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Reading witness statements instead of examining witnesses in person at trial violates domestic law and the right to a fair trial

The OSCE Mission in Kosovo (OSCE) is concerned that, in several monitored criminal cases, the courts failed to ensure the presence of witnesses at the main trial and instead read out declarations witnesses had previously given during investigations. This violates the defendant's right to a fair trial.

According to the European Convention on Human Rights, the right to a fair trial comprises the right of defendants to examine and cross-examine witnesses against them.¹ The Provisional Criminal Procedure Code of Kosovo establishes a similar general principle.²

The right to a fair trial "presupposes that all the evidence must normally be produced at a public hearing, in the presence of an accused, with a view to adversarial argument."³ Article 368(1) of the Provisional Criminal Procedure Code similarly prescribes that, as a general rule, witnesses should be examined directly by the court. This procedure can be substituted with the reading in court of previously-given statements only when exceptional circumstances exist (e.g. when the witness has died or has become mentally incapacitated, or if all parties agree to replace their direct examination with a reading out of their statements).⁴

However, the OSCE monitored cases where witness statements were read out by the court, even though none of the circumstances of Article 368(1) existed.

In a case before a court in the Prizren region involving a defendant charged with attacking official persons performing official duties,⁵ at the main trial hearing of 25 January 2008, the prosecutor proposed to read the statements of two Kosovo Police Service officers. Defence counsel objected and asked the court to summon the witnesses.⁶ Nevertheless, the trial panel decided not to summon the officers and to read out their statements instead.⁷ On 30 January 2008 the court found the defendant guilty and sentenced him to three months of imprisonment.⁸

¹ See Article 6(3)(d), European Convention on Human Rights.

² See Article 10(2), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 ("Provisional Criminal Procedure Code").

³ *Romanov v. Russia*, 41461/02, judgment, 24 July 2008, paragraph 100. The right to an adversarial trial means in principle "the opportunity for the parties to have knowledge of and to comment on all the evidence adduced or observations filed with a view to influencing the court's decision." (*L.B. Interfinanz A.G. v. Croatia*, 29549/04, judgment, 27 March 2008, paragraph 24).

⁴ According to the European Court of Human Rights, if the "impossibility" of examining witnesses is merely due to the fact that they are missing, the authorities must make a "reasonable effort" to secure their presence (see *Bonev v. Bulgaria*, 60018/00, judgment, 8 June 2006, paragraph 43).

⁵ Article 317, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 ("Provisional Criminal Code").

⁶ Moreover, since the defence stated that it was never given copies of those witness testimonies to whose reading it objected, it means that the lawyer was also not provided with adequate time and facilities for the preparation of defence, in violation of Articles 12 and 307 of the Provisional Criminal Procedure Code, and of Article 6(3)(b) of the European Convention on Human Rights.

⁷ Such evidence is inadmissible, since the defence was not given an opportunity to "challenge it by questioning [the] witness during some stage of the criminal proceedings" (Article 156(2),

In the above case, the court did not make any effort to secure the attendance of the witnesses at trial. Moreover, it denied the defendant's request to examine the witnesses. By relying on their written statements only, the court deprived the defendant of his right to cross examine the witnesses, in violation of Article 6 of the European Convention on Human Rights.⁹

The OSCE also monitored several cases where defence counsel agreed to have prosecution witness statements read in court, thus improperly waiving the defendant's right to cross-examine the witnesses.

In a case before a court in the Pejë/Peć region, involving a defendant charged with unlawful weapon possession,¹⁰ and damage of protected monuments¹¹ at the trial session of 18 September 2008 the presiding judge proposed to the parties to read all the statements in the investigative file. Among these was the report of an expert witness which concluded that the defendant's fingerprints matched those found on the weapon used to commit the crime. Even though the witness could have been summoned and cross-examined, the defence counsel agreed to have the report read out, thus failing to challenge this key piece of evidence. Moreover, the defence counsel did not call any witness for the defendant. On 18 September 2008, the defendant was found guilty and sentenced to three years and six months of imprisonment.

In the above case as in other monitored cases, by agreeing to hear transcribed witness statements rather than live witness testimony, the defence counsel effectively prevented the defendant from cross-examining key prosecution witnesses. It is questionable whether such a decision matches the interest of their clients.

Therefore, it is the position of the OSCE that:

- Courts must not read out witness statements instead of examining witnesses at trial, unless one or more of the exceptions foreseen in Article 368(1) of the Provisional Criminal Procedure Code are met.
- Lawyers should object to proposals to read out prosecution witnesses' statements when their presence can be ensured. Before agreeing to reading out witness statements, lawyers should carefully evaluate whether waiving their client's right to cross-examine prosecution witnesses is in their client's best interest.

Provisional Criminal Procedure Code). It is the court's duty to "ensure that no inadmissible evidence [...] is included in the file or presented at the main trial" (Article 154(5), Provisional Criminal Procedure Code).

⁸ By basing its decision on a piece of evidence that is inadmissible (see previous footnote), the court violated not only domestic law (Article 153(2), Provisional Criminal Procedure Code), but also the defendant's right to a fair trial (according to the European Court of Human Rights, "a conviction should not be based either solely or to a decisive extent on statements which the defence has not been able to challenge." See *W v. Finland*, 14151/02, judgment, 24 April 2007, paragraph 43).

