



**Human Rights and Communities Department**

**Legal System Monitoring Section**

**Monthly Report – February 2009**

## **Improper statements by judges violate the defendants' right to the presumption of innocence.**

The Organization for Security and Co-operation in Europe (OSCE) is concerned that in some cases judges have made inappropriate remarks which are irreconcilable with the defendants' right to be presumed innocent until proven guilty. This may violate international human rights standards as well as the domestic law.

The presumption of innocence is a fundamental precept of criminal proceedings and a cornerstone of the right to a fair trial. The European Convention on Human Rights prescribes that "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law".<sup>1</sup> The European Court of Human Rights has held that this principle "requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged".<sup>2</sup> Similarly, under the applied Kosovo Code of Criminal Procedure, "[a]ny person suspected or charged with a criminal offence shall be deemed innocent until his or her guilt has been established by a final judgment of the court".<sup>3</sup>

Despite these clear legal provisions, the monitoring of judicial proceedings has revealed that, on some occasions, judges fail to fully respect a defendant's right to be presumed innocent.

In a trial session held in the Prizren region in January 2008 involving a defendant charged with attacking official persons performing official duties,<sup>4</sup> the defence counsel complained about a series of procedural violations committed in the case. Responding to the counsel's submissions, the presiding judge repeatedly told him to "save all those matters for the appeals". Such statements of the presiding judge, made before the conclusion of the main trial, betrayed a pre-judgment on his part as to the guilt of the defendant, arguably in violation of the presumption of innocence guarantee.

In a December 2008 trial session of an aggravated murder<sup>5</sup> case in the Prishtinë/Priština region, one defendant was asked to describe his apartment,

---

<sup>1</sup> Article 6(2), European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>2</sup> European Court of Human Rights, *Barbera, Messegue and Jabardo v. Spain*, 10590/83, Judgment of 6 December 1988, paragraph 77.

<sup>3</sup> Article 3(1), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments. On 22 December 2008, Kosovo promulgated the Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, which left the Code substantially the same as the 2003 law, though a section on guilty plea agreements was added, an article on the length of police-ordered detention was amended, and the name of the code was changed. Hereinafter, Kosovo Code of Criminal Procedure.

<sup>4</sup> Article 317, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003, with subsequent amendments. On 22 December 2008, Kosovo promulgated the Law No. 03/L-002 on Supplementation and Amendment of the Provisional Criminal Code of Kosovo, which left the Code substantially the same as the 2003 law, though a paragraph addressing guilty pleas was added and the name of the code was changed. Hereinafter, Criminal Code of Kosovo.

<sup>5</sup> Article 147, Criminal Code of Kosovo.

where the crime had been committed. After the defendant gave his description, one judge from the panel publicly inferred that the defendant had forgotten to add that he himself had been present there when the crime occurred. Since the defendant's presence at the crime scene was disputed by the defence and had not been established as a fact, the judge's remark revealed undue bias against the defendant and a possible prejudice against him.

In another trial session held in the Prizren region in October 2007 involving a defendant charged with causing general danger<sup>6</sup> during the 2004 March riots, the court ruled that the criminal prosecution was barred by statutory limitation.<sup>7</sup> In its decision the court argued that "Through the verification of the proposal and of the other pieces of evidence which are inside the case file it is established that the accused committed the criminal offence he is charged with, causing general danger in violation of article 291 para. 1 of Provisional Criminal Code of Kosovo (PCCCK)". However, since the criminal prosecution had been initiated after the lapse of the legally prescribed statute of limitations, the court ruled to dismiss the summary indictment and terminate criminal proceedings. The court's cited statement reflects an opinion of the accused being guilty – this without the defendant having had a chance to defend himself – and thus runs counter to the presumption of innocence guarantee.<sup>8</sup>

Both domestic and international law prescribe that defendants must be presumed innocent until proven guilty, no matter how compelling the evidence is against them. This precept places a duty on the authorities involved in criminal proceedings – in particular the judge, but also the prosecutor<sup>9</sup> and the police<sup>10</sup> – to refrain, before the judgment is delivered, from doing or saying in public anything that would imply that the defendant has already been convicted.<sup>11</sup> The presumption of innocence guarantee may be violated even where public officials, without any formal finding, merely opine or suggest through some reasoning that the defendant is regarded as guilty.<sup>12</sup>

In light of the above, the OSCE recommends that:

---

<sup>6</sup> Article 291, Criminal Code of Kosovo.

<sup>7</sup> Under Article 468(1) in conjunction with Article 316(1)3 of the Kosovo Code of Criminal Procedure.

<sup>8</sup> The European Court has held that "the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty". See *Minelli v. Switzerland*, 8660/79, Judgment of 25 March 1983, paragraph 37. See also *Lutz v. Germany*, 9912/82, Judgment of 25 August 1987, paragraphs 59-60.

