilitate questioning of the witnesses or victims via video conference link in case their presence of at the trial cannot be ensured.

#### *To the Media:*

- Considering that the principle of presumption of innocence **was not fully respected by the media, additional training sessions** focusing on the respect of the principle of presumption of innocence by media during criminal proceedings **should be provided to journalist and editors.**

## **CIVIL PROCEEDINGS**

#### *To the Courts:*

- The newly adopted Law on Prohibition of Discrimination requires that all buildings and facilities open to public must be adapted to the needs of persons with disability when financially possible. **To this end, it is recommended that the State provide support to the Courts for the adaptation of the court buildings to meet the needs of persons with disabilities.**
- Considering the need to efficiently implementation the Law on Free Legal Aid after its adoption, **special attention should be given to the organisation of promotional activities in order to acquaint the members of judicial system as well as general public with its mechanisms and solutions.**
- Considering the observed lack of information on public boards in a limited number of Basic Courts in Montenegro, it is recommended to introduce the practice of **posting the list of scheduled trials on respective public boards and update them on regular weekly basis in all Basic Courts in Montenegro. It is suggested to develop an official website for all Basic Courts as it is the case in the first instance Courts in neighbouring countries, where the publications, reports, schedule of trials, statistics and other relevant information related to the work of the Courts are posted.**
- Considering the observed insufficient space and/or the progressively increasing caseload in civil area and the necessity to comply with the right to a public hearing, it **is recommended to hold the hearings in courtrooms instead of the judges' offices, especially when there is high public interest for the case.**

- The **main reasons of delays in civil procedure were**: parties in the procedure asked for adjournment (26.1 %), expert witness failed to appear or he/she did not submitted the expertise in due time (19.1 %), absence of the Judge and replacement between the hearings (13.9 %), inadequate cooperation of other State bodies (5.2 %). In addition, requests for adjournments, extension of time limits and additional opportunities to present submissions or introduce new evidences are generously tolerated and granted. Considering such practice and the fact that the Law on Civil Procedure in Montenegro is rooted in the principles of adversarial trial, it is recommended to the Court to:
  - **use its wide discretion to sanction** negligent and opportunistic conduct and delaying tactics utilized by the participants in the civil procedure;
  - **conduct a concentrated trial** instead of series of short sessions between the Court and the parties over a period of many months, in accordance with the Recommendation No. R (84) 5 of the Committee of Ministers of the Council of Europe and Article 13 of the Law of Civil Procedure.
  - **make a better use of preliminary hearings** and fix a timetable at an early stage in the proceedings, based upon conferrals by the Court and by both parties, containing an estimated time for the conclusion of the proceedings;
  - **encourage the various stakeholders in the justice system to use the technology** as the law has generally entrenched the juridical value of electronic documents if their integrity is assured, including electronic submission and exchange of lawsuit-related documents.
- As one of the main reasons of delayed trials is the absence of properly summoned expert witness or/and the failure to deliver the expert report within time limits set by the Court, **it is recommended that in case of constant unprofessional behaviour of a particular expert, Judges and the Presidents of the Courts initiate a removal from the list of court-appointed experts before the Commission for Appointment and Dismissal of the Court Appointed Experts, as defined by the Law on the Court Appointed Experts.**
- Considering that a number of cases were adjourned due to inadequate cooperation and collaboration of the State administration authorities, it is recommended that in such cases the Presidents of the Courts apply Article 22 of the Law on Protection of the Right to a Trial within a Reasonable Time **and initiate a disciplinary and/or dismissal procedure against the responsible persons that failed to act upon their orders.**
- Although the annual reports of the Judicial Council provide a comprehensive overview of the work of the courts, **it is recommended to also make available to the public general statistical and other data on the length of proceedings, especially in accordance with the nature of the cases.** For this purpose it is suggested to use the Time Management Checklist of the European Commission of the Efficiency of Justice (CEPEJ) of the Council of Europe which provides a checklist composed of indicators for the analysis of length of proceedings in justice system. This would help contributing to the creation of comparable data between CoE Member States.
- Having in mind the necessity to maintain and preserve the impartiality and independence of the Court, **the Judges should not allow pressure of any kind, especially exerted from the parties.**

- Considering that the mediation mechanism was not utilized by the parties so frequently, **the Court should make a better use of its power to suspend the case in order to allow to the parties enough time to settle, using alternative dispute resolution procedures.**

#### *To the Professional Association of the Court Appointed Experts*

- Considering that a number of hearings were adjourned due to actions of expert witnesses, **it is recommended that the Professional Association of Court Appointed Experts develop a Code of Ethics for the Court Appointed Experts in order to further promote ethical standards among experts.** In case of violation of such Code of Ethics, sanctions should be imposed by the Association.

#### *To the Centre for Mediation*

- Considering the importance of mediation mechanism for efficiency of civil procedure, **the Centre for Mediation should continue to promote it. In addition to the actual statistics, the Centre could develop different types of and more detailed statistics in order to present clear picture on the use and effectiveness of mediation.**

#### *To the Bar Association*

- Considering the various observed examples when lawyers **failed to act in accordance with the principles of professionalism, competence, diligence and respect of the Court, it is recommended to warn and sanction the attorneys who failed to comply with the ethical standards encoded in the Code of Professional Ethics of the Lawyers.**

#### *To the Legislator:*

- Considering comprehensive overview of the state of play in civil proceedings given by this Report, **it is recommended to legislator to take into consideration all proposed legislative interventions particularly those related to:**
  - The Law on Free Legal Aid;
  - Modification of some time limits set by the Law on Civil Procedure for taking certain procedural actions by the court and ensure realistic implementation of these provisions;
  - Modification of the legal framework related to the court appointed experts;
  - Amendments of the Law on State Administration in order to provide better assistance to the Courts;
  - Ratification of certain international instruments for mutual legal assistance in civil matters.