

Department of Human Rights and Communities
Legal System Monitoring Section

Ineffective Legal Representation

Issue 7

September 2010

Executive Summary

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned by the ineffective legal representation observed in criminal and civil proceedings in Kosovo. Legal representation by defence counsel for criminal matters, and by lawyers when authorized as representatives in civil matters, is often substandard and ineffective. This may violate the legal framework in Kosovo, the Code of Professional Ethics of Advocates,¹ and international law. It also has serious repercussions on a defendant's right to a fair trial.

Criminal Proceedings Performance of Defence Counsel

Defence counsel is expected to play an active role in criminal proceedings. Under the Applied Kosovo Code of Criminal Procedure², defence counsel shall be appointed at public expense if the interest of justice requires and if the defendant is unable to pay.³ The Code does not create separate advocacy duties based on whether a counsel is court-appointed or privately-hired. The advocacy duties remain the same.

Similarly, Article 6(3)(c) of the European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR) entitles one "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." As explained by European Court of Human Rights (ECtHR) case law, the ECHR is intended to guarantee rights that are "practical and effective", not "theoretical or illusory",⁴ which means authorities have a duty to ensure that legal assistance is effective, particularly when appointed by the court.

While some defence counsel do provide effective legal representation, there are many instances where both court-appointed and privately-hired defence counsel fail to exercise their professional advocacy duties.

The OSCE witnessed a number of instances that raised concerns regarding ineffective legal representation. In some cases, defence counsel were seen as generally passive and

¹ The Code of Professional Ethics of Advocates, Kosovo Chamber of Advocates, 7 July 2007 (hereinafter the "Code of Professional Ethics"). Retrieved on 4 August 2010, http://oakks.org/images/dokumente/oak_dok.kodi-anglisht.pdf.

² Originally called the Provisional Criminal Procedure Code of Kosovo, which was promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments. On 22 December 2008, Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26 was promulgated, which left the Code substantially the same as in 2003. 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 to Kosovo Code of Criminal Procedure, hereinafter referred to as KCCP.

³ Articles 12(4), 73 and 74(1)(2), KCCP.

⁴ ECtHR judgment, *Artico v. Italy*, 6694/74, 13 May 1980, paragraph 33.

uninterested, only there to fulfil the requirement that legal representation was present. In general, they failed to make use of procedural guarantees designed to safeguard their clients' rights. Prior OSCE reports discussed these matters with numerous examples.⁵ This report continues that discussion.

On 29 April 2010, at a district court confirmation hearing, the defendant told the judge that he had not been visited by counsel while he was detained. A detention on remand period started four months earlier, following his arrest on 28 December 2009, with no visits from his defence counsel. The defence counsel did not contradict the client. The defendant declared himself guilty after the judge read the indictment. Because the defendant was exhibiting a mental health problem the judge required the defendant to first undergo a psychiatric examination before accepting any plea of guilty. The defendant did not have the benefit of a defence counsel argument that he might not be criminally liable because of a mental illness. As of August 2010, a psychiatric examination had still not been received by the court, and the court's next session was not expected until September 2010. The defendant remains in detention.

Both the legal framework in Kosovo and international law provide that an accused has a right to sufficient time to prepare a defence.⁶ The OSCE monitored violations of this right, often due to the failure of defence counsel to request preparation time. In addition, it should also be noted that a weak court case management system negatively impacts a lawyer's performance, making it difficult to plan a work schedule or develop a defence strategy. Defence counsel were changed several times in many OSCE monitored cases.

On 17 November 2009, at a district court confirmation hearing, the defendant made statements asserting that he had acted in a state of mental distress, out of negligence, or in self-defence in reply to a charge of attempted murder. The defence counsel proposed that the indictment be withdrawn, but did not explain why. On 16 February 2010, there was a change in defence counsel just as the trial started. The new defence counsel turned to the multiple defendants to inquire which one was his client, and then failed to raise a defence. This suggests that the defence counsel had no meaningful communication with his client before the trial and, therefore, could not have prepared properly. The defendant pled guilty, and was sentenced to two years and six months imprisonment.

Change of counsel may benefit the defendant in case where ineffective lawyers are replaced by qualified counsel. Often counsel were primarily fulfilling the requirement of a lawyer's presence, without the court raising a concern about the lawyer's effectiveness.

⁵ OSCE *Review of the Criminal Justice System (1 February 2000 – 31 July 2000)*, http://www.osce.org/documents/mik/2000/08/970_en.pdf; OSCE *Review of the Criminal Justice System (October 2001)*, pages 27-30, http://www.osce.org/documents/mik/2001/11/966_en.pdf; OSCE *Review of the Criminal Justice System (April 2003 – October 2004)*, pages 32-33 and 68-73, http://www.osce.org/documents/mik/2004/12/3984_en.pdf; OSCE *Monthly Report – January 2009*, http://www.osce.org/documents/mik/2009/01/39174_en.pdf.

