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Organization for Security and Co-operation in Europe

Mission in Kosovo

Department of Human Rights, Decentralization and Communities

Legal System Monitoring Section

Quarterly Report

(January-March 2007)

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EXECUTIVE SUMMARY

Pursuant to its mandate the Legal System Monitoring Section (LSMS), part of the Department of Human Rights, Decentralization and Communities (HRDC) of the Organization for Security and Co-operation in Europe (OSCE) Mission in Kosovo, monitors the justice system, assessing its compliance with domestic law and international human rights standards and recommending sustainable solutions to ensure that these standards are respected.

This report is a collection of the major findings observed by the OSCE during the period January to March 2007, and includes recommendations to the judiciary and to other relevant local and international institutions for positive changes in the future.

During the first month of 2007 the OSCE has concentrated its attention on the violation of the defendant's right to a public trial. Trial schedules for civil and criminal proceedings are still absent or not updated in many courts of Kosovo. This situation is sometimes exacerbated due to the difficulties in accessing places where trials are held.

In February 2007, the OSCE has found some documents and monitored some criminal cases that clearly show that people arrested by the police are often detained beyond the 72 hours time limit foreseen by the law, in violation of the domestic legislation and of the right to liberty of the person. The analysis of case files and the monitoring of civil cases have shown that the incorrect number of lay judges present in divorce proceedings may violate the right to a tribunal established by law.

In March 2007, the OSCE has ascertained cases where the lack of effective investigation and prosecution of alleged criminal offences occurred in Kosovo may have breached the standard of due diligence. As far as civil proceedings are concerned, the OSCE has observed continuous and excessive delays due to problems in delivering summonses to respondents residing outside Kosovo.

The OSCE will distribute its 2007 first quarterly report to prosecutors and judges throughout Kosovo and to other relevant institutions (such as the Ministry of Justice and UNMIK Department of Justice). The OSCE has been completing these reports and distributing them to the judiciary, on a regular basis, for several years.

I. JANUARY 2007

A. Difficulties in obtaining information about the schedule of public hearings and in accessing places where trials are held may breach the defendant's right to a public trial

The OSCE is concerned about the persistence of difficulties encountered by members of the general public in obtaining information on the date and place of public hearings in district and municipal courts. In addition, the OSCE is also concerned that a criminal trial is currently being held in the Dubravë/Dubrava detention facilities. These occurrences may breach a defendant's right to a public hearing.

The holding of court hearings in public constitutes a fundamental principle enshrined in international human rights law.[1] Its purpose is to render the justice system open to public scrutiny and thereby protect the parties from the exercise of arbitrary state power. The European Court of Human Rights (ECtHR) has found that: "[a] trial only complies with the requirement of publicity if the public is able to obtain information about its date and place […]".[2] As part of their obligation to ensure publicity of the hearing, the authorities must make available to the public information on the date and place of a hearing.[3]

In addition, even if the right to a public trial is not absolute, and the press and the public may be excluded from all or part of it in certain situations,[4] the ECtHR case law establishes that the holding of a criminal trial inside a prison may violate the right to a public hearing. Even though there is no legal impediment to public attendance, the actual arrangements of the authorities might, in practice, impede the access.[5]

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[1] See Article 6(1), European Convention on Human Rights and Fundamental Freedoms (ECHR), and Article 14(1), International Covenant on Civil and Political Rights (ICCPR). Human rights provisions foreseen by ECHR and ICCPR are directly applicable in Kosovo according to UNMIK Regulation No. 1999/24 *On the Law Applicable in Kosovo*, 12 December 1999, as amended by UNMIK Regulation No. 2000/59 of 27 October 2000, Section 1.3.

[2] See *Riepan v. Austria*, European Court of Human Rights (ECtHR), 35115/97, Judgment, 14 February 2001, Para. 29, and *Van Meurs v. The Netherlands*, Human Rights Committee, Communication No. 215/1986, 13 July 1990, Para. 6.2.

[3] *Riepan v. Austria,* id., Para. 30.

[4] See ECHR and ICCPR, *supra* at 1. In *Campbell and Fell v. the United Kingdom*, 7819/77, 28 June 1984, Para. 87-88, the ECtHR stated that there might be sufficient reasons of public order and security justifying the exclusion of the press and public from the proceedings, including when there might be a disproportionate burden on the authorities to hold some proceedings in public.

