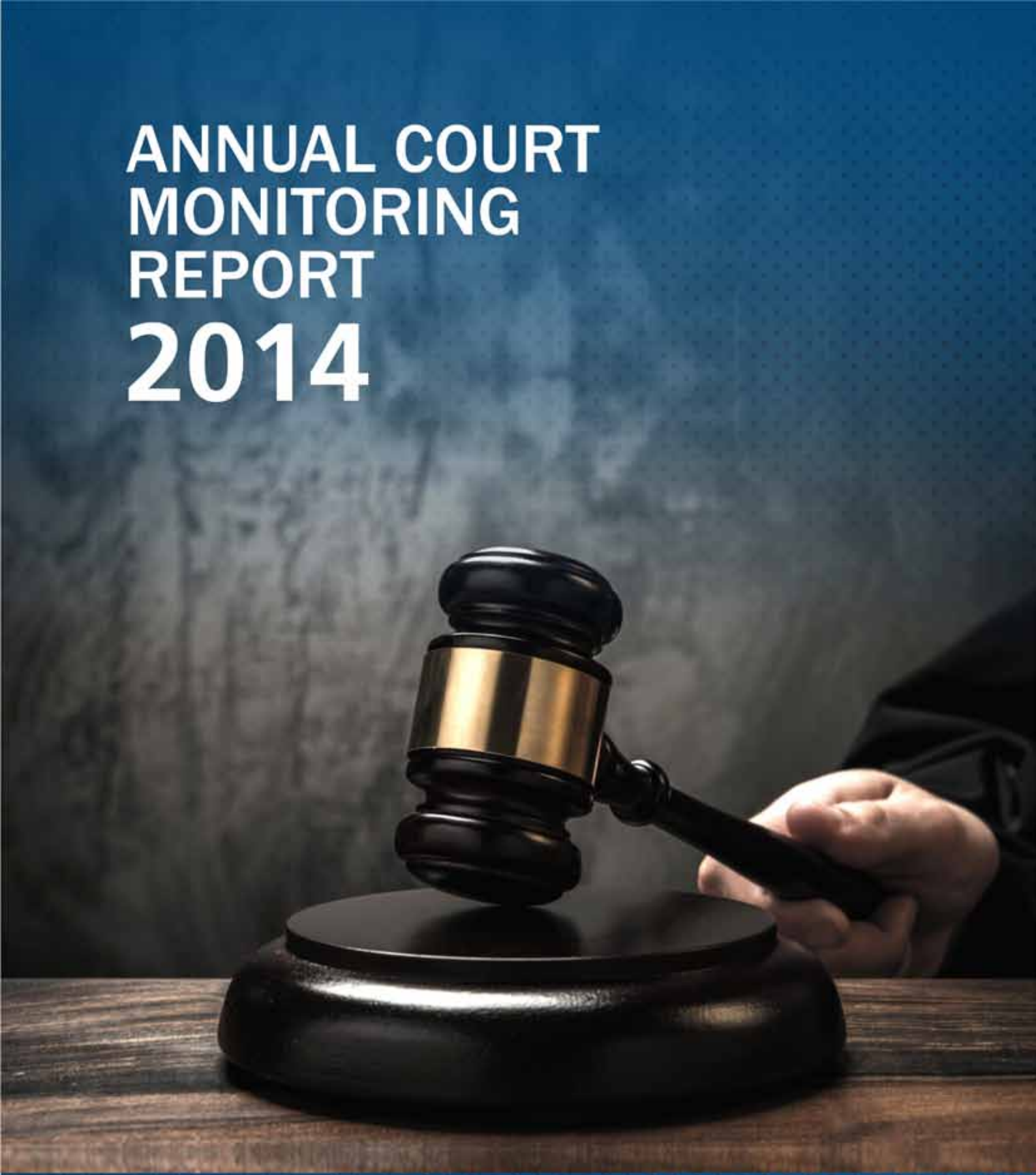
ANNUAL COURT MONITORING REPORT 2014



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Internews Kosova

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Published by:

BIRN
BALKAN INVESTIGATIVE REPORTING NETWORK

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INTERNEWS KOSOVA

ANNUAL COURT MONITORING REPORT 2014

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I. INTRODUCTION

For the eighth year in a row, the Balkan Investigative Reporting Network continued monitoring trial proceedings in Basic Courts, the Court of Appeal and the Supreme Court. This year, for the first time ever, the Constitutional Court has also been included in the Report – where the legal analysis prepared by the team of monitoring jurists shall be presented.

2014 was the second year in which courts and prosecutions have applied new organizational structure and new criminal provisions and criminal procedures.

In 2013, the pilot year of the new organizational structure of courts, our monitoring identified shortcomings and various violations of criminal proceeding processes, from technical to ethical ones. Meanwhile, as the second year of structural changes, 2014 was a good opportunity for courts to improve their performance.

Nonetheless, irrespective to this fact, we have noted a continuation of procedural and technical irregularities during the court hearings. The inadequate announcement of court hearings, their start with delay, and the use of telephones during the hearings are only some of the technical irregularities also marked during 2014, which will be addressed in the first part of this report. To address this issue most correctly, we have continued with an analysis of whether the Palace of Justice will help in solving any of the technical issues.

In the second part of the report, we will treat procedural irregularities, starting from processing of unacceptable evidence by the Prosecution, through to non-reading of the indictments in the initial hearing, to continue with the analysis made between the actual number of judges and prosecutors, and the number that would need to exist in order for the system to function better.

The third section includes a novelty that this year is introduced in the monitoring report, which is related to the Constitutional Court. This part has been allocated for the legal analysis carried out regarding the Verdict on Inadmissibility issued by the Constitutional Court regarding the Request of Ombudsperson's Institution for extension of the mandate of three international judges of the Constitutional Court.

In the fourth part, we will present yet another novelty which is related to monitoring of Bench Bars or Roundtables organized by the Kosovo Bar Association. Discussions in these roundtables have tackled many issues raised in BIRN reports from court monitoring, thus expanding the discussion to a wider spectrum, including lawyers, judges, prosecutors and police officials.

The report concludes with the positive observations from the courts and recommendations taken out of the monitoring carried out throughout 2014.

II. METHODOLOGY

This year, the methodology used during monitoring consists of:

1. **Monitoring of regular hearings**: The method of observing in courtrooms and filling out questionnaires as a result of observance was used for monitoring regular hearings.
2. **Analysis of the Constitutional Court's verdict**: In this section, the Constitutional Court's Verdict on re-appointment of international judges of the Constitutional Court has been analysed.
3. **Bench Bars**[1]: The method of observing was also used for monitoring Bench Bars, with the same as report drafting as a result of observance.

The monitoring covered regular courts in 26 Kosovo municipalities (Basic, Appeals and Supreme Court.)

This report is based on 501 questionnaires completed during 2014, out of which 426 hearings were held, while 75 monitored court hearings were not held.

Including the 501 hearings monitored during 2014, the overall number of hearings monitored under the court-monitoring project has reached 9,195, thus developing a reliable sample and solid base of data, which are grounded and comparatively analyse the project results and findings.

1 Bench Bars are round tables organized by the Chamber of Advocates, which gathers lawyers , judges , prosecutors and police officers to discuss the problems in the judiciary.

III. MONITORING OF REGULAR COURTS

During 2014, the BIRN monitoring team has monitored regular courts (the Basic, Appeals and the Supreme Court) throughout the territory of Kosovo.

Towns in which we have carried out the monitoring are:

Prishtina, Prizren, Peja, Mitrovica, Gjilan, Ferizaj, Vushtrri, Skenderaj, Drenas, Kaçanik, Viti, Podujeve, Rahovec, Suhareka, Klina, Istog, Gjakova, Deçan, Dragash, Lipjan, Kamenica, Novoberde, and Malisheva.

A. TECHNICAL IRREGULARITIES

Addressing technical irregularities remains one of the primary goals of monitoring carried out by BIRN monitors since 2008, which, as proved in many cases, causes new problems.