⁶ Article 12, KCCP; Article 6(3)(b), ECHR, Article 14(2)(b), International Covenant on Civil and Political Rights (ICCPR).

Courts are obliged to recognise and respect the defence counsel's critical role to ensure that defendants receive a fair trial. "It is a fundamental aspect of the right to a fair trial that criminal proceedings [...] should be adversarial and that there should be equality of arms between the prosecution and defence."⁷ Inequality of parties before the courts may easily result in a miscarriage of justice. When defence counsel fails to provide effective representation, authorities must either replace the counsel or otherwise compel the counsel to fulfil mandatory obligations.⁸

Civil Proceedings Performance of Authorized Representatives

The OSCE is concerned that the failure of authorized representatives in civil cases to diligently and effectively represent their clients' interests may violate the legal framework in Kosovo, the Code of Professional Ethics, and international human rights standards.

The applied law on contested procedure⁹ (LCP) provides that a litigant may conduct the case either in person or through an authorized representative. The litigant may appoint an authorized representative either in writing or verbally in the course of the proceedings.¹⁰ The litigant determines the extent of the representative's authority, and may authorize the representative to conduct "only certain actions or all the actions in one proceeding".¹¹ Actions conducted by the representative have the same legal effect as those actions performed by the litigant personally.¹² However, a litigant may change or withdraw a statement made by the authorized representative.¹³ While the focus of this report is on authorized representatives who are lawyers, an authorized representative does not need to be a lawyer. Any person that has full legal capacity to act can qualify.¹⁴ If a court determines that an authorized representative is not performing according to the applied Law on the Bar,¹⁵ the court is obliged to inform the "competent bar association."¹⁶

⁷ ECHR *Case of Jasper v. United Kingdom*, 27052/95, 16 February 2000, paragraph 51.

⁸ ECHR *Kamasinski v. Austria*, 9783/82, Judgment, 19 December 1989, paragraph 65; Art. 75(4), KCCP.

⁹ Law No. 03/L-006 on Contested Procedure, Kosovo Official Gazette, 20 September 2008, which courts in Kosovo began applying on 6 October 2008. See also Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982 of 12 February 1982, with amendments from 1998 (1982 law on contested procedure). Many provisions in the LCP remain substantially similar to those in the 1982 law on contested procedure.

¹⁰ Articles 85.1, 92.1, LCP. Where given verbally, the authorization must be recorded in the court minutes.

¹¹ Articles 89 to 91, LCP.

¹² Article 86.2, LCP. Article 87 of the LCP provides that the litigant "may change or withdraw the statement of the representative during the session in which such statement is made" and also provides that if the representative "has made a statement or submitted in written any fact in the session in which the party was absent, and the party amends or withdraws such statement, the court considers both statements in accordance with this law."

¹³ Articles 86.2 and 87, LCP.

¹⁴ Article 86.1, LCP.

¹⁵ Law No. 03/L-117 on the Bar, Kosovo Official Gazette 49, 25 March 2009. This law supersedes the Law on the Bar and other Legal Assistance, Official Gazette of the Socialist Autonomous Province of Kosovo, No: 011-69/79.

¹⁶ Article 88.2, LCP.

The authorized representative is obliged to “honourably exercise his/her profession and justice and to behave in compliance with professional ethics.”¹⁷ The lawyer “should not cause unnecessary expenses” to the client, must represent the client “with honesty and dedication” and inform the client on a regular basis concerning developments in the client’s case.¹⁸ There is a duty to provide all “necessary legal assistance to [the client] as soon as possible” and to take steps to prevent any delay or any “misuse of rights before courts and other bodies.”¹⁹ The lawyer must not “give any false information” to the court, nor any information “of such a nature that would lead the judge” to make a mistake in the adjudication of the case.²⁰ The court is authorized to issue monetary fines or apply other legal measures when a legal representative breaches professional obligations.²¹

In addition, Article 6(1) of the ECHR provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”²² The Court has held that this requirement “underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility.”²³ All proceedings covered by Article 6(1) are subject to the reasonable time requirement.²⁴ The reasonableness of the length of the proceedings will be assessed in the light of the particular circumstances of the case [...], having regard to the complexity of the case and the conduct of both the applicant and the competent authorities.²⁵

The authorized representative must also observe the need for a fair trial within the meaning of Article 6(1) of the ECHR. When authorized representatives fail to perform their duties diligently and effectively, delays frequently jeopardize a party’s right to trial within a reasonable time.

The OSCE monitored civil cases where authorized representatives neglected to represent litigants in a diligent or effective manner, thereby harming the parties and adding to court inefficiency.

On 19 November 2009, the parties jointly submitted a proposal to a district court requesting the dissolution of their marriage. At a hearing on 9 December 2009, the wife was present with an authorized representative appearing on behalf of both parties, the wife and the husband. The wife and the authorized representative confirmed the joint dissolution agreement. During the course of the hearing, discrepancies arose over important facts presented in the court papers, including the number of children of the marriage, and the correct residence of the husband.