[5] In *Riepan v. Austria*, id., Para. 28-29, the ECtHR stated that: "[t]he mere fact that the trial took place in the precincts of Garsten Prison does not necessarily lead to the conclusion that it lacked publicity. Nor did the fact that any potential spectators would have had to undergo certain identity and possibly security checks in itself deprive the hearing of its public nature […] Nevertheless, it must be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective […] The ECtHR considers that a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the Court observes that the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an

Applicable law in Kosovo for criminal and civil proceedings requires that the main trial shall be public, while the exclusion of the public is permitted only in certain limited circumstances.[6] Moreover, the Rules on Internal Activity of Courts[7] foresee the daily placing of a list of the court's sessions on the information board, which includes the time and venue of the session.[8] In February 2004, the Department of Justice (DOJ) issued Justice Circular No. 2003/7, which requires that court administrators and court presidents ensure that hearing schedules are posted on a bulletin board in public view in accordance with Article 76 of the Rules on Internal Activity of Courts.[9]

Despite these legal requirements, the OSCE has observed that a number of district and municipal courts in Kosovo continue to fail to post in public view the complete and updated trial schedules for public criminal and civil trial sessions.[10] This problem also affects the activity of international judges. Frequently, personnel of the local courts do not post trial schedules for public sessions presided over by international judges, mainly because international staff did not provide them in advance with sufficient information about the trial. Thus, in most instances, the only way to obtain the requisite information is to personally approach the presiding judge (local or international) of a case, which may not be appropriate to guarantee the publicity of the respective hearing.[11]

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obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access."

[6] Articles 328-331, UNMIK Regulation No. 2003/26 On the Provisional Criminal Procedure Code of Kosovo (PCPCK), 6 July 2003; Articles 306-310, Law on Contested Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia (SFRY), No. 4/77, 36/80, 69/82.

[7] Rules on Internal Activity of the Courts, Official Gazette of the Socialist Autonomous Province of Kosovo (SAPK), No. 7/81

[8] Article 76, Rules on Internal Activity of the Courts.

[9] See Para.5, Justice Circular 2003/7 of 4 February 2004, which also adds that these schedules must be published in all relevant languages in accordance with Sections 9.3 and 9.4 of UNMIK Regulation No. 2000/45 On Self-Government of Municipalities in Kosovo. Note that the year in the reference of this justice circular was incorrectly referred to 2003, although it was promulgated in 2004.

[10] For instance, trial schedules at the Municipal Court of Prishtinë/Priština and the District Court of Gjilan/Gnjilane are not posted at all. Furthermore, trial schedules for criminal and civil trials at the District and Municipal Courts of Pejë/Peć are almost never posted. The Municipal Court of Kamenicë/Kamenica does not have updated trial schedules for public hearing and, most of the time, it does not have trial schedules at all. At the Municipal Court in Gjilan/Gnjilane and the Municipal Court in Rahovec/Orahovac, trial schedules of criminal cases are not posted on a regular basis. In Viti/Vitina Municipal Court, the trial schedules are not updated; also the Municipal Courts in Suharekë/Suva Reka and Malishevë/Mališevo fail to regularly update their trial schedules. In Mitrovicë/Mitrovica District Court, one civil judge does not publish the schedule whereas the other civil judge regularly publishes schedules. Also in Vushtrri/Vučitrn Municipal Court, some civil judges post their trial schedules while other civil judges of the same court do not. The District Court of Prishtinë/Priština has a board inside the building with trial schedules posted only in Albanian for criminal proceedings. In practical terms, however, it is uncertain if persons outside the court know about the existence of this board, since it is placed on the first floor in a non-easily accessible location. It better serves the administrator to determine which court rooms are available rather than to provide the public with trial information. Similarly, the District and Municipal Courts of Prizren have posting tables only inside their buildings (second and first floor respectively) and only indicating the case number. Moreover, generally people cannot enter the courthouse without a summons or a justification.

[11] Of note, in February 2007 the Office of International Judges has started posting at the Supreme Court building trial schedules that international judges conduct over a week.

The above practices make it difficult for the general public to obtain information on criminal and civil public hearings in the district and municipal courts. Although a member of the public with knowledge of the system may eventually obtain the relevant information, the enormous effort required in many instances may, effectively, act as a barrier to observing the trial. This, consequently, may adversely affect the right of the accused to a public trial.

