



## **Human Rights and Communities Department**

### **Legal System Monitoring Section**

## **Monthly Report – January 2009**

## **Poor performance of court-appointed defence counsel affects defendants' trial rights and violates defence counsel's due diligence duty**

The OSCE is concerned that in many cases court-appointed defence counsel provide substandard and ineffective legal representation to their clients in the course of criminal proceedings. This may violate applicable domestic and international law as well as counsel's professional duty of due diligence; it may also have serious repercussions on the course of criminal proceedings and may directly affect trial outcomes.

Under Article 6(3)(c) of the European Convention on Human Rights, any person charged with a criminal offence has the right to free legal assistance if he or she cannot afford a lawyer and the interests of justice so require. Since the European Convention is intended to guarantee rights that are practical and effective, not theoretical or illusory, authorities have a duty to ensure that legal assistance, when provided, is "effective".<sup>1</sup>

Similarly, under the Provisional Criminal Procedure Code of Kosovo, if the interests of justice so require and if the defendant is unable to pay for legal assistance, a defence counsel shall be appointed for him or her at public expense.<sup>2</sup> Defence counsel are expected to play an active role in criminal proceedings, particularly at the trial stage. The Kosovo Code of Professional Ethics of Advocates requires lawyers to exercise their duties diligently and responsibly,<sup>3</sup> whether engaged privately or appointed by the court.

Nevertheless, the monitoring of judicial proceedings has revealed that appointed defence counsel many times fail to provide their clients with effective legal representation. Previous monitoring has found that court-appointed defence counsel are generally passive, appear disinterested, often put up only a formal representation, and in general fail to make use of procedural guarantees designed to safeguard their clients' rights.<sup>4</sup>

Continued monitoring of the performance of court-appointed defence counsel in the course of judicial proceedings reveals that this pattern of ineffectiveness largely persists. More alarming, in some cases appointed defence counsel seem to openly and completely disregard the wishes and interests of their clients.

---

<sup>1</sup> European Court of Human Rights, *Artico v. Italy*, 6694/74, Judgment, 13 May 1980, paragraph 33 (*Artico v. Italy*).

<sup>2</sup> Articles 12(4) and 74(1)(2), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 (Provisional Criminal Procedure Code).

<sup>3</sup> Articles 6 and 8, Code of Professional Ethics of Advocates, Kosovo Chamber of Advocates, Prishtinë/Priština, 7 July 2007 (Code of Professional Ethics). The Code of Professional Ethics "[d]etermines rules and principles of conduct, that advocates are obliged to pursue during their law practice, due to retaining honesty, dignity and reputation as advocates acting in Kosovo." *Id.* Article 1.

<sup>4</sup> See OSCE *First Review of the Criminal Justice System (1 February 2000 – 31 July 2000)*, page 53; OSCE *Third Review of the Criminal Justice System (October 2001)*, pages 28-31; OSCE *Sixth Review of the Criminal Justice System (April 2003 – October 2004)*, pages 33 and 72.

In a case before the Mitrovicë/Mitrovica District Court, a defendant charged with the commission of Aggravated Murder<sup>5</sup> was assigned by the court a defence counsel. At a detention on remand hearing on 28 February 2008, the defence counsel raised the issue of the defendant's possible mental illness but agreed with the prosecutor that the circumstances and dangerousness of the criminal offence warranted his client's detention on remand. The lawyer did not object to detention and did not suggest any alternative involving medical treatment. The defendant himself had to intervene and state that he did not feel mentally sick, and that he objected to detention on remand. Pre-trial detention was applied and subsequently extended in the case.

In another case before the Pejë/Peć District Court involving a defendant charged with the commission of Attempted Murder,<sup>6</sup> the public prosecutor on 19 August 2008 filed a proposal for detention on remand against the defendant. At the detention hearing, the appointed defence counsel agreed that there was a need for detention to be applied against his client. The counsel did not challenge the evidence presented by the prosecutor nor the proposal for detention.

In another case before the Prishtinë/Priština Municipal Court involving three defendants indicted on multiple charges of Fraud,<sup>7</sup> during a trial session on 18 July 2008 one of the defendants stated that his defence counsel, although court-appointed, requested a payment for the legal assistance provided. Surprisingly, no attention was paid to this allegation.

While some defence counsel do provide proper legal representation both when privately engaged and when court appointed, there are many instances in which appointed lawyers fail to exercise their professional duties with the required diligence and responsibility.

It must be stressed that the mere nomination or presence of a defence counsel does not satisfy the legal requirement of providing legal assistance. The European Court of Human Rights has made clear that Article 6 of the Convention calls for "assistance" and not just "nomination".<sup>8</sup> Consequently, where a lawyer shirks his duties or for some other reason fails to provide effective representation, authorities must either replace him or cause him to fulfil his obligations.<sup>9</sup>

Therefore, the OSCE recommends:

- Defence counsel always provide effective legal representation to their clients, irrespective of whether privately hired or court appointed.

---

<sup>5</sup> Article 147, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (Provisional Criminal Code).

<sup>6</sup> *Id.* Article 146, in conjunction with *id.* Article 20.

<sup>7</sup> *Id.* Article 261.

<sup>8</sup> *Artico v. Italy*, paragraph 33.

