

**Department of Human Rights and Communities**

**Legal System Monitoring Section**

**Confirmation of Indictment Concerns**

**Issue 8**

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## Executive Summary

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that the criminal justice system may violate international human rights law and the legal framework in Kosovo when adjudicating confirmation of indictment hearings during criminal court proceedings. The OSCE observed numerous hearings that did not comply with the legal framework in Kosovo and violated the defendant's right to a fair trial.

The OSCE monitored confirmation hearings with less than full disclosure of materials from the prosecution to the defence, inaccurate record keeping, public trial requirements that were not met, and confirmation rulings with little to no reasoning. That being said, not all of the OSCE observations were negative, and the report concludes with an example of a confirmation hearing reasoned well.

### Failure to Disclose Material to Defendants

International law requires that the prosecution and defence are treated equally, including having equal opportunities to present their case. One party should not be placed at a substantial disadvantage in comparison to the other. This requirement includes the need for the prosecution to transfer material in its possession to the defence.<sup>1</sup> The legal framework in Kosovo is consistent with international law.

The applied Kosovo Code of Criminal Procedure<sup>2</sup> (KCCP) regulates the procedure for indictments and confirmation of indictments. The term indictment is not defined, but the KCCP explains, among other points, that an indictment should contain “[t]he time and place of commission of the criminal offense”<sup>3</sup> and “[a]n explanation of the grounds for filing the indictment [...] and the evidence which establishes key facts.”<sup>4</sup> The KCCP defines a confirmation hearing as a “hearing at which a judge renders a ruling on the indictment [...]”<sup>5</sup>

The prosecutor should provide the defence counsel with material that supports the indictment no later than at the time of the filing of the indictment, if not provided previously.<sup>6</sup> After the filing of the indictment there is a continuing obligation to provide the defence, within 10 days of receipt by the prosecution, any new material that comes into its possession.<sup>7</sup> The OSCE is concerned that this material is not always provided to the defendant.

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<sup>1</sup> European Court of Human Rights, *Foucher v. France*, 18 March 1997, paragraph 36.

<sup>2</sup> 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 to Kosovo Code of Criminal Procedure.

<sup>3</sup> KCCP Article 305 paragraph 1 (4).

<sup>4</sup> KCCP Article 305 paragraph 1 (5).

<sup>5</sup> KCCP Article 151 (12).

<sup>6</sup> KCCP Article 307 (1).

<sup>7</sup> KCCP Article 307 (3).

On 23 November 2009 several defence counsel informed a district court confirmation judge that the prosecutor failed to provide items that were significant to the preparation of the defence. The material included video and telephone recordings that the prosecution planned to use in their case against the defendants. Defence counsel objected to the inability to review and receive the video and telephone recordings prior to the trial, and requested the right to inspect the material that the prosecutor and the court possessed. The confirmation judge responded that the material would be examined at the main trial. The defence counsel's request for these materials was denied.

A confirmation of the indictment hearing allows a defendant the right to object to the admissibility of evidence.<sup>8</sup> But this right is not realistic if the defence is not granted the right to review the material or effectively challenge what is in the prosecutor's possession. Denying defence access to purportedly inculpatory video and telephone recordings the prosecution planned to use against the defendants at trial, violated the defendant's rights in at least three areas.

First, the court violated a fundamental principle stated in the KCCP Article 10 paragraph 1: "The defendant and the prosecutor shall have the status of equal parties in criminal proceedings, unless otherwise provided for by the present Code."

Second, denying access to these materials violated the KCCP Article 142(2) right to the inspection of files: "Upon completion of the investigation, the defence shall be entitled to inspect, copy or photograph all records and physical evidence available to the court."

Third, denying defence access to video and telephone recordings for the confirmation hearing violates the KCCP Article 142(3): "[T]he defence shall be permitted to inspect, copy [...] tangible objects in the [...] control of the public prosecutor which are material to the preparation of the defence [...]."<sup>9</sup>

### **Inadequate Court Minutes**

In addition to situations where defence counsel are not treated equally with prosecutors, the OSCE observed situations where court minutes did not reflect what happened when the defendant's rights were denied.