We consider that the situation in the rule of law sector will continue to remain problematic as long as technical irregularities will be tolerated, which, although easily evitable, demonstrate the willingness for concrete actions toward improvement of the overall situation.

The probability for something to go procedurally wrong is very high if, for example, telephones are used during hearing sessions – which directly impacts the loss of concentration, or if trials are held at the judge's office instead of being held in the courtroom. As long as minor irregularities are tolerated, it will be difficult to also fight the major ones. Technical irregularities often were and remain a paved road toward procedural violations; for example, this directly impacts the lack of audio/video recording.

Due to these and many other reasons, we have decided to continue monitoring court hearings over the course of this year in regular courts and see if there were technical irregularities, and in case yes, what kind of irregularities were marked and how can they be addressed to improve the situation next year.

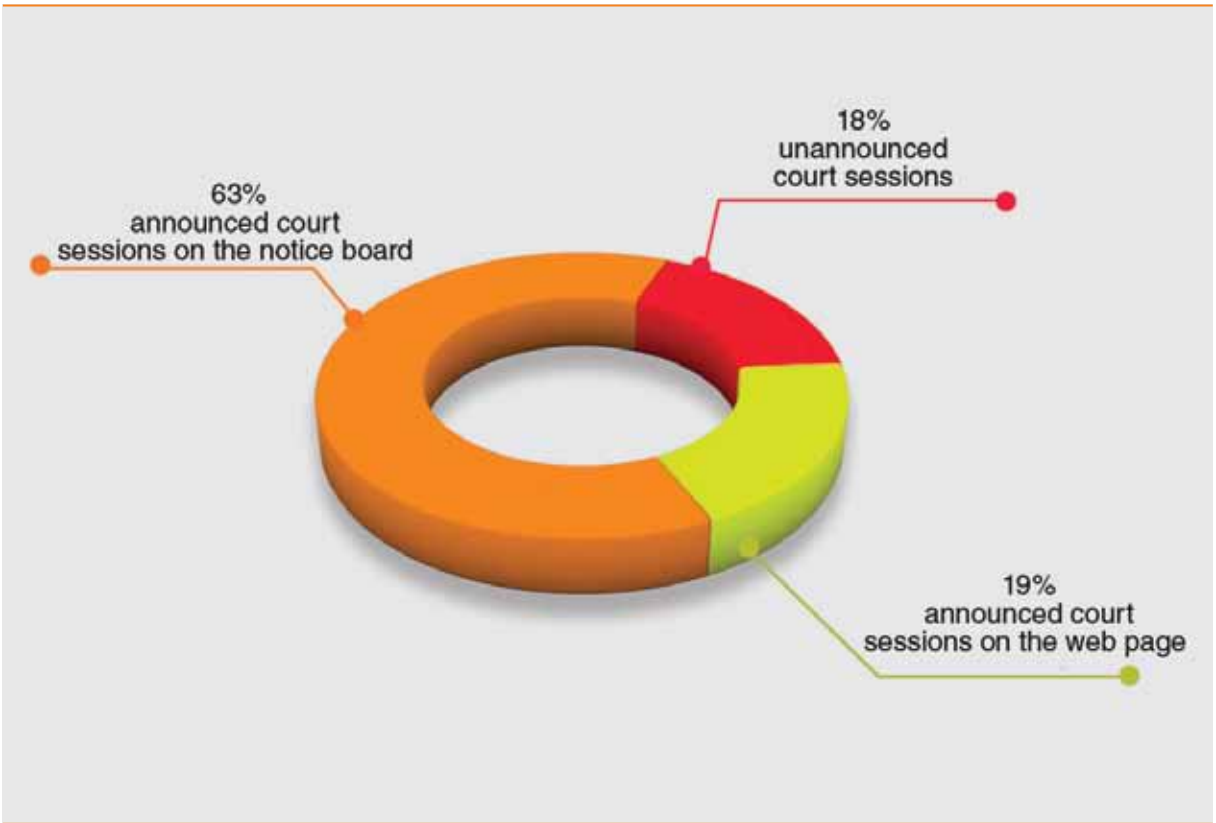
1. Announcement of court sessions With or without transparency?

This year, as was the same last year, sessions continued to be announced on announcement boards and through internet – via courts' websites. Our 2012 reports drew the attention to the fact that websites were only being used for the announcement of EULEX hearings. In 2013, a significant improvement was noted, which made the 2013 Monitoring Report – to identify it as a more transparent judiciary as far as hearings' announcements are concerned[2].

Meanwhile, as far as 2014 is concerned, out of the overall monitored hearing sessions, 82% were announced, thus leaving only 18% of the hearings unannounced. Out of 82% of announced hearings, 63% of them were announced in the announcement boards, while 19% were announced on websites.

The percentage of monitored/held hearings, those that were announced and unannounced prior to the hearing is reflected in the following table.

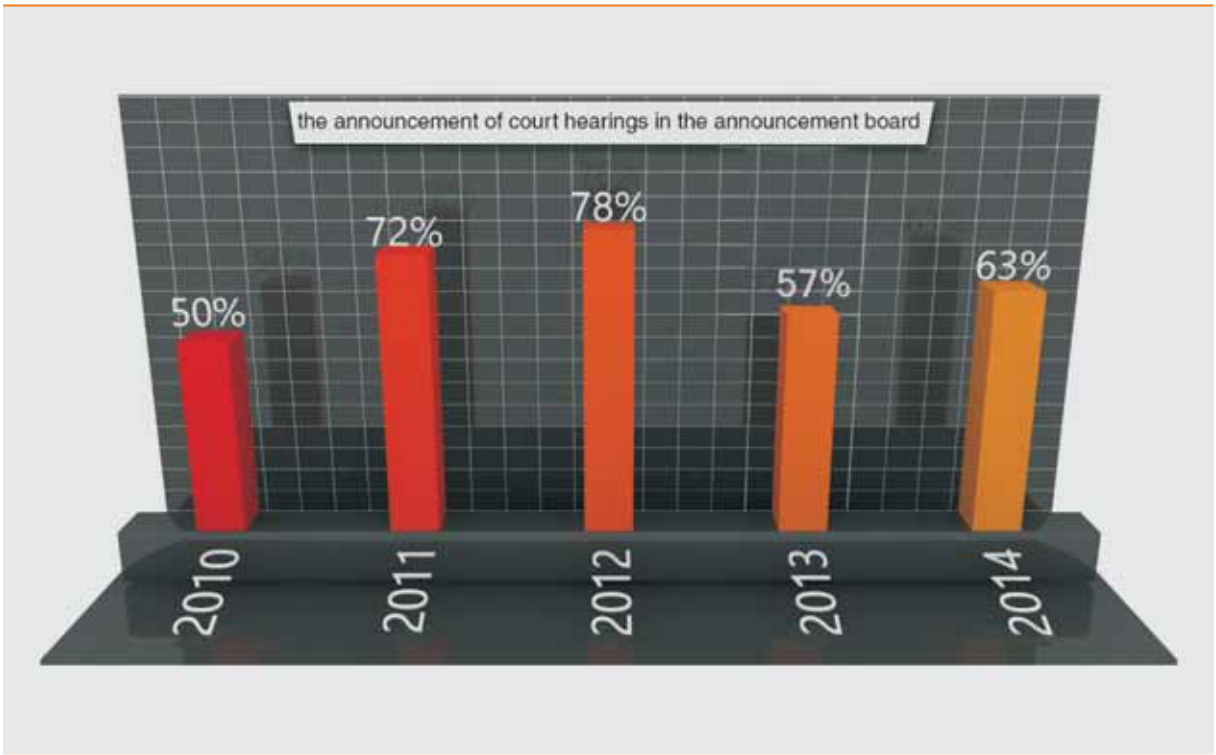
2 Court Monitoring Report 2013 – page 27



Last year, the number of unannounced hearings was 22%, while this year it has decreased to 18%, which means that a small improvement in this regard is being noted. Compared to last year, the percentage of hearing announcements made on websites remains the same (21% in 2013 and 2014), while announcement of hearings on the announcement board was increased from 57% from the same timeframe in 2013 - to 63% in 2014.