In addition, the OSCE is concerned that the requirements of the right to a public trial might not be met regarding a trial currently held at Dubravë/Dubrava detention facilities. The trial involves thirteen defendants accused of having committed several terrorist-related crimes, such as the murder of both an international and local police officer which occurred on 23 March 2004[12] on the road to Podujevë/Podujevo, attempted murder,[13] participation in a terrorist organisation,[14] and illegal possession of weapons.[15] According to the minutes, the trial was scheduled to begin on 9 June 2006 at the District Court of Prishtinë/Priština. However, that same day, the panel rescheduled the session because "[…] a recommendation for change of venue pursuant to Regulation 2000/64 was sent by the Department of Justice to the SRSG [...]"[16]

The trial eventually occurred in a building within the Dubravë/Dubrava detention centre, notwithstanding concerns expressed by the Presiding Judge and some of the defendants' lawyers. However, defense counsel complained that most of the defendants' family members had to travel more than 150 Kilometers to reach Dubravë/Dubrava detention facility. In addition, some of the lawyers noted that during some sessions, family members of the defendants could not obtain access to the courtroom.

In view of the above, the OSCE recommends that:

- All courts make available information on the date, time and venue of criminal and civil public hearings to the public, in all official languages of Kosovo;
- International judges inform court administrators about public trials they will hold in the local courts to allow a prompt publication of the public hearings; and
- International and local authorities take all necessary steps to guarantee the effective access of the public to all public sessions held in the Dubravë/Dubrava detention centre to comply with domestic legislation and international human rights standards, or change the venue to a public court.

[12] Article 30(2) items 2 and 6, Criminal Code of the SAPK (CCK), Official Gazette of the SAPK No. 25/77, 28 June 1977 as read in conjunction with Section 2.2 of UNMIK Regulation No. 2001/12 On The Prohibition of Terrorism and Related Offences, 14 June 2001, and with Article 22, Criminal Code of the SFRY (CCSFRY), Official Gazette of the Socialist Federal Republic of Yugoslavia No. 44/76, 8 October 1976.
[13] Article 30(2) items 2 and 6, CCK, read in conjunction with Sections 2.1 and 2.4, UNMIK Regulation No. 2001/12 and Articles 19 and 22, CCSFRY.
[14] Section 5.3, UNMIK Regulation No. 2001/12.
[15] Section 8.2, UNMIK Regulation No. 2001/7 On the Authorization of Possession of Weapons in Kosovo, 21 February 2001.
[16] From the minutes of the session of 9 June 2006. See, for further reference, UNMIK Regulation No. 2000/64 On the Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December 2000.

II. FEBRUARY 2007

A. Detention beyond the 72 hours time limit violates the domestic legislation and the right to the liberty of the person

The OSCE is concerned that in some monitored cases people arrested by the police are detained beyond the 72 hours time limit foreseen by the law, in violation of the domestic legislation and of the right to liberty of the person.

According to the ECHR "[N]o one shall be deprived of his liberty save […] in accordance with a procedure prescribed by law […]".[17] Lawfulness of the procedure is understood to mean that any detention must be in accordance with domestic law and the ECHR. The ECtHR has stressed that whenever there is a failure to fulfil a procedural requirement before any deprivation of liberty, the arrest or detention must necessarily be regarded as improper.[18]

The Provisional Criminal Procedure Code of Kosovo (PCPCK) affirms that "[a] person deprived of liberty under the suspicion of having committed a criminal offence shall be brought before a judge promptly and at the latest within 72 hours of the arrest […]"[19] and that the detention of the person arrested by the police should "[n]ot exceed seventy-two hours from the time of arrest. On the expiry of that period the police shall release the detainee, unless a pre-trial judge has ordered detention on remand."[20]

Despite this legal background, the OSCE has monitored cases in which the arrested persons were brought before a pre-trial judge after the expiration of the 72 hours time limit foreseen by the law and thus detained beyond this time limit without any judicial control.[21]

In a case before the District Court in Prizren, on 16 October 2006 the pre-trial judge imposed one month detention on remand on a suspect who was arrested on charges of robbery.[22] According to the minutes of the detention on remand hearing that took place the same day and that started at 13:40, the suspect had been arrested on 13 October 2006 at 13:50; however, police documents enclosed in the case file show that the actual time of arrest was no later than 12:30 on 13 October 2006. Of note, several official documents in the case file did not report the correct time of the original arrest and detention.[23]