16 August 2010 confirmation hearing district court minutes reflected that the defendant was informed of his rights. These rights include the right not to respond to specific questions, not to provide a statement which may incriminate the defendant or relatives, a right to defence counsel or to defend himself, and to oppose the indictment or the admissibility of the evidence presented in the indictment.<sup>10</sup> The OSCE observed, however, that the defendant was not informed of any of the above rights. What the minutes asserted was not accurate. The defendant was not informed of his rights.

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<sup>8</sup> KCCP Article 311.

<sup>9</sup> KCCP Article 142(3).

<sup>10</sup> KCCP Article 314.

The court in the above case entered into the confirmation hearing standard form minutes of what defendants should be informed about, rather than create a document to show what actually happened.

### **Public Trial Requirements Not Met**

The holding of court hearings in public constitutes a fundamental principle of the right to a fair trial, keeping the justice system open to public scrutiny and protecting the parties from the exercise of arbitrary state power. The OSCE has reported on this topic previously,<sup>11</sup> however no substantial improvement has been noticed so far.

The right to a public trial is enshrined in international law.<sup>12</sup> As part of the obligation to ensure the publicity of a hearing, the authorities must ensure that information on the date and place of the hearing is readily available to the public.<sup>13</sup> The legal framework in Kosovo is consistent with this requirement. It prescribes that the main trial shall be public<sup>14</sup> and the exclusion of the public is permitted only in certain limited circumstances.<sup>15</sup> Confirmation hearings should comply with the same requirement as the main trial, including the requirement to be public.<sup>16</sup>

Additionally, the OSCE often found that the only way to obtain the information about the time and place of a confirmation hearing was to speak personally to the judge handling the hearing. Information on, and access to, the trial may eventually be granted to specific members of the public with knowledge of the system, but the enormous effort constitutes a barrier to observing the trial. This adversely affects the right of the accused and others to a public trial.

### **Improper and Insufficient Reasoning in Confirmation of Indictment Rulings**

The OSCE observed shortcomings in the reasoning of confirmation of indictment rulings. A lack of reasoning breaches international human rights law and the KCCP.

International standards and European Court of Human Rights case-law requires courts to provide reasons for their decisions and judgments.<sup>17</sup> Similarly, the KCCP requires that “[a]ll rulings rendered by the judge in connection with the confirmation of the indictment shall be supported by reasoning [...]”.<sup>18</sup> Similar to the need for an accurate record of court proceedings, a reasoned decision demonstrates, among other things, that the parties have been heard, allows public scrutiny of the justice system, and is

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<sup>11</sup> See the Legal System Monitoring Section (LSMS), Reforms and Residual Concerns, March 2006, p. 50-51, accessible at: [http://intranet/n/s/documents/monitoring/4/405\\_1.pdf](http://intranet/n/s/documents/monitoring/4/405_1.pdf).

<sup>12</sup> Article 6(1) European Convention on Human Rights; Article 14(1) International Covenant on Civil and Political Rights; Article 10 Universal Declaration of Human Rights.

<sup>13</sup> *G.A van Meurs v. The Netherlands*, Communication No. 215/1986, U.N. Doc. CCPR/C/39/D/215/1986 (1990), accessible at: <http://www1.umn.edu/humanrts/undocs/session39/215-1986.html>.

<sup>14</sup> KCCP Articles 328-331.

<sup>15</sup> KCCP Article 329.

<sup>16</sup> KCCP Article 313(3).

<sup>17</sup> European Court of Human Rights, *Ruiz Torija v. Spain*, 9 December 1994, paragraph 29; European Court of Human Rights, *Hirvisaari v Finland*, 27 September 2001, paragraph 30.

<sup>18</sup> KCCP Article 317(1).

necessary for mounting an appeal. The failure of courts to explain the reason for confirming or rejecting an indictment violates international human rights law.

The OSCE has monitored numerous cases that are not sufficiently reasoned and has previously reported on this topic.<sup>19</sup> While there are exceptions, the majority of rulings continue to be reasoned poorly.

