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Public access to proceedings involving child victims of sex-related and other serious crimes violates domestic law and the principle of the best interest of the child

The OSCE Mission in Kosovo (OSCE) is concerned that public hearings in cases involving juvenile victims of sex-related and other serious crimes do not comply with the general principle of the best interest of the child and violate domestic law.

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) foresees the individual right to a public trial, it also provides that this right may be restricted in a number of cases, including “where the interests of juveniles [...] so require.”¹ The International Covenant on Civil and Political Rights (ICCPR) also limits the right to a public trial, such as where “the interest of the private lives of the parties so requires.”² Moreover, the Convention on the Rights of the Child (CRC) prescribes that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”³

Domestic law provisions related to the publicity of proceedings involving child victims⁴ are contained in the Juvenile Justice Code of Kosovo (JJC).⁵ Article 47 of the JJC prescribes that “[a]ll proceedings involving minors shall be confidential.” This provision also applies when adults have allegedly committed specific crimes against children,⁶ such as rape, sexual assault, abduction, facilitating prostitution, and trafficking.⁷ Consequently, in these cases the judge must hold hearings *in camera* and exclude the public.⁸

¹ Art. 6(1), ECHR. The European Court of Human Rights (ECtHR) justified this exception in cases involving sexual offences against children (see *X v. Austria*, No. 1913/63, 30 April 1965).

² Art. 14(1), ICCPR. Art. 6(1), ECHR contains a similar provision.

³ Art. 3(1), CRC. The best interest of the child is to be safeguarded by a number of measures, including closed trial sessions, when necessary to protect the child’s privacy (see Committee on the Rights of the Child, General Comment 10/2007, Para. 23).

⁴ According to Art. 2(1) of the Juvenile Justice Code (JJC) of Kosovo (UNMIK Regulation No. 2004/8 *On the Juvenile Justice Code of Kosovo*, 20 April 2004), the term “child” means a person who is under the age of 18 years. A minor is defined under Article 2(2) of the JJC as someone between the ages of 14 and 18. The confidentiality of trial sessions applies to minors involved in proceedings and non-minor child victims.

⁵ The JJC should be viewed as *lex specialis* (special law) when compared to the Provisional Criminal Procedure Code of Kosovo (UNMIK Regulation No. 2003/26 *On the Provisional Criminal Procedure Code of Kosovo*, 6 July 2003) and “any other relevant legislation” that may also apply to minors in criminal proceedings (see Art. 4, JJC).

⁶ See Art. 143(5), JJC.

⁷ See Art. 141, JJC. The *rationale* of this provision is to reduce the “secondary victimization” of the victim (see Committee of Ministers of the Council of Europe, Recommendation 2006/8 On assistance to crime victims, 14 June 2006).

⁸ The JJC also provides for alternative interrogation techniques when a juvenile injured party is heard as a witness. For example, the child may be examined in his/her home or in a Centre for Social Work (Art. 143(3), JJC), or outside of the courtroom by means of a closed circuit television (Art. 143(4), JJC). Moreover, the examination of the child shall be conducted with the assistance of a pedagogue, psychologist or another expert (Art. 143(1) and (2), JJC).

Despite these legal requirements, the OSCE has monitored several cases involving sex-related and other serious crimes committed against children where the judge allowed the public access to the hearing:

In a case in the () Court involving the alleged () of a child by her father,⁹ the presiding judge allowed approximately 20 law school students to attend for research purposes the trial session of () 2007. The child was extremely nervous and, when asked about the alleged incident, she was unable to testify regarding key facts crucial to establishing criminal liability.

In another case in the () Court involving four defendants (),¹⁰ the presiding judge declared the trial session of 2007 open to the public, although one of the victims of forced prostitution was a seventeen-year-old girl.

In a third case before the (_) Court involving the () on 2006 the judge failed to exclude the public from the hearing to confirm the indictment against the two defendants.

In the above examples, the judge failed to exclude the public from cases involving (). This violated domestic law and the principle of the best interest of the child.

Consequently, the OSCE recommends that:

- Judges exclude the public from proceedings involving juvenile victims of sex-related and other serious crimes, as required by the Juvenile Justice Code.
- When it is necessary to question a juvenile victim, judges should use alternative examination techniques provided by the Juvenile Justice Code, such as interrogating the child in his/her own home, a Centre for Social Work, or via a closed circuit television.
- The public should not be provided with information or documents (e.g., minutes or decisions) in cases involving juvenile victims of sex-related and other serious crimes.

Inadequate translation during court hearings violates domestic law and international human rights standards

The OSCE is concerned that poor translation from Albanian to languages of non-Albanian communities in civil cases hearings violates domestic law and international human rights standards.

⁹ Art. 193, Provisional Criminal Code of Kosovo (PCKK), (UNMIK Regulation No. 2003/25, On the Provisional Criminal Code of Kosovo, 6 July 2003).

¹⁰ Art. 201(1), PCKK.