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[17] Article 5(1), ECHR.
[18] See *Van der Leer v. the Netherlands*, 11509/85, Judgment, 21 February 1990, Para. 22, and *K.-F. v. Germany*, 25629/94, Judgment, 27 November 1997, Para. 63 and 69-73.
[19] Article 14(2), PCPCK.
[20] Article 212(4), PCPCK.
[21] The OSCE has also monitored several cases in which hearings over the detention on remand take place at the very last moment prior to the expiry of the 72 hours time limit. This is caused either by delays by the police in providing the prosecutor with the relevant police report or delays by the prosecutor in submitting a request for the detention on remand to the competent pre-trial judge.
[22] Article 255(3), UNMIK Regulation No. 2003/25 On the Provisional Criminal Code of Kosovo (PCCK), 6 July 2003.
[23] The ruling to initiate the investigation and the decision on the detention on remand dated 16 October 2006 states that the arrest occurred on 13 October 2006 at 13.50h (according to the report that the police

In another case before the District Court in Pejë/Peć, two suspects were arrested and detained on 18 August 2006 under suspicion of committing the crime of aggravated murder.[24] The detention on remand hearing took place on 21 August 2006 after the expiry of the 72 hours time limit.[25]

The failure to release the detainees after the expiry of the 72 hours time period and the following detention on remand hearing and order is, in the aforementioned cases, in breach of the domestic legislation and the right to liberty of the person.

In light of the above, the OSCE recommends that:

- Police should promptly submit their criminal report to the competent prosecutor as soon as possible after the arrest and detention of an individual;
- Police should release the arrested person if within 72 hours from the arrest a detention on remand hearing has not taken place;
- Prosecutors should file their written request for the detention on remand of an arrested individual to the pre-trial judge as soon as they receive the police report;
- The pre-trial judge should not grant the detention on remand if the hearing takes place after the expiry of the 72 hours time limit.

B. Incorrect number of lay judges present in divorce proceedings violates the right to a tribunal established by law

The OSCE has observed that in a number of divorce proceedings the composition of the trial panel was not in compliance with the applicable legislation, in breach of the right to have a case adjudicated by a tribunal established by law.[26]

The ECHR foresees that "[I]n the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[27] In interpreting this right, the ECtHR held that a court should be properly composed "in accordance with law" and noted that a violation occurs when a tribunal does not function according to applicable procedural law.[28]

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wrote pursuant to Article 207(2) of the PCPCK when the police handed over the file to the prosecutor). In the relevant case files the OSCE did not find the police report on the arrest. However, the police minutes of the interrogation of the arrested person took place at 12.30h. Therefore, there is a discrepancy between the different documents, and there are elements to believe that the police might have forged the time of the arrest in order to avoid evidence of the lapse of the 72 hours time limit.

[24] Article 147 item (3) and (11), PCCK.

[25] As in the previous case the pre-trial judge ordered one month detention on remand.

[26] See Article 14(1) ICCPR, and Article 6(1) ECHR.

[27] Article 6(1), ECHR.

[28] *Zand v. Italy*, Commission Report No. 7360/76, 1978, and *Rossi v. France,* Commission Report No. 11879/85, 1989.

The formerly applicable Law of Marriage and Family Relations (LMFR)[29] states that "[t]he panel consisting of the judge and two lay judges runs and makes decision in the procedure of marriage disputes on the first level."[30] However, according to the new family law of Kosovo that entered into force on 16 February 2006,[31] "[a] panel comprised of one judge and three lay judges conducts procedures in marital disputes and brings decisions."[32]

Originally, the English and Serbian versions of the law conflicted with the Albanian version, which states that the panel should include one professional judge and two lay judges.[33] Since trial panels in general should be composed of an uneven number of judges in order to reach a majority decision, it is more logical for the trial panel in divorce cases to be composed of one professional judge and two lay judges. This mistake was recently corrected: in February 2007 the OSCE noticed that all three translated versions of the law state that the panel should be comprised of "[o]ne judge and two lay judges".[34] Of concern, UNMIK never notified the public or judiciary of this change to the law.