### **Not All Confirmation Hearings Reasoned Poorly**

Although many confirmation hearings lack sufficient reasoning, this OSCE report wishes to highlight a confirmation hearing reasoned well that may serve as a model for others.

On 27 July 2010 a district court confirmation hearing involving three defendants was reasoned well. In applying the Criminal Code of Kosovo<sup>20</sup> (CCK), all three defendants were charged with the unauthorized supply, transport, production, exchange or sale of weapons.<sup>21</sup> Two of the three defendants were charged with unauthorized ownership, control, possession or use of weapons.<sup>22</sup> A different set of two defendants were charged with organized crime.<sup>23</sup> The illegal weapons charges were confirmed, while the organized criminal activity charges were rejected.

Prior to explaining the reasoning for the ruling the way the court did, the confirmation ruling first verified that the indictment was filed in accordance with the KCCP Articles 304-309. The confirmation judge next verified that the defendants understood the indictment, heard their not guilty pleas, and then heard objections raised by defence counsel.

This ruling was particularly well-reasoned in explaining the court's rejection of the indictment pertaining to organized crime. The confirmation judge heard objections from the counsel representing the two defendants charged with organized crime, reviewed the CCK, and turned to international law for additional guidance. The ruling discussed definitions found in the CCK, including the terms "organized crime"<sup>24</sup> and "structured group."<sup>25</sup>

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<sup>19</sup> See the Legal System Monitoring Section (LSMS) Reviews of the Criminal Justice System in Kosovo, 31 March 2006, pages 24-25, accessible at: [http://www.osce.org/documents/mik/2006/12/22703\\_en.pdf](http://www.osce.org/documents/mik/2006/12/22703_en.pdf); and 31 October 2004, pages 16-17, accessible at: [http://www.osce.org/documents/mik/2004/12/3984\\_en.pdf](http://www.osce.org/documents/mik/2004/12/3984_en.pdf).

<sup>20</sup> Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003, with subsequent amendments. On 6 November 2008, the Kosovo Assembly promulgated Law No. 03/L-002 on Supplementation and Amendment of the Kosovo Provisional Criminal Code of Kosovo, which left the code substantially the same as the 2003 law, with only a section on guilty plea agreements added and the name of the code changed to Criminal Code of Kosovo, hereinafter referred to as CCK.

<sup>21</sup> CCK Article 327.

<sup>22</sup> CCK Article 328.

<sup>23</sup> CCK Article 274.

<sup>24</sup> CCK Article 274(7)(1). The term "organized crime" means a serious crime committed by a structured group.

<sup>25</sup> CCK Article 274(7)(4). The term "structured group" means a group of three or more persons that is not randomly formed for the immediate commission of an offence.

The ruling referred to international law in its reasoning by noting that Article 2(a) of the United Nations Convention Against Transnational Organized Crime,<sup>26</sup> which defines the term “organized criminal group,” requires a minimum of three people acting in concert with the aim of committing a serious crime, before a structured group which could expose one to an organized crime charge is formed.

In summary, while the OSCE noted the above confirmation ruling to be well-reasoned, this case was also noted as an exception to the majority of monitored cases.

## **Recommendations**

### **To the Courts**

- Confirmation hearings should comply with the KCCP public trial requirements, and this includes announcing the time and place of the hearings.
- Ensure, when completing confirmation hearing minutes, that the information is accurate.
- Confirmation of indictment rulings should have sufficient reasoning.
- Courts should assist with the transfer of all relevant material that is in possession of the prosecution or the court to the defence.

### **To the Prosecutors**

- Prosecutors need to transfer all relevant material to the defence.

### **To the Kosovo Judicial Institute**

- Train judges and prosecutors on the requirement to transfer evidence to the defence, to draft accurate minutes, to hold public trials, and to write reasoned confirmation of indictment rulings.

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<sup>26</sup> United Nations Convention Against Transnational Organized Crime, UN General Assembly resolution 55/25 of 15 November 2000, entered into force 29 September 2003.