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Legal System Monitoring Section

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The failure to maintain the wiretapping system hinders investigations of alleged criminal activities and may violate domestic law

The Department of Human Rights, Decentralization and Communities (HRDC) of the OSCE Mission in Kosovo is concerned that the failure by authorities to maintain the system to intercept phone calls which is foreseen by the Provisional Criminal Procedure Code of Kosovo (PCPCK)¹ impedes the proper investigation of serious crimes, and may violate domestic law.

Prosecutors are responsible for investigating and prosecuting people that allegedly commit criminal offences.² International prosecutors often handle the most sensitive investigations, such as cases related to trafficking, organized crime, war crimes or corruption.³ The Council of Europe's Committee of Ministers recommends that public authorities "[s]hould take effective measures to guarantee that public prosecutors are able to fulfil their duties and responsibilities under adequate legal and organisational conditions [...]."⁴

The PCPCK creates the possibility of covert and technical measures of surveillance and investigation. In particular, interception of telephone calls is a very powerful tool for the competent authorities to investigate and effectively prosecute crime. According to the PCPCK, "[a] pre-trial judge may issue an order [for interception of telecommunication] on the basis of an application by a public prosecutor."⁵ In addition, the authorised police officer should commence the implementation of the order "[n]o later than fifteen days after it has been issued."⁶

However, the OSCE learned that at least from October 2006 until the end of January 2007, due to technical problems, international prosecutors could not intercept phone calls.⁷ According to documents and interviews of international prosecutors, this has negatively affected several highly sensitive investigations (organised crimes, corruption cases, etc.).

On 31 October 2006, the UNMIK Directorate of Organised Crime notified international prosecutors of a "serious failure" in the system, but did not specify the cause of the breakdown. It added that the breakdown also affects "CD media, making data checks or

¹ Articles 256-267, Provisional Criminal Procedure Code of Kosovo (PCPCK).

² Article 46(1), PCPCK.

³ For an overview of the role of international prosecutors, see UNMIK Regulation 2000/6 *On the Appointment and Removal From Office of International Judges and International Prosecutors*, 15 February 2000 as amended by UNMIK Regulations No. 2000/34 and 2001/2.

⁴ Council of Europe, in *Recommendation Rec(2000)19 of the Committee of Ministers to members states on the role of public prosecution in the criminal justice system*, 6 October 2000, para. 4.

⁵ Id. at Article 258(2).

⁶ Id. at Article 260(1).

⁷ Some local prosecutors also faced similar problems intercepting phone calls.

live interception.”⁸ Due to these technical difficulties, police could not implement within the prescribed time period the pre-trial judges’ orders to intercept telecommunications,⁹ which may have violated domestic law.

The breakdown of the system to intercept phone calls impeded investigation and prosecution of alleged criminal activity, as international prosecutors could not use covert investigation techniques. Arguably, relevant authorities may have violated domestic law by failing to maintain the wiretapping system which is foreseen by the provisions in the PCPCK related to investigative techniques available to prosecutors.

Therefore, the OSCE recommends that:

- The relevant authorities, such as the Department of Justice, the Directorate of Organised Crime, the Kosovo Police Service, and the Ministry of Justice, promptly take all necessary steps to maintain a functioning interception system so that a pre-trial judge’s order for phone interception may be executed without delay.

Delays in proceedings due to repeated absence of expert witnesses may violate the right to a trial within reasonable time.

The OSCE is concerned that the repeated absence of expert witnesses during civil trials delays the proceedings, which violates domestic law and may contribute to a violation of the right of the individual to a trial within reasonable time.¹⁰

Regarding the appointment of expert witnesses, according to applicable law, “[t]he court shall adduce evidence by testimony of expert witnesses whenever for the purpose of determination or clarification of a fact expert knowledge is needed which the court does not dispose of.”¹¹ The expert witness is obliged to respond to the court summons and provide their findings and opinion.¹² In addition, the court may fine the expert witness who does not appear at the main hearing, although properly summoned, and does not justify his absence.¹³

However, the OSCE has observed violations of these legal requirements in the following cases:

⁸ Quotation from a document contained in the investigative file of a case which was adversely affected by the collapse of the wiretapping system.

⁹ Id. at Article 260(1).

¹⁰ Article 6(1), European Convention on Human Rights and Fundamental Freedoms.

¹¹ Article 250, Law on Contested Procedure (LCP), SFRY Official Gazette 4/77–1478, 36/80–1182, 69/82–1956.

¹² Article 253(1), LCP.

¹³ Article 255(1), LCP.

In a () dispute regarding the confirmation of ownership before, the court ordered on 13 July 2006 that a geodesy expert¹⁴ conduct an expert evaluation regarding the measurements of the contested property. After submission of the expert report on 18 September 2006, the court decided during the trial session dated 11 October 2006 upon proposal of the plaintiff, to summon the geodesy expert for the next session to further clarify the expert report. Since September 2006, the court has postponed the main trial session six times¹⁵ due to the absence of the expert witness. The expert justified his absence only once.¹⁶

In a second a () dispute before the Court in () involving a claim for (), the court summoned the geodesy expert¹⁷ for a trial session on 18 January 2007, to explain his expert report. Although the court properly summoned the expert, he did not appear at the session. Only after the presiding judge inquired with his employer did the court learn that the expert could not take part in the proceedings because he was otherwise engaged in field work. Consequently, the court postponed the session.

In both of these examples, the postponements could have been avoided if the expert witness had observed the court summons. Of concern, in these cases the experts, as public officials employed by municipalities, ignored summonses of another public authority, the municipal courts. Moreover, the courts did not use the punitive measures allowed by domestic law to secure the presence of expert witnesses in trials. The European Court of Human Rights, when assessing the reasonableness of the length of proceedings, takes into account the conduct of administrative and judicial authorities. Therefore, the failure of municipal employees acting in their capacity as experts to observe court summonses and the courts to ensure the presence of experts may lead to a violation of the right to a trial within reasonable time.¹⁸

Consequently, the OSCE recommends that:

- The courts use all measures provided by the applicable law to ensure the presence of the expert witnesses at trials.
- Municipal authorities should ensure that when summoned, municipal employees respond to the summons issued by the court and attend the sessions.

¹⁴ The geodesy expert was an employee of () Municipality.

¹⁵ The court postponed the sessions on the following dates: 14 November 2006, 5 and 26 December 2006, 15 January 2007, 12 February 2007, and 16 March 2007.

¹⁶ For the session of 14 November 2006, the expert informed the court by phone that he could not attend the session due to other field work.

¹⁷ The geodesy expert was an employee of () Municipality.

¹⁸ See *Frydlender v. France*, no. 30979/96, judgment, 27 June 2000, para. 43, cited amongst others in *Atanasovic and others v. FYR of Macedonia*, no. 13886/02, judgment, 22 December 2005, para. 33; see also *Dumanovski v. FYR of Macedonia*, no. 13898/02, judgment, 8 December 2005, para. 40.