Given the ambiguity in the law, the OSCE has observed that, in some divorce cases, the trial panel was not composed in accordance to the new applicable family law of Kosovo.[35]

For example, in two cases under the new family law and submitted to the Court on 22 August and 12 October 2006 and held before the District Court in Prizren concerning the dissolution of a marriage, no lay judges were present during the trial sessions which were both held on 27 December 2006.[36]

In a third example before the District Court in Mitrovicë/Mitrovica involving a divorce claim submitted to the court on 5 May 2006, during the trial session held on 24 May 2006, only two lay judges were present instead of three, in contradiction with the then-existing English and Serbian versions of the new family law.

The failure to properly compose the trial panels in the first two divorce cases was in breach of domestic law and of the right to a tribunal established by law. Furthermore, the lawyers representing the parties did not object to the improper composition of the panels. In the third example, however, the court and lawyers cannot be blamed for improper

[29] Law on Marriage and Family Relations (Official Gazette of the SAPK, No. 10/84).
[30] Article 333, Law on Marriage and Family Relations.
[31] Kosovo Assembly Law No. 2004/32 on Family, promulgated by UNMIK Regulation No. 2006/7, 16 February 2006.
[32] Article 73, Kosovo Assembly Law No. 2004/32, English and Serbian version.
[33] Article 73, Kosovo Assembly Law No. 2004/32, original Albanian version.
[34] Article 73, Kosovo Assembly Law No. 2004/32.
[35] The general issue of absence of lay judges in civil proceedings has been reported by the OSCE on several previous occasions. See the OSCE report "The Administration of Justice in the Municipal Courts" (March 2004), p. 18. See also the OSCE, Department of Human Rights, Decentralization and Communities (former Human Rights and Rule of Law Department) monthly reports of January 2005 and February 2006.
[36] In both cases, the court records contain the names of the two absent lay judges, instead of the three lay judges that were supposed to attend the session as required by the new law.

composition of the panel, but rather the relevant authorities promulgating a law with contradicting translations regarding the composition of the trial panel.

In view of the above issues, the OSCE recommends that:

- The Kosovo Judicial Institute provides training for judges on the family law of Kosovo;
- The Kosovo Chamber of Advocates reminds counsels of the application of the new family law and their role in ensuring the proper composition of trial panels;
- UNMIK publishes a notice of the change of the new family law and clarify that there should be two lay judges and one professional judge present in divorce cases.

III. MARCH 2007

A. Lack of effective investigation and prosecution of alleged criminal offences may have breached the standard of due diligence

The OSCE is concerned about the lack of effective investigation and eventual prosecution where a criminal offence is likely to have occurred. Arguably, in some cases the relevant authorities failed to meet the required due diligence standard under human rights law.

According to ECtHR case law,[37] any recourse to violence against a person deprived of his liberty not made strictly necessary by the conduct of the detainee, is in principle an infringement of Article 3 of the ECHR,[38] because it diminishes the human dignity of the individual concerned.

In addition, the protection of human rights in cases of inhuman and degrading treatment extends to the protection of individuals from the actions of both private persons and officials. Authorities have a duty to demonstrate due diligence in investigating, protecting, and punishing human rights violations.[39]

The domestic legislation in Kosovo requires that "[t]he public prosecutor shall initiate an investigation […] if there is a reasonable suspicion that a person has committed a criminal offence which is prosecuted *ex officio.*"[40]

However, the OSCE has monitored cases in which the authorities failed to properly investigate cases of alleged inhuman and degrading treatment and/or alleged criminal activity by officials or private individuals.

In a case investigated by the Prizren District Prosecution Office, on 25 October 2006, the police arrested an individual belonging to the Kosovo Roma community in relation to the rape of a 13 year-old girl. During the first interrogation by the police, the defendant admitted committing the alleged criminal act. However, on 27 October 2006, the suspect told the Prizren District Prosecutor that he confessed to the alleged crime only because the police had threatened and beat him.[41] He also showed his torn clothes as visible signs of the alleged mistreatment. The victim of the alleged rape, in her statement to the prosecutor of 1 November 2006, confirmed that she witnessed the mistreatment of the defendant by the police. Nevertheless, the prosecutor failed to initiate an investigation of