Nonetheless, the difference in the percentage of hearings announced in websites and those announced in the announcement board is high, and as such it represents a concern. No matter that the percentage increase of hearings announced in the announcement board might be considered as an achievement of this year – this achievement is followed by the concern of non-movement in the percentage of hearing announcements in websites. This is one of the concerns that our monitoring points to this year, together with the announcement of urgent need for Courts' digitalization and the functionalizing of websites in general, and hearing announcements in particular.

The trajectory of BIRN measures from 2010 to 2014, regarding the announcement of court hearings in the announcement board, is represented below:



At the same time, the trial timetables have never been announced regarding the Basic Court in Prishtina, Serious Crimes Department; and information regarding the holding of hearings can only be gathered through other sources, such as communication with case lawyers.

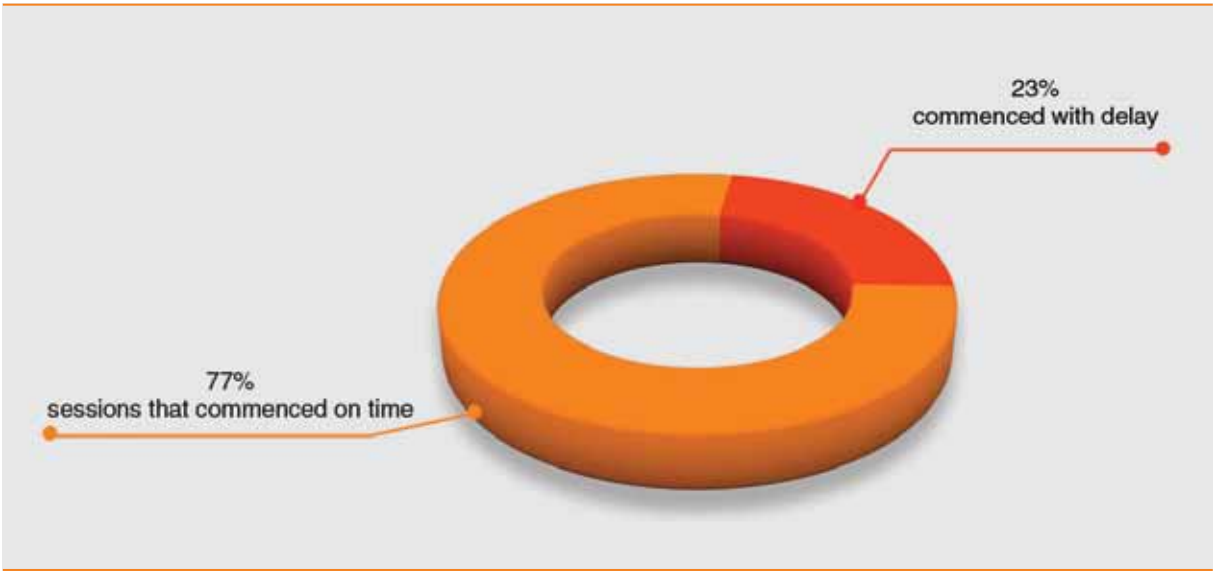
Holding of trials in judges' offices has been significantly noted in the same Court in Prishtina, whereas a large number of defendants and parties have ruled out the transparency principle.

Unfortunately, there are cases when announcement of hearings is not done in the announcement boards, or the websites. This is particularly true when it comes to the Basic Court in Prishtina – SCD, no announcement is made for a hearing (court hearing with P.no 363/12, hearing with P.no 330/12 held on 5 December, hearing with P.no 583/14 held on 2 December 2014). The same problem also exists in Basic Court in Peja, where the hearing announcements are not made, with justification that monitors are not functional.

2. Commencement of court sessions With or without delay?

Last year we reported that 27% of hearing sessions commenced with delays, while the most frequent reason for this was the trial panel, no matter that the percentage of non-commencement of hearings on time has decreased by 4% this year. Different from last year, when 27% of hearing started with delay, this year 23% of them have started with delay.

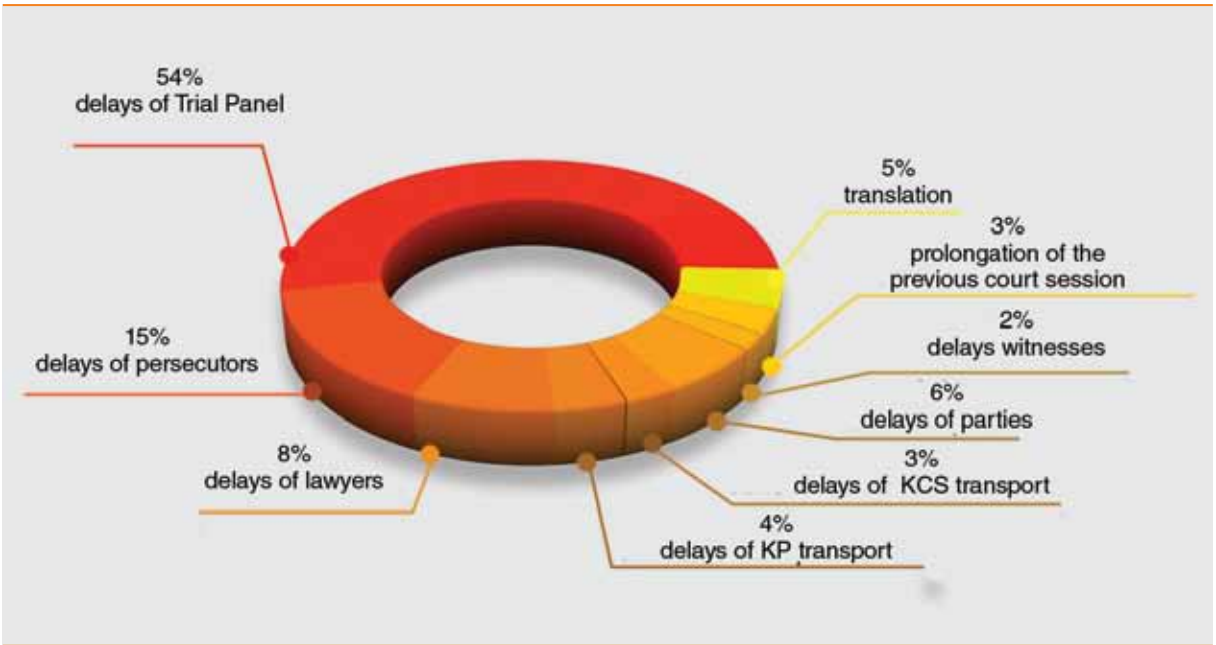
The following table reflects the hearing sessions that commenced on time and those that commenced with delay during 2014:



Meanwhile, the actors that caused delays are among the most diverse. They vary from the trial panel, prosecutors, lawyers, witnesses, problems with translation, extension of the previous hearing, and similar. Nonetheless, the trial panel has a considerably high percentage at this point (54%).

Delay of the trial panel is noted to be the main reason for non-commencement on time of hearing sessions, even during this year. Immediately after the trial panel, it is notable that the delays are frequently caused by prosecutors (14%) and lawyers (8%), and as an outcome the sessions cannot commence on time. Meanwhile, delay of witnesses and transport issues take 2% in the overall percentage and they seem to present the most minor problems in this regard.