¹⁷ Article 11, Law on the Bar.

¹⁸ Article 30, Code of Professional Ethics.

¹⁹ Article 49, Code of Professional Ethics.

²⁰ Article 50, Code of Professional Ethics.

²¹ Articles 288-295, LCP, for legal representative activity constituting “disrespect of the court”.

²² Article 6(1), ECHR.

²³ ECtHR, *H v France*, 24 October 1989, paragraph 58.

²⁴ ECtHR, *König v Germany*, 28 June 1978, paragraph 96.

²⁵ ECtHR, *H v France*, 24 October 1989, paragraph 50; see also *König v Germany*, 28 June 1978, and *Pedersen and Baadsgaard v Denmark*, 17 December 2004.

The authorized representative did not pay sufficient attention to the case. The court requested that the Centre for Social Work carries out a preliminary reconciliation procedure and provide its opinion over the custody of the minor children. The case was scheduled to continue on 21 April 2010. On that day, neither party, nor their authorized representatives, were in court when the case was called. After ascertaining that everyone had been duly summoned and were unjustifiably absent, the court ruled the joint proposal for divorce withdrawn. The husband and wife entered the courtroom a few minutes later. They explained they had expected that their authorized representative would be present and requested the judge to re-open the proceedings. The request was denied.

Despite an obligation to promote his clients' interests and to defend their rights, this authorized representative failed to perform his duties with the required diligence or professionalism, and this negatively impacted his clients. When authorized representatives fail to perform their duties diligently or professionally, the court may be obliged to intervene. The court is "bound to carry out proceedings without delay, to minimize costs and to prevent any misuse of procedural rights"²⁶ available to litigants. In this case, the court should have reminded the authorized representative of his legal and professional obligations. The court should also have instructed the litigants on the appropriate procedural remedies in response to their lawyer's poor performance of his professional obligations.²⁷ Finally, the court should have assessed whether the lawyer's conduct warranted the imposition of a monetary fine, another legal sanction, or, as contemplated by the LCP, to inform the bar association.²⁸ A more pro-active case management approach by the court would have assisted these litigants to assess the quality of the representation they were receiving from their lawyer, and may well have minimized its negative impact.

As noted above, lawyers have a professional duty to provide legal assistance to their clients to prevent delays or the misuse of procedural rights.²⁹ Notwithstanding this duty, the OSCE monitored cases where an authorized representative's conduct delayed the proceedings.

On 30 March 2006, the plaintiff filed a damage compensation claim in a district court. A preparatory session was held on 14 November 2008 with only the respondent present. The judge postponed the session to 12 December 2008, and then to 10 February 2009 because of the continued absence of both the plaintiff and his authorized representative. The preparatory session convened on 10 February 2009, but because only the respondent's authorized representative was present the session was postponed to 9 March 2009. Then, the judge postponed the 9 March 2009 session in response to a written request of the plaintiff's representative, who had a scheduling conflict. The plaintiff's authorized representative failed to appear at any of the above preparatory sessions, and

²⁶ Article 10, LCP.

²⁷ Article 11.2, LCP.

²⁸ Articles 10.2 and 88.2, LCP.

²⁹ Article 49, Code of Professional Ethics.

communicated a justification for his absences only for the fourth absence. Moreover, the authorized representative did not send a practitioner to replace him at the preparatory session, a procedure provided for in the LCP.³⁰

The unexcused failure of an authorized representative to attend a court session is a breach of the representative's professional obligations to the client and the court. Repeated requests for postponements, especially if requests are not timely or without adequate justification, may constitute violations of the representative's professional and legal obligations, and constitute a violation of the Law on the Bar. In addition, the legal framework in Kosovo gives the court the power to remind the authorized representative of his/her professional obligations, impose monetary fines or other legal measures, or inform the bar association of his/her conduct. It is important for the court to consider using these legal measures where indicated. Otherwise, parties and others present in the courtroom could perceive the court's inaction as tacit acceptance of such conduct.

In response to the issues discussed above, the OSCE recommends the following:

To Defence Counsel and Authorized Representatives

- Those providing legal representation should conduct themselves diligently and professionally when promoting clients' interests and defending clients' rights. They should manage their court calendars so as to be able to appear on time, avoid requesting postponements, and not be unjustifiably absent. Courts should be notified in advance with valid justifications for postponements or absences.

To the Court

- The court should proactively manage cases, ensure that proceedings are carried out without delay, and consider imposing monetary fines or other legal measures to minimize ineffective legal representation.

To the Kosovo Judicial Institute

- The Kosovo Judicial Institute should continue to train judges and prosecutors on proactive case management, including training on how to respond when defence counsel and authorized representatives are ineffective.

To the Kosovo Chamber of Advocates

- The Kosovo Chamber of Advocates is encouraged to increase training of its membership on their professional and ethical duties as foreseen by legislation.

³⁰ Article 90.4, LCP.