⁹ See *Barbera, Messegue and Jabardo v. Spain*, judgment, 6 December 1988, paragraph 78.

¹⁰ Unauthorized ownership, control, possession or use of weapons (Article 328, Provisional Criminal Code).

¹¹ Damage, destruction and unauthorized removal from Kosovo of protected monuments or objects (*id.*, Article 289).

Kosovo courts' frequent postponement of sessions for an unspecified period of time contributes to judicial backlogs and may violate the right to trial within a reasonable time

The OSCE is concerned that, by failing to set a specific date and time for each hearing, courts are causing unnecessary delays in civil proceedings, thus contributing to case backlogs.

Article 6(1) of the European Convention on Human Rights guarantees the right to "a fair and public hearing within a reasonable time." One of the purposes of the right to a trial within a reasonable time is "to protect [parties] against excessive procedural delays" and to avoid that a person "should remain too long in a state of uncertainty about his fate"¹². More generally, it underlines "the importance of rendering justice without delays which might jeopardise its effectiveness and credibility."¹³

Under the Law on Contested Procedure, courts have a duty to "try to conduct the procedure without any unnecessary delay, causing as little costs as possible and to make impossible any misuse of rights that belong to the parties in the proceedings."¹⁴

Lawyers also play a role in ensuring cases proceed efficiently. Article 50 of the Code of Lawyer's Professional Ethics says, "The lawyer should take care to provide his party with necessary defense as soon as possible and with as few expenses as possible, as well as to fight any delay and abuse of rights before courts and other state bodies."¹⁵

Effective case management is an essential tool for avoiding unnecessary delays in court proceedings. One simple way of ensuring cases efficiently move through the trial process is by setting a specific date and time for each hearing and expecting each party to appear unless they have a legitimate excuse.

However, the OSCE observed several cases where courts rescheduled hearings for a later and unspecified date.

At the end of a proposal for re-trial session in a Mitrovicë/Mitrovica-region confirmation of ownership suit, the court postponed the session for an unspecified period of time. The initial case began on 17 May 2003; the respondent filed a proposal for retrial on 4 April 2005. The court finally heard the retrial proposal on 6 November 2007. Eventually, the court granted the request for a retrial but never set a date for the first hearing. Respondent eventually made a settlement offer, but the case is currently stalled due to the non-functioning of the Mitrovicë/Mitrovica municipal court.

¹² *H. v. France*, 10073/82 judgment, 24 October 1989, paragraph 58.

¹³ *Stögmüller v. Austria*, 1602/62, judgment, 10 November 1969, paragraph 5.

¹⁴ Article 10, Law on Contested Procedure, Official Gazette Socialist Autonomous Province of Kosovo 4/1977, 36/1980, and 69/1982.

¹⁵ Code of Lawyer's Professional Ethics, adopted by the Kosovo Chamber of Advocates, 11 June 2005.

In a case in the Prizren region, a plaintiff filed for divorce on 6 November 2003. The first session was scheduled in September 2005, but postponed for an unspecified time because neither party appeared in court. The next session was set for 15 February 2006 but was postponed to an unspecified date; the reason for the postponement is unclear. The following session was held on 17 April 2007. Another session was held on 14 December 2007 and again on 3 April 2008. In each session, the court merely noted the presence of plaintiff and the absence of respondent. No further issues were addressed.

Often, courts reschedule cases for an unspecified time in order to locate the respondent or wait for other agencies to respond to requests for legal assistance. Often, a considerable amount of time passes before another hearing is held.

In a case in the Pejë/Peć region, involving annulment of a contract, the respondent failed to appear at the 7 September 2006 hearing. The court addressed the Ministry of Justice, the Department of Justice, and the Municipal Civil Registry Office with various legal assistance requests. Instead of rescheduling the case for a time sufficient to enable them to respond, the court scheduled the next hearing for an unspecified time. The next hearing did not happen until 20 June 2008.

In a Gjilan/Gnjilane-region property case, in November 2006 the court rescheduled a hearing for an unspecified time in order to locate the absent respondent. The court requested the Kosovo Police Service to look for the respondent and said the case would be reset when it received a response. The next hearing was held in March 2007.

In the above cases, postponements to an unspecified date led to unnecessary delays in the proceedings. Rescheduling cases for an unspecified time also generates uncertainty: witnesses cannot be summoned for an unspecified date and parties face difficulty preparing for a trial whose date is unknown.

On the contrary, setting a particular date for a subsequent hearing enables courts to inform proposed witnesses of the time when they are expected to testify, ensures that parties and the court can better prepare for sessions, and motivates parties to submit relevant evidence on time. Additionally, it enables courts to better schedule all the cases they hear.

In light of the above, it is the position of the OSCE that:

- At the end of each session, courts should set a specific date for the next session.
- At the end of each session, attorneys should request the court to set a specific date on which the next session is to be held. In the event a case is scheduled for an unspecified time, attorneys should regularly assess whether conditions exist for a hearing to be held and request the court to set the date.