Figures that demonstrate reasons behind the delay in commencement of court hearings have been presented in the following table:

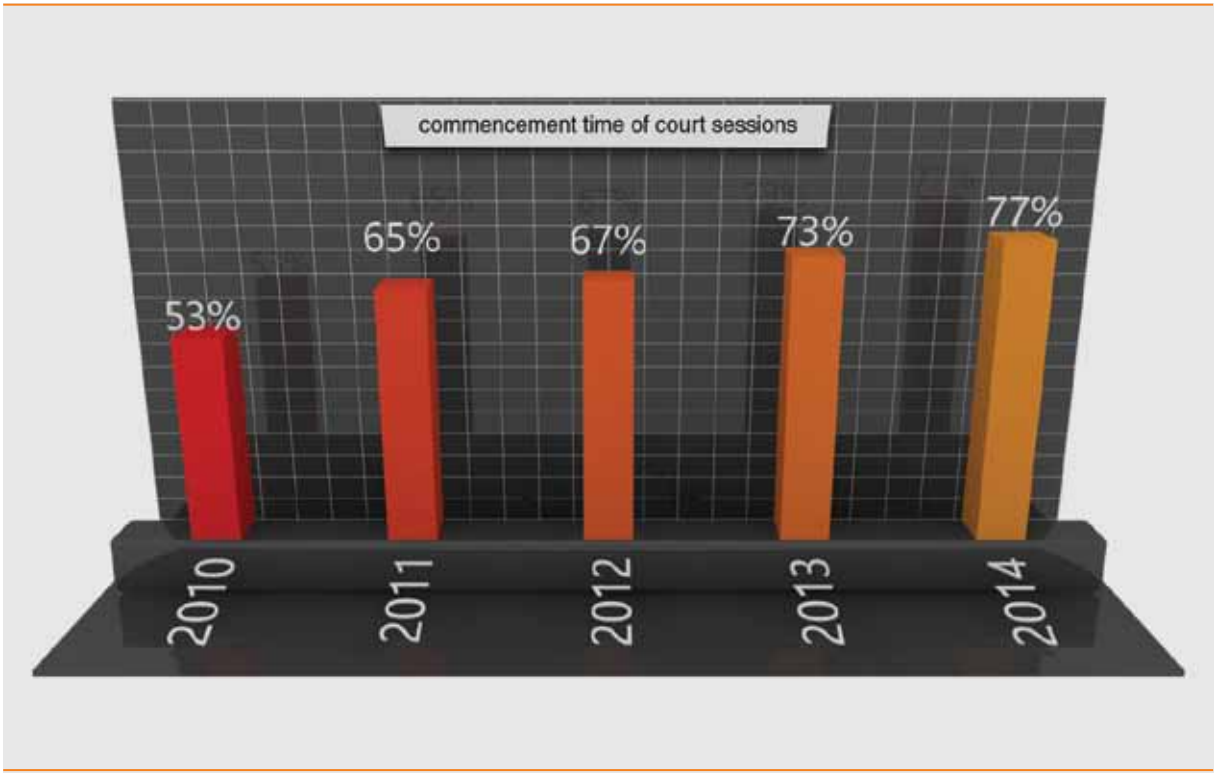


Throughout all these years of monitoring, the trial panel delay was the main reason behind delay of court sessions, namely their non-commencement on time.

Compared to last year, this year's figures are more concerning; the trial panel caused 50% of delays last year – this year there 54% of the delays were caused by trial panels' delay. Prosecutors follow with 15% of delays, followed by lawyers with 8%. Parties have delayed in 6% of monitored hearings, while translators, witnesses, KCS transport and KP have a percentage lower than 5% in delays of monitored court sessions.

In our efforts to raise awareness regarding important issues, delays of court sessions have always taken a central position. The increase in percentage when it comes to the reason for non-commencement on time of court sessions must be seen as an urgent need for taking measures regarding the delays of trial panel.

The trajectory of our measurements between 2010 and 2014 regarding the timely commencement of court sessions is represented below:



As far as this point is concerned, this technical irregularity was very evident during our monitoring. In the Basic Court of Prishtina – DP, the court hearing on 12 December 2014 was announced that it would be held at 9:00hrs, but it commenced with 55 minutes delay. We have also identified other cases in the Basic Court of Prishtina like: On 8 November 2014 the hearing session commenced with 20 minutes delay, while the hearing session held on 2 December 2014 started with 1 hour delay.

The trial held in Suhareka Basic Court for the case – loss compensation - commenced with 15 minutes delay because of defendant's delay. Defendant's waiting was done in coordination with the accusers.

In the hearing held on 10 June 2014, in the civil case – property verification - the hearing commenced with 1 hour 5 minutes delay, because of lawyer's delay, as he was in another hearing.

The hearing held in Suhareka Basic Court on 26 November 2014, with Pno-165/13 in legal case – Slight body injury – the session was announced to start at 10:00hrs, but it started with one hour delay, because of prosecutor's delay, as she was in a hearing with another judge. The parties waited in the courtroom for one hour until the prosecutor came in from the other hearing.

In the hearing session with case number P.no.171/13, where the defendants were accused of committing the criminal offences – Misuse of duty and official authority – the hearing session started with a 10-minute delay, because of trial panel's delay. Delay reasons were not provided by the latter.

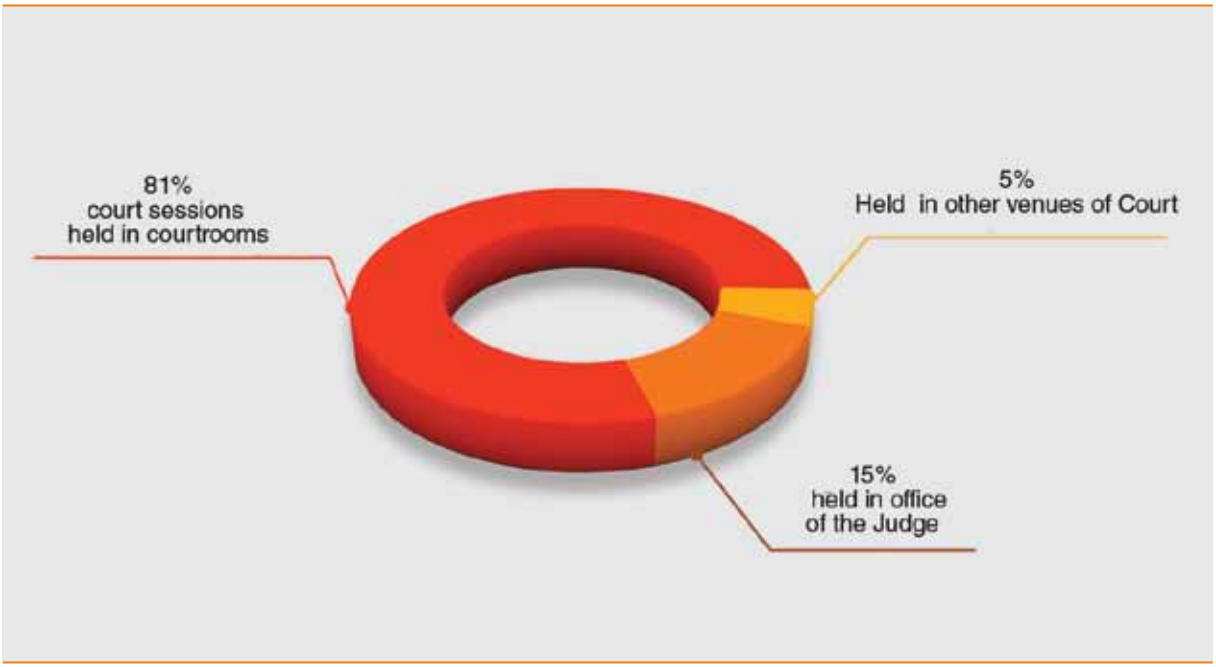
In the case of disclosing official secrets from Article 433, paragraph 1 of the CCK, the court session with case number P.no. 440/13 commenced with 40 minutes delay, because of the delay of the lawyer, who had informed the trial panel that he was engaged in another murder case in the same court.

Out of all the hearings monitored during 2014, no sentences were issued for these delays even in the cases when they were not justified.

3. Holding of court sessions in the courtroom or out of it?

Throughout the years, the venue of holding court sessions has continuously been an object of interest to BIRN monitoring because of the fact that throughout the years many court sessions were held in offices of judges instead of being held in courts.

According to the data that come out of our monitoring, it turns out that in 80% of cases the court sessions were held in courtrooms, while 15% of them were held in office of the Judge, and 5% in other venues, such as buildings rented by the court.



4. Basic norms of discipline at work

To see if the discipline trajectory leads judges to objectivism and full independence, we have monitored use of mobile phones and uniforms during court sessions.