[37] *Tekin v. Turkey*, 22496/93, Judgment, 9 June 1998, Para. 53l; *Ribitsch v. Austria*, 18896/91, Judgment, 4 December 1995, Para. 38.
[38] "No one shall be subject to torture or to inhuman or degrading treatment."
[39] General Comment No. 31, UN Human Rights Committee, *The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 26 May 2004 (CCPR/C/21/Rev.1/Add.13), Para. 8.
[40] Article 220(1), PCPCK.
[41] Evidence gathered under duress is inadmissible and cannot be the basis of court decisions. See Articles 153 and 155, PCPCK.

the alleged mistreatment. Rather, the pre-trial judge ordered one month detention on remand of the defendant.[42]

In another case in Ferizaj/Uroševac, on 20 November 2006 the Municipal Public Prosecutor dismissed a police criminal report[43] dated 3 November 2006 that indicated a man had physically assaulted his wife and caused her injuries, thus committing a crime that should be prosecuted *ex-officio.*[44] According to the information that the police had gathered, there had been violent incidents between the couple prior to the current event.

In the decision of dismissal,[45] the prosecutor wrongly interpreted the current applicable legislation and affirmed that both parties committed "domestic violence", a criminal offence that does not exist.[46] In addition, the decision on dismissal stated that "[t]he criminal offence (*of domestic violence – n.o.a.*) is not among the criminal offences prosecuted ex-officio."[47]

In summary, prosecutors have failed to promptly investigate and prosecute possible inhuman and degrading treatment and criminal activity. This breaches due diligence standards and the legal obligations of prosecutors under domestic law.

Consequently, the OSCE recommends that:

- Prosecutors promptly investigate and, if appropriate, prosecute, with the required due diligence, police officers who allegedly maltreat arrested and detained persons;
- Prosecutors promptly investigate and, if appropriate, prosecute, with the required due diligence, persons who may have committed crimes such as light bodily injury in the context of domestic violence;
- The Judicial Inspection Unit investigates the two aforementioned cases.

[42] Of note, several documents in the prosecution file suggest a lack of reasonable suspicion against the suspect.. On the date of the alleged crime, the suspect worked during the day and thus may have had a defense of *alibi*. In addition, although there is evidence of rape, body fluid samples were not collected from the victim.
[43] See Article 208, PCPCK.
[44] For example, the defendant might be guilty of Light Bodily Harm under Article 153, PCCK. This crime is not one of the crimes that are prosecuted upon the motion of the injured party.
[45] The case file does not contain a medical certificate, or any request for such a document.
[46] See UNMIK Regulation No. 2003/12 On Protection Against Domestic Violence, 9 May 2003. The crime of light bodily harm, whether committed in or outside the context of domestic violence, should be automatically prosecuted. Id. at Section 16.2; see Article 153, PCCK.
[47] Unofficial OSCE translation of the relevant part of the decision of the Prosecutor of 20 November 2006.

B. Delays in civil proceedings due to problems in delivering summonses to respondents residing outside Kosovo

The OSCE is concerned that repeated postponements of trial sessions due to problems in summoning parties residing outside Kosovo delays civil proceedings and may lead to a breach of the right to have a case adjudicated within a reasonable time.[48]

Regular summoning procedure, as established in the Law on Contested Procedure,[49] is conducted using mail service, or, in some cases, through a designated member of the court staff (typically court messengers).[50] In cases where parties or witnesses are residing outside Kosovo, Justice Circular 2003/03 On International Legal Assistance in Civil and Criminal Matters, issued by the Department of Justice (DOJ) on 5 September 2003, states that the request for the delivery of summonses shall be communicated in writing by the court and addressed to the Director of the DOJ.[51] The Director will forward the request to the relevant authorities in the respective States.[52] Courts should allow for a minimum period of three to four months for the processing of a request.[53]

The OSCE has monitored multiple cases where excessive delays occurred in civil proceedings due to problems in summoning parties residing outside Kosovo. This indicates that the summoning procedure described above is impractical and does not function properly.