<sup>9</sup> See *Daktaras v. Lithuania*, 42095/98, Judgment of 17 January 2001, paragraphs 42-44.

<sup>10</sup> See *Allenet de Ribemont v. France*, 15175/89, Judgment of 10 February 1995, paragraph 41.

<sup>11</sup> See *Austria v. Italy*, ECHR Application no. 788/60.

<sup>12</sup> See *Allenet de Ribemont v. France*, cited above, paragraph 35. See also *Daktaras v. Lithuania*, cited above, paragraph 41.

- Law enforcement and judicial authorities always respect fully the defendant's right to be presumed innocent in the course of criminal proceedings and refrain from any statement that may run counter to the presumption of innocence until or unless he/she is found guilty by a court.

### **Transitional provisions included in the 2008 Law on Contested Procedure contribute to delays in already-delayed civil cases**

On 6 October 2008, courts in Kosovo began applying a new civil procedure code.<sup>13</sup> Though many provisions in that code remain the same or substantially similar to the 1982 Law on Contested Procedure,<sup>14</sup> the transitional provisions of the applied Law on Contested Procedure require courts in first-instance cases to use the provisions of the new code in all ongoing proceedings, even those initiated before the effective date of the law.<sup>15</sup>

During pre-trial proceedings, when no main session has been held, the 2008 Law on Contested Procedure requires courts to “revoke the order by which the [pre-trial] session is convened and [...] ask the plaintiff to present written charges according to the provisions of this law.”<sup>16</sup> In most cases, the plaintiff would have already submitted written charges. However, often in Kosovo courts, the respondent would provide an oral response to the plaintiff's claim during a court session. Under the 2008 Law on Contested Procedure, the respondent must submit a written response to the claim within 15 days of the claim being filed in the court.<sup>17</sup>

While parties often wait years for their case to reach the first main hearing before Kosovo courts, requiring the proceedings to start again under new procedural rules may further delay cases.

Substantial delays in civil proceedings raise international human rights concerns. 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.”<sup>18</sup> Furthermore, it underlines “the importance of rendering justice without delays which might jeopardize its effectiveness and credibility.”<sup>19</sup>

---

<sup>13</sup> Law No. 03/L-006 on Contested Procedure, Kosovo Official Gazette, 20 September 2008 (hereinafter, 2008 Law on Contested Procedure).

<sup>14</sup> Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982 (12 February 1982) (hereinafter, 1982 Law on Contested Procedure).

<sup>15</sup> Article 532, 2008 Law on Contested Procedure.

<sup>16</sup> *Id.* article 532.2.

<sup>17</sup> *Id.* article 395.1.

<sup>18</sup> *H. v. France*, 10073/82 judgment, 24 October 1989, paragraph 58.

<sup>19</sup> *Stögmüller v. Austria*, 1602/62, judgment, 10 November 1969, paragraph 5.

The OSCE has monitored cases in which the application of the 2008 Law on Contested Procedure appears to have caused additional delays. For example:

In a case filed in the Prishtinë/Priština region on 11 July 2007, the plaintiff asked for the annulment of the decision of a public entity's selection committee rejecting his application for employment. The first hearing did not take place until 8 October 2008, two days after the effective date of the 2008 Law on Contested Procedure. At that hearing, the court requested the respondent to submit certain items of evidence at the session to be held on 13 November 2008. However, at the 13 November 2008 session, the court revoked its previous order on the submission of evidence, citing the 2008 Law on Contested Procedure. In particular, the court requested the respondent to submit a written response to the plaintiff's claim within 15 days, citing articles 395 and 396 of the 2008 law. Though the court followed its requirements, the application of the 2008 Law on Contested Procedure only contributed to delay in the already-delayed case.

In a marital property case filed in the Prishtinë/Priština region on 18 July 2007, the first hearing was not scheduled until June 2008. The court postponed that session due to the absence of the respondent's attorney. The following hearing was also postponed because the court failed to properly summon the plaintiff. The next session was postponed because the respondents were not properly summoned. Finally, at the fourth session held in November 2008, the court revoked its ruling scheduling that trial session and ordered the respondent to submit a written response to the claim, citing article 532.2 of the 2008 Law on Contested Procedure.

In addition to the monitored cases, judges have expressed concern that applying the 2008 Law on Contested Procedure may contribute to delays. In conversations with OSCE monitors since October 2008, judges specifically mentioned that the requirement of article 532 of the 2008 Law on Contested Procedure to effectively re-start proceedings in certain cases causes delays.

In order to alleviate additional delays in civil cases and comply with international human rights standards, the OSCE recommends that:

- Lawmakers should amend the 2008 Law on Contested Procedure to require that cases already filed at the time of its promulgation continue under the 1982 Law on Contested Procedure.