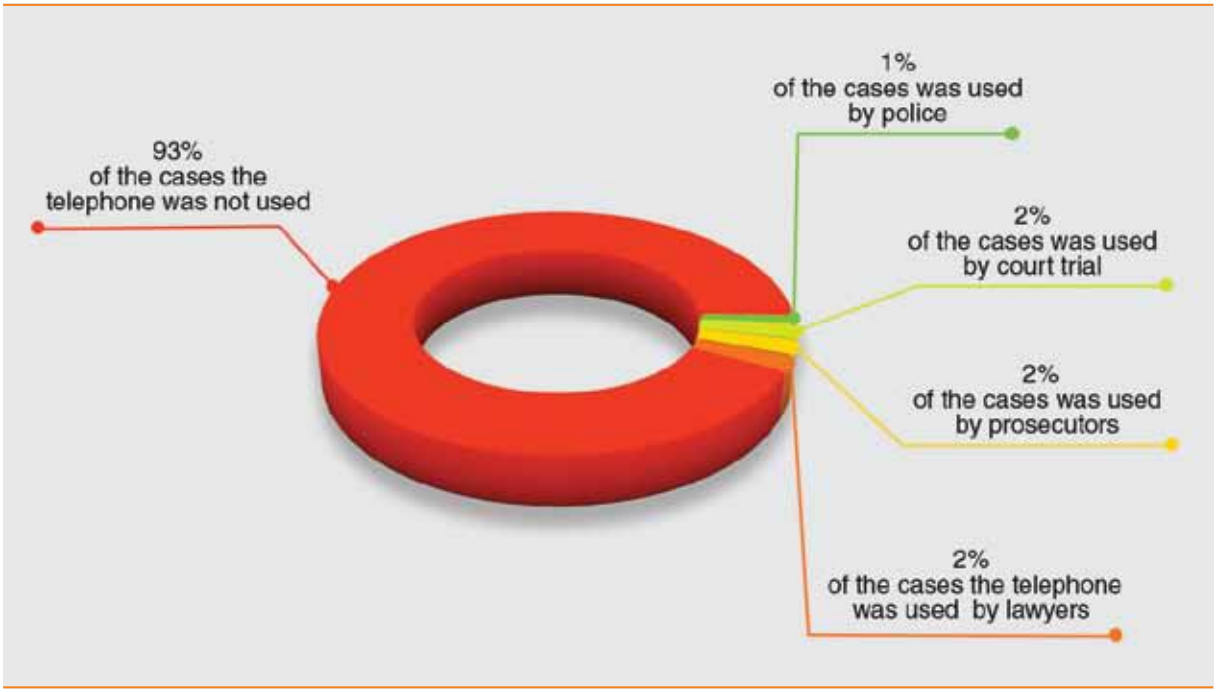
As far as disciplinary norms and their reporting is concerned, BIRN had numerous cases that it addressed to appropriate legal instances, such as cases of disciplinary violations of the judge that published his political support in social networks[3], potential disciplinary violations in the case of Vonesa Topalli, where the responsibility of one suspect of the case is excluded, potential disciplinary violations in the case of non-payment of taxes in Klina court[4], legal violations in the case of leaking of messages in Gjakova Prosecution[5], potential disciplinary violations in prolonging Skender Sina's case[6], and many other cases. Reporting these cases demonstrates the seriousness with which BIRN treats disciplinary norms and the commitment with which we have treated them in this report.

a. With or without telephone?

Even during this year, BIRN has continued monitoring the use of cell phones during the monitored court sessions. Responsibility of the presiding judge of the trial panel or the responsibility of the case judge, when it comes to ensuring well-functioning court hearings by not allowing the use of cell phones during trials, continues not to be very satisfactory even during this year.

Taking into account that different parties, starting from the trial panel/individual judge, lawyers, prosecutors, police and the public are present in court sessions, monitoring the use of telephones was done for everybody.

Our findings show that in 93% of cases the telephone was not used by anyone, while



3 http://gazetajnk.com/?cid=1,1018,8322

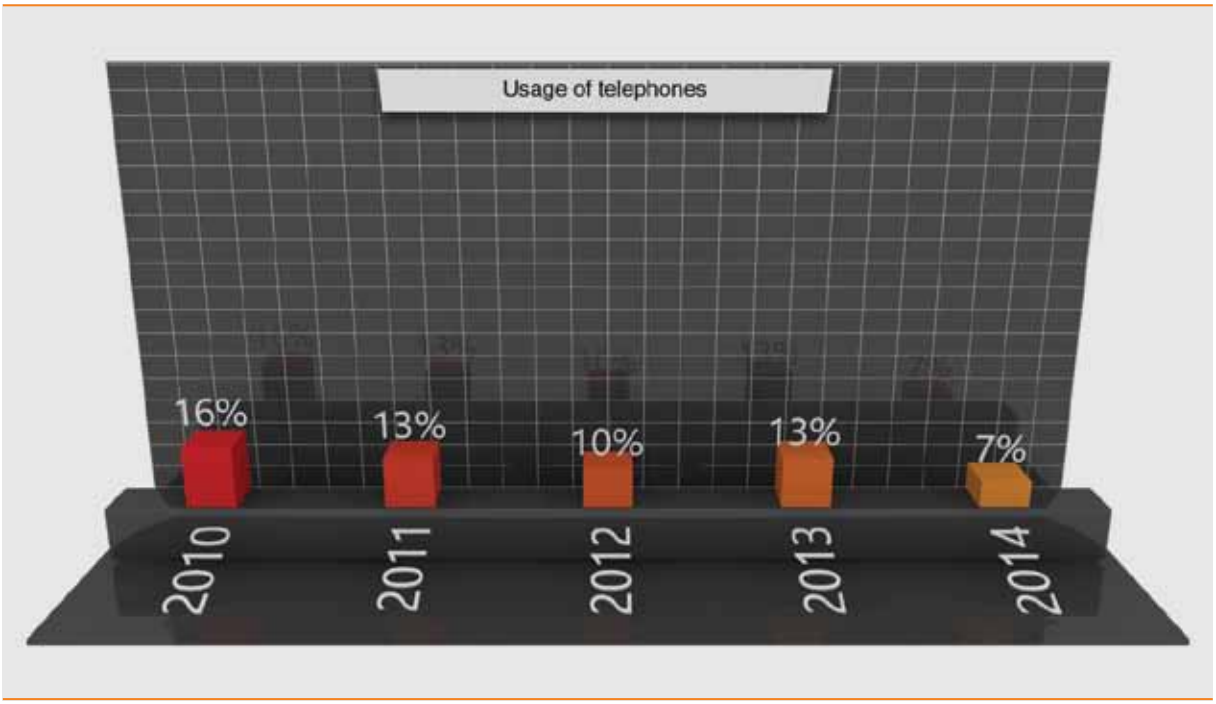
4 http://www.drejtesianekosove.com/sq/Emisione/Avullimi-i-takses-gjyqesore-ne-Kline-1252

5 http://gazetajnk.com/?cid=1,1018,9196

6 http://www.drejtesianekosove.com/sq/Emisione/Ryshfeti-ne-Gjakove-1068

the other 7% is divided among the lawyers - who used telephones in 2% of the cases, prosecutors – who also used telephones in 2% of the cases, the trial panel – which also used their telephones in 2% of the cases, and police - who used telephones only in 1% of the cases. Meanwhile, according to data of our monitoring, telephones were never used in any of the hearings monitored by us.