<sup>9</sup> *Id.* See also *Kamasinski v. Austria*, 9783/82, Judgment, 19 December 1989, paragraph 65.

- When confronted with a specific case of ineffective legal representation, authorities discipline the counsel and cause him or her to fulfil their duties or replace the counsel.
- The Kosovo Chamber of Advocates ensure that all lawyers perform their professional duties according to the standards set by the Code of Professional Ethics of Advocates.

### **Lawyers’ failure to consistently uphold the professional obligation of conscientious representation in civil matters violates the Code of Professional Ethics**

Under Article 8 of the Code of Professional Ethics, lawyers must “[...] carry out with conscientiousness duties that arise from his/her profession, and maintain honesty, respect, and dignity of advocacy throughout legal practice and in private life.” Further, the Code of Professional Ethics requires that “[...] advocates with his/her performance should gain and strengthen [their] client’s trust, the trust of legal entities and other entities in front of which he/she appears.”<sup>10</sup> In addition to their clients, advocates owe duties to courts, administrative bodies, and other authorities. Hence, their appearance before those authorities, whether in writing or in person, “[...] should be as realistic as possible, focused, and on that measure that doesn’t damage the defense of the client’s interest.”<sup>11</sup>

Further, lawyers owe a duty of care to provide “[...] necessary legal assistance to the party as soon as possible and to prevent any delay and abuse of rights before courts and other bodies.”<sup>12</sup> And, “[i]t is [an] advocate’s duty to handle cases on time and properly, to archive notes, to keep regular evidence of terms and trials, in order that he and the client are able to confirm data on the status of cases [...]”<sup>13</sup>

The professional obligation of lawyers to perform their duties with the utmost care stems from the special role lawyers play in the justice system and as representatives of their clients.

“Clients seek special knowledge, skills, and diligence from lawyers precisely because they are unable to navigate a complex legal system by themselves. In addition, the lawyer’s competence and diligence are essential to fostering public confidence in the legal profession and the administration of justice and in maintaining high standards of professionalism among lawyers.”<sup>14</sup>

However, the OSCE has monitored cases in which lawyers neglected to provide professional and responsible representation of their clients. For example:

---

<sup>10</sup> *Id.* Article 7.

<sup>11</sup> *Id.* Article 44.

<sup>12</sup> *Id.* Article 49.

<sup>13</sup> *Id.* Article 87.

<sup>14</sup> Goldstein Bolocan, Maya “Professional Legal Ethics: A Comparative Perspective” (July 8, 2002). CEELI Concept Paper Series, *available at* <http://ssrn.com/abstract=321700>.

At an 18 June 2008 hearing in a Gjilan/Gnjilane region verdict annulment case, the plaintiff's lawyer arrived one hour late without informing the court in advance. After being asked by the presiding judge, the lawyer said he had another trial at the Commercial Court in Prishtinë/Priština. Arriving late for hearings indicates a lack of respect for the court, diminishes the court's credibility in the eyes of public, and detracts from the notion that lawyers "[...cooperate] in applying law and in defending basic rights and interests of citizens."<sup>15</sup> In addition to courts, lawyers should also notify clients if they will be late for hearings.

On 12 September 2008 in a Prishtinë/Priština region domestic violence case, the protected party's lawyer did not wait with his nervous and emotional client in the courtroom for the delayed hearing to start. The lawyer instructed his client to call when the hearing began. When the hearing started, the judge denied the protected party's request to call the lawyer and noted in the minutes that the lawyer was not present.

In a Pejë/Peć region annulment of contract case, the respondent's legal representative requested by submission a hearing postponement on 5 November 2008 and again on 3 December 2008. Plaintiff filed the claim in October 2005, and several hearings had previously been postponed. Though respondent's lawyer justified his request for postponement on the basis of obligations in other courts, given the delayed state of the case the lawyer should act diligently to avoid any further postponements.

In at least two hearings of a Gjilan/Gnjilane region confirmation of ownership case, the temporary representative for the absent Kosovo Serb respondent neglected to challenge contradictory evidence presented in support of plaintiff's claim. During a 6 August 2008 hearing, the plaintiff testified that his father bought the contested property from an Albanian male, though another witness testified that the plaintiff's father bought it from a Serbian male. The temporary representative neglected to inquire as to the reason for the discrepancy in testimony. Further, in closing remarks made at the 14 November 2008 final session, the respondent's temporary representative said the evidence presented at trial demonstrated that plaintiff was the rightful owner of the property.

Arriving late at hearings, requesting postponements in already-delayed cases, and failing to question evidence presented that is contrary to a client's interests all amount to violations of the lawyer's duty to provide conscientious representation of clients and to a breach of the client's right to an adversarial hearing.

In light of these issues, the OSCE recommends:

- Lawyers consider their unique duties to both clients and the legal system when undertaking legal representation.
- Lawyers act to ensure their clients receive fair and efficient treatment in the justice system.

---

<sup>15</sup> Article 30, the Code.

- Lawyers manage their time in such a way as to be able to appear on time at hearings and to avoid the need to request postponements.
- The Kosovo Chamber of Advocates promote the Code of Professional Ethics of Advocates among lawyers, judges, and the general public.