A re-trial of a property dispute before the Mitrovicë/Mitrovica Municipal Court began on 16 July 2004. The first session on 22 September 2005 was postponed because the defendant, residing in Serbia, was not regularly summoned. Consequently, the court requested on 11 October 2005 from the DOJ to summon the lawyer of the defendant in Serbia. The next sessions, dated 27 December 2005 and 8 May 2006, were also postponed because, according to the judge, there was no evidence that the summons was delivered to the defendant. The next session, dated 14 September 2006, was postponed because the DOJ had informed the court[54] about a letter of the Ministry of Justice of Serbia dated 8 March 2006. This letter explained that the Serbian authorities would need more time to process the request, and that the DOJ therefore should repeat its request for International Legal Assistance (ILA). On 14 September 2006, the court sent another ILA request to summon the party.[55] Consequently, almost one and a half years have passed

[48] Article 6(1), ECHR.
[49] *Supra* 6.
[50] See Article 133, Law on Contested Procedure.
[51] Justice Circular 2003/03 applies both to requests for International Legal Assistance (ILA) and requests for legal assistance concerning Serbia and Montenegro.
[52] Para. 5, Justice Circular 2003/03.
[53] Para. 10, Justice Circular 2003/03; under Para. 11, the Director of DOJ cannot guarantee that requested states will process ILA requests within this time frame. However, the Director will make every effort to reduce the time actually needed to transmit requests.
[54] The DOJ informed the Mitrovicë/Mitrovica Municipal Court with a letter of 14 April 2006 that reproduced the correspondence of the Ministry of Justice of Serbia.
[55] The court, however, wrongly addressed the ILA request to the Ministry of Justice instead of the DOJ. According to UNMIK Regulation No. 2005/53 Amending UNMIK Regulation No. 2001/19 On the Executive Branch of the Provisional Institutions of Self-Government in Kosovo dated 20 December 2005,

since the first postponed session in September 2005, and the party in Serbia has not yet been summoned. Conclusion of the legal dispute appears years away even under a best case scenario.

In another case before Pejë/Peć Municipal Court dated 4 April 2005 concerning the annulment of a contract, the court requested on 2 May 2006 from the DOJ to summon a witness residing in Montenegro for the next session on 14 September 2006. However, the September 2006 session was postponed because the DOJ did not notify the court whether or not the summons had been delivered. The court requested the DOJ a second time to summon the witness for the next session on 16 January 2007. However, prior to that date the DOJ informed the court that the summons could not be delivered due to administrative difficulties and asked the court to resend a request for ILA. The session was therefore postponed to 22 May 2007.

In a case before the District Court in Prizren on 30 August 2005, the plaintiff requested a divorce from his wife who was living in Germany and custody of their child. On 23 February 2006, the court sent a request to the DOJ to summon the wife for the next session dated 19 June 2006. However, by that date, the court had not received an answer if the summons had been delivered. The judge postponed the session and asked the DOJ for the reasons for non-communication in a letter dated 19 June 2006, which remained unanswered. The court sent a second request to the DOJ on 2 October 2006 to summon the wife for the next session dated 8 April 2007. As of the end of March 2007, the court has not received a response from the DOJ if the summons had been delivered.

The excessive delays in the cases described above may constitute violations of the right of the parties to a trial within reasonable time. In the first case, one year and four months have passed since the first request to the DOJ.[56] In the second case, a period of over one year will pass between the date of the first request to the DOJ and the next scheduled trial session in May 2007. In the third case, there will be more than one year and one month between the request to the DOJ and the next trial session.

Although delays caused by authorities outside Kosovo cannot be attributed to the authorities in Kosovo when deciding whether the "reasonable time" requirement has been violated, the public authorities in Kosovo should be more proactive in ensuring that the requests for ILA are executed. According to ECtHR case law, national authorities must organize their legal system so that courts can meet the Convention's requirements. Administrative difficulties do not excuse violations of the ECHR.[57]

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the processing of requests of ILA is not within the competencies of the Ministry of Justice. Therefore, the competent authority to address requests of ILA is still the DOJ. However, the Ministry of Justice shall, according to Para. xiv of the Annex to the Regulation "[a]ssist UNMIK where appropriate in the exercise of its responsibility for international legal cooperation…"

[56] In total, two years and seven months have passed in this case from the date of the request for re-trial. No trial session has been held because the defendant was not summoned properly.

[57] See *H. v. the United Kingdom*, 9580/81, Judgment, 8 July 1987, Para. 85.

In light of the above, the OSCE recommends that:

- The DOJ should play a more proactive role in ensuring that requests for ILA are followed up and in minimizing delays;
- The DOJ should inform the courts prior to the scheduled sessions if the summons had been delivered;
- Courts should minimize delays in the summoning procedure and address requests for ILA to the DOJ as the competent body for dealing with such requests, not the Ministry of Justice.