The trajectory of our measurements between 2010 and 2014 as far as usage of telephones during court sessions is concerned is represented below:



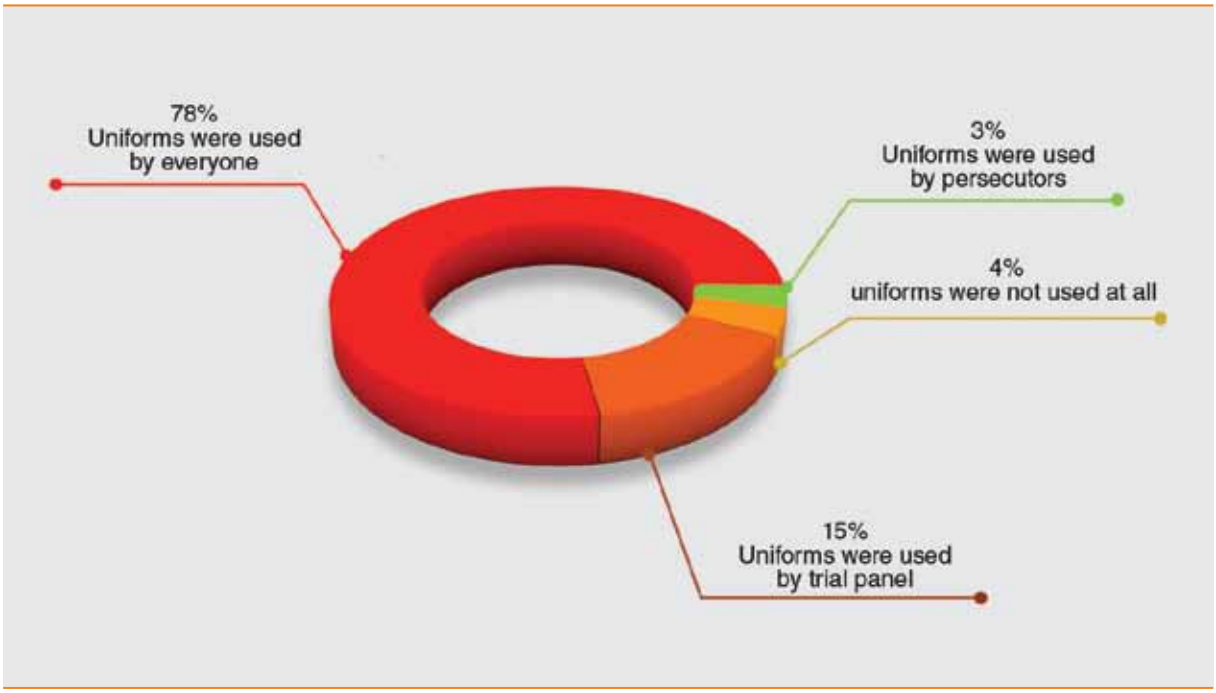
b. With or without uniform?

In 2013 the Kosovo Judicial Council adopted the decision by which it authorized procurement of uniforms for judges of the three levels of courts, in compliance with the previously approved design by the KJC members. The project for procurement of uniforms of judges cost about EUR 45,000 to KJC. As a result of this decision, all judges were supplied with new uniforms; consequently all of them were obliged to carry uniforms in the courtroom.

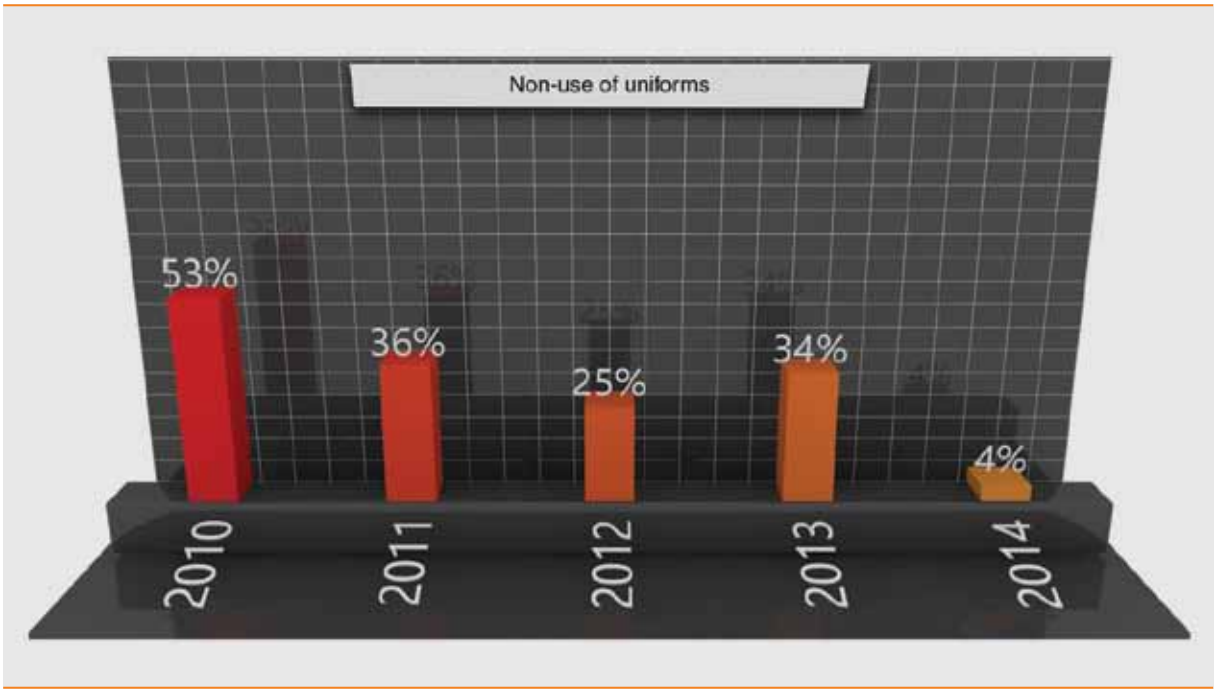
Nonetheless, BIRN has noted that the same action was not carried out by the Kosovo Prosecutorial Council, and as an outcome many prosecutors currently are not supplied with uniforms. However, cases remain when judges, although supplied with uniforms, have chosen not to use them.

While in 2013, BIRN identified that 34% of the judicial uniforms were not used at all, in 16% of cases uniforms were partially used (only by the judge, prosecutor or lawyer) and in 50% of monitored hearings uniforms were worn by all parties, in 2014 it has been noted that things have improved in this regard.

Out of 34%, the percentage of non-use of uniforms by anyone in 2013, it has fallen to 4% this year. However, it must be taken into account that this percentage is related to the cases when no person in the courtroom used the judicial uniform. In 22% of the cases judicial uniforms were not used by everyone, which means that they were used only by the trial panel, only by the prosecutor, or the lawyer. In 22% of the cases there was no consistency in their use. In 4% of the cases, judicial uniforms were not used by anyone. This year, judicial uniforms were used in 78% of the cases.



Compared to previous years, the use of judicial uniforms marked an increase, which has been reflected in the table below:



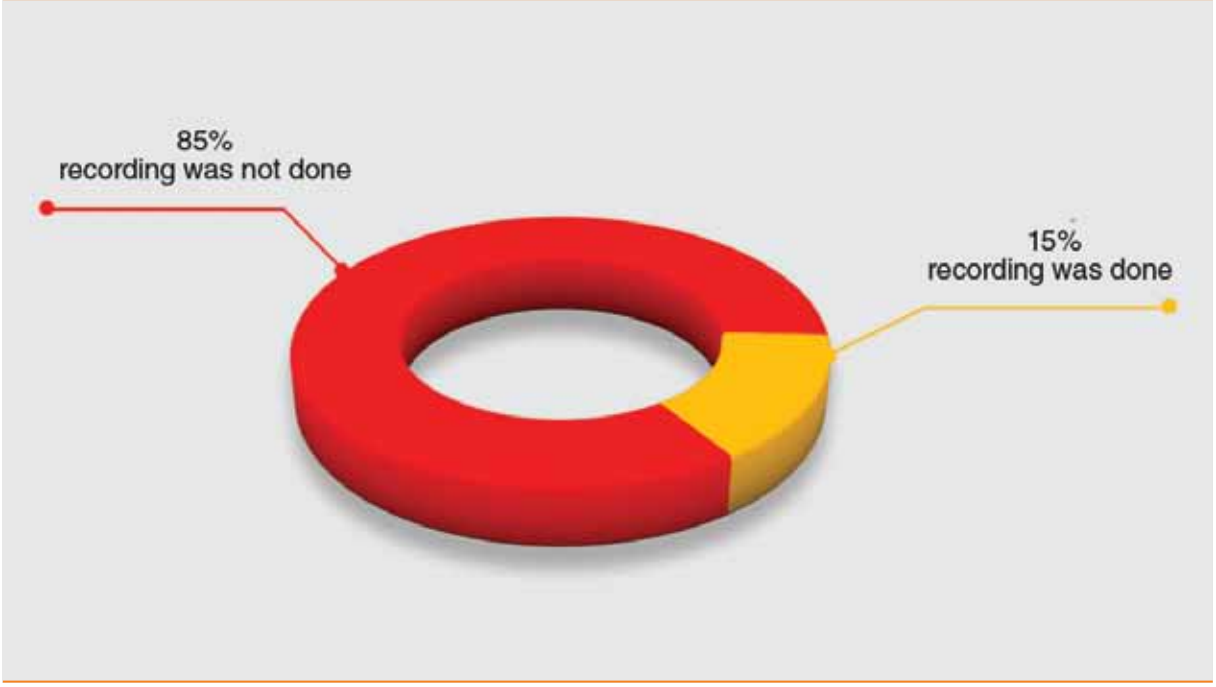
Based on the feedback received by the lawyers, judges and prosecutors, we consider that the presence of monitors in monitored court sessions has considerably impacted the increase in the percentage of use of uniforms.