The fair trial principle, guaranteed by the ECHR,¹¹ includes a party's ability to effectively participate in court proceedings. In light of the principles of equality of arms¹² and freedom from discrimination,¹³ arguably an equal participation of the parties in a state with several official languages¹⁴ includes the right to use this official language in which the parties are sufficiently proficient to be able to adequately understand and express themselves before the court. Furthermore, the European Charter for Regional or Minority Languages (ECRML)¹⁵ imposes the obligation on civil courts that "[...] whenever a litigant has to appear in person before a court, that he or she may use his or her regional or minority language without thereby incurring additional expense [...] if necessary by the use of interpreters and translations."¹⁶

Following the ECHR and ECRML, the Constitutional Framework for Provisional Self-Government in Kosovo¹⁷ provides that communities and their members shall have the right to use their language freely before the courts in Kosovo.¹⁸ More specifically, the applicable Law on Contested Procedure (LCP) states that:

"[t]he parties and other participants in the proceedings are entitled to use their own language when taking part in a hearing trial and when orally undertaking other actions before the court. If the proceedings are not conducted in the language of a party or other participants in the proceedings, there shall be provided oral interpretation into their language of things stated during the hearing, as well as oral interpretation of documents used as evidence during the hearing."¹⁹

¹¹ Art. 6, ECHR.

¹² In *De Haes and Gijssels v. Belgium*, 19983/92, 24 February 1997, para. 53, the ECtHR stressed "that the principle of equality of arms - a component of the broader concept of a fair trial - requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."

¹³ Art. 14, ECHR.

¹⁴ According to Article 2(1) of the Law No. 02/L-37 On the Use of Languages, 27 July 2006, promulgated by UNMIK Regulation No. 2006/51, 20 October 2006 (Law on Languages), Albanian and Serbian are official languages of Kosovo and have equal status. In addition, other languages can also have the status of official languages at the municipal level if a member of a community that constitutes at least five percent of the municipality speaks the language as his or her mother tongue (Art. 2(3)).

¹⁵ Adopted by the Council of Europe on 5 November 1992, directly applicable in Kosovo according to Art. 3(2)(g) of UNMIK Regulation 2001/9 On a Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001 (Constitutional Framework).

¹⁶ Art. 9(1) (b), ECRML. In Kosovo, the ECRML applies to all community languages (i.e. Turkish, Bosnian, Roma) although they are not official languages under Art. 2 of the Law on Languages (Art. 1(a) ECRML).

¹⁷ See footnote 14.

¹⁸ Art. 4(4) (a) of the Constitutional Framework.

¹⁹ Art. 102(1), LCP, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, and 35/91. Also, the Law on Languages covers the use of languages in judicial proceedings. According to Art. 12-18 of the Law on Languages, official languages shall be used on an equal basis in judicial proceedings, persons participating in judicial proceedings may use the official language of their choice, and courts shall conduct the proceedings in the official language(s) chosen by the parties to the proceedings, and, if necessary provide simultaneous translation. The LCP does not contradict, but is more specific than, the provisions of the Law on Languages. Consequently, the LCP provisions related to languages still apply in Kosovo (see Art.37 of the Law on Languages).

Furthermore, the courts must inform the parties and participants about their right to translation.²⁰

However, the OSCE has monitored several cases where the translation provided by interpreters in civil proceedings was inadequate, violating domestic law and international human rights standards. The following cases serve as examples²¹:

In a case submitted to the (_) Court on () 2007, during the first hearing the interpreter only translated the judges' remarks into the Serbian language and failed to translate the statements of the plaintiff's representative from Albanian into Serbian. In a subsequent hearing, the interpreter prepared the minutes for the session instead of orally translating the proceedings. In another hearing, the interpreter exited the court room during the session to receive a phone call so that no translation was provided.

In a case before the () Court, during the session dated 2005 the interpreter did not translate from Albanian to Serbian during the entire hearing. Consequently, the Kosovo Serbian plaintiff could not follow the entire proceedings, did not learn of all the discussed factual and legal issues, and could not intervene effectively.

In a case before the () Court, during a hearing dated 2005, the interpreter did not translate during the entire proceedings. Rather, the interpreter translated from Albanian to Serbian only those parts of the hearing where the court or attorney directly questioned the Serbian party.

In the above cases, the court did not provide complete or verbatim translation of court proceedings. The party could not follow the entire proceedings and this affected the right to a fair hearing. The failure of the courts to provide adequate translation not only violates domestic law, but also international human rights standards.

Consequently, the OSCE recommends that:

- Courts should inform the parties about the right to verbatim and continuous translation through an interpreter at the beginning of the first hearing.
- Courts should only employ interpreters with the requisite skills.²²
- Judges should ensure that the courts' interpreters translate all portions of a proceeding verbatim and the evidence is accurately translated into the languages understood by the parties.

²⁰ Art. 102(2), LCP. According to Art. 105 of the LCP, the court pays for costs associated with translation.

²¹ Although the second and third examples are from 2005, the first from 2007 shows the continuing problem of inadequate translation during civil case hearings.

²² See also the OSCE Report *Translation and Interpretation in the Judicial System of Kosovo*, January 2007.