5. Documentation and archiving of hearing sessions

Documentation and archiving is a very important process, in particular when we deal with court sessions when the statements of different parties are presented and different versions of the same history. For this reason, BIRN even during this year has monitored if sessions were recorded and if statements of the parties were adequately taken.

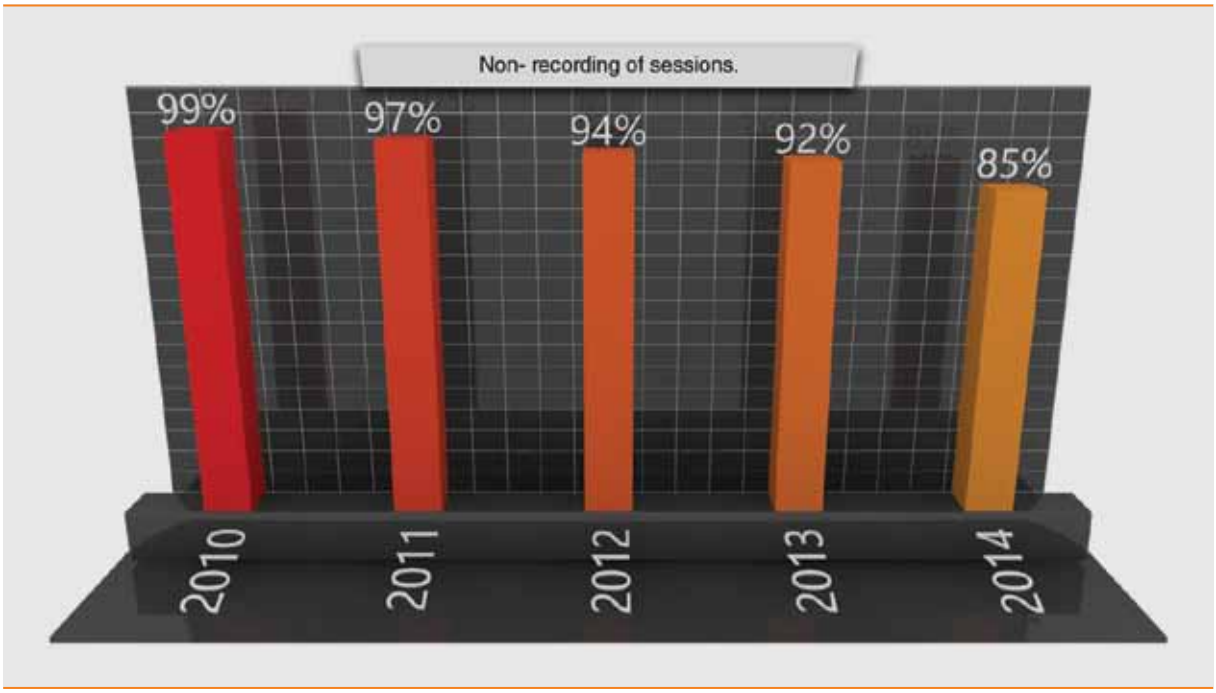
a. With or without audio/video recording

Non-usage of the opportunity for recording of court sessions, which is also determined with Kosovo's Criminal Procedure Code[7], irrespective to the fact that it has doubled since last year; is still not at the desired level. While in 2013 – only 8% of the sessions were recorded, out of all the sessions followed by BIRN monitors over the course of this year, audio-video recording was done in 15% of the cases despite the fact the courts have the technical equipment to do so. It is rather clear that there are improvements, but the fact that audio-video recording is done only in 15% of the cases leads to disregarding Kosovo's Criminal Procedure Code in 85% of the cases.



No matter that the sessions' recording trend has increased over the years, the percentage of increase is so low that it is not enough to be considered as an improvement, because the concern for slow increase of percentage is considerably higher than the enthusiasm for its increase in the first place. Further, we will analyse how the situation is realistically in our courts when it comes to equipment necessary for audio-video recording of sessions.

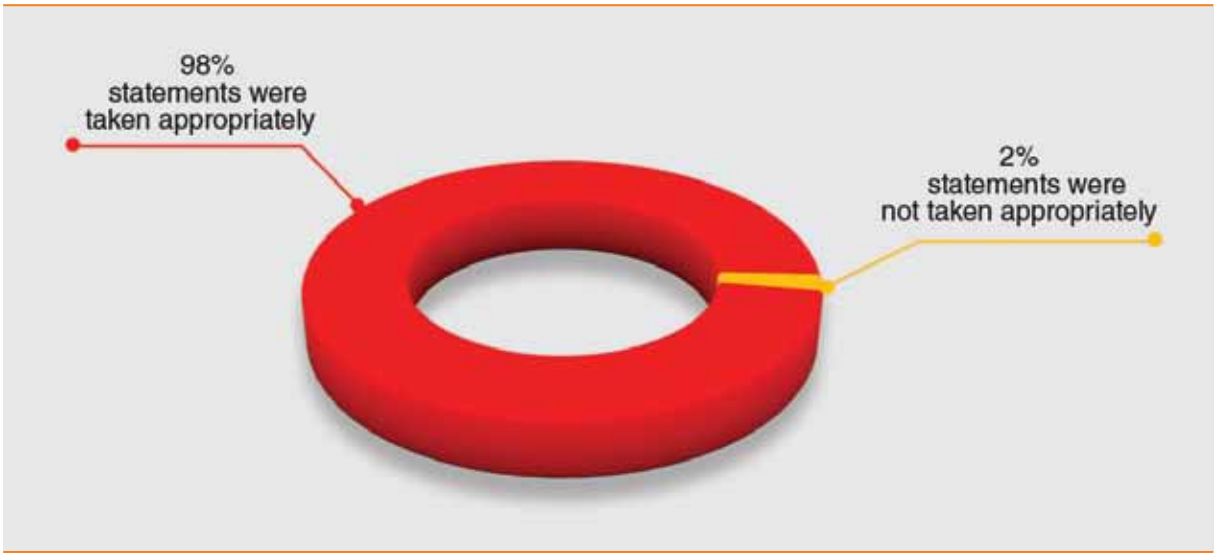
7 Article 208 of the Criminal Procedure Code of the Republic of Kosovo



b. With or without statements? With or without instructions?

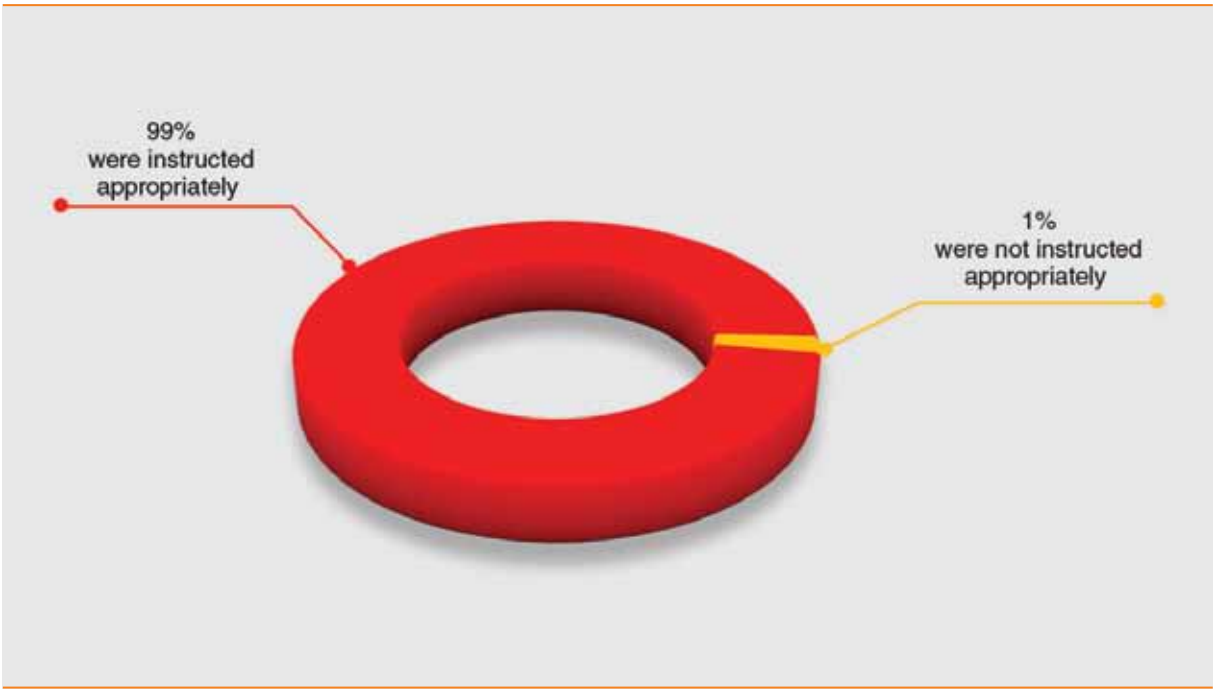
Appropriate statement taking of witnesses and defendants is also part of the adequate documentation of court sessions. This happens because, with the taking of these statements which can be read by different parties afterwards, a process is documented – if it was conducted adequately, or not. The same also counts for instruction of the parties in procedure. It must be clarified that by appropriate taking of statements we mean reading of witness' rights, information about his/her rights, timely sending of invitations, and similar.

During 2014, the area of appropriate or inappropriate statement taking was one of the main points where courts have demonstrated improvement. Out of all the cases that BIRN monitors followed this year, statements were not taken appropriately in only 2% of the cases.



Nonetheless, the goal is that statements are always appropriately taken and to see improvement, until the percentage of inappropriate statement taking comes to zero.

On the other hand, instruction of parties in procedure seems to have been significantly improved, keeping in mind that this year, parties were not instructed appropriately in only 1% of the cases.



6. Technical equipment of courts

Digitalization and technical equipment of institutions is a necessary reform, which would directly improve the situation of their performance and meeting of the needs for precise, fast and correct results at this period of speedy development of technology. Courts, as a pillar of each state, inevitably need their technical equipment, as their ultimate goal is correctness and non-delay of procedures. By having the necessary technical equipment in court halls and courtrooms, the delays and obscurities are avoided, an accessible system is developed, mistakes in the minutes are avoided if hearings are recorded in audio; in other words, the possibility of mistakes and misuses that would go unnoticed and tolerated is minimized.

Aside from the challenge that courts encounter regarding their furnishing with technical equipment, another negative phenomenon that was noted in the monitoring carried out was non-use of this equipment that would contribute to transparency and improvement of work in these courts. While some of the courts have not been furnished with the very necessary equipment, other ones avoid their use, leaving them to depreciate and come out of their function. It was also noted in the earlier report that audio-recording of sessions is very useful, because by having documented the entire procedural course of the session and statements in digital form, if needed, this would enable more efficient use of un-intervened material of all that was said, concluded, verified and testified during the session.

Supplying courts/judges with laptops is necessary, because they would be able to systematize the materials for easier processing of information, documents, and this would

allow them to manage data and certain notes more confidentially, in particular during their fieldwork.

As we have noted in many cases, the judges that over the course of their work hold hearings out of the courts' buildings, such as site visit or crime scene reconstruction, etc. lacking a laptop, they are forced to write minutes by hand. In August 2014, Elmaze Syka[8], President of Peja Court, told the Justice in Kosovo show that non-furnishing of the Court with laptops has caused many problems for this court, as while visiting the field the court drafts its minutes in writing. Syka said that on several occasions she has requested from the KJC Secretariat to supply the Court with such equipment; however, this request was not approved. Upon publication of these concerns, we understood that the KJC Secretariat decided to provide two laptops to this Court for its needs.

The fact such necessary and minimal requests are rejected, for such a low-price laptop, and that is necessary for the Court President to complain to the media, and for the KJC to take necessary actions to meet basic requests of the court only after this, is a concerning fact to BIRN.

During their regular monitoring, BIRN monitors assigned importance to this area of equipment possession and their use or non-use by the courts, while the conclusions are as the following:

- Out of the four courtrooms that the Basic Court of Prishtina has, only one of them is furnished with equipment for audio recording of sessions, but that equipment is hardly used. As far as laptops are concerned, only some of the judges have been supplied with them.
- All the courtrooms and offices of the judges in the Basic Court in Prizren are supplied with computers, while none of the judges have been supplied with laptops. There is a courtroom that is furnished with audio and video recording equipment. This equipment is used during the hearings by the locals, but also during the hearings held by EULEX. This court has the adequate archiving system of court sessions held in at least 10 last years. On the other hand, branches of this Court in Suhareka and Dragash have not been supplied with recording equipment and judges have not been supplied with laptops.
- Because of damage, the audio recording equipment of the Basic Court of Peja is out of use. As an outcome of this, the equipment has depreciated. The monitor for announcement of hearing sessions is also out of use. As far as supplying of judges with computers is concerned, judges of the Basic Court with its headquarters in Peja and in the branches of this Court have been supplied with them.
- Basic Court in Gjakova has not been supplied with audio recording equipment, while it is well supplied with computers and other technical equipment (printers). It lacks laptops for procedures out of the Court building.
- Basic Court in Gjakova, Rahovec and Malisheva branches, do not have recording equipment and judges have not been supplied with laptops.
- All the courtrooms of the Basic Court in Gjilan have been furnished with computers, while only one of its courtrooms has audio recording equipment. This equipment is rarely used and mainly in EULEX sessions.
- Basic Court of Mitrovica has not been supplied with laptops at all, while in the sessions held by EULEX in the northern part of Mitrovica, judges have been supplied with monitors for controlling what is being noted in the minutes and equipment for connecting with protected witnesses.

8 http://www.drejtesianekosove.com/sq/Emisione/Gjykata-e-Pejes-1223

- None of the courtrooms of the Basic Court in Ferizaj have been furnished with audio recording systems. All the courtrooms have been furnished with computers. Meanwhile, the foll0wing persons were supplied with laptops in 2014: Court President, Regional Administrator of the Court, Kosovo Judicial Council Member from the Basic Court in Ferizaj, Supervising Judge of Kaçanik Court, Supervising Judge of Shterpce branch, and Assistant Administrator of Shterpce branch.

Irrespective to difficulties faced with technical equipment in court, some of the courts (Prizren, Mitrovica –Vushtrri branch, and Peja) have demonstrated their willingness to start the practice of live broadcasting the court sessions.

B. PALACE OF JUSTICE AS HOPE FOR IMPROVEMENT

The Palace of Justice, construction of which started on 3 June 2011, was planned to be finished within a 24-month period, namely during 2012, but became functional only in 2015. The project was planned to be built based on the old law on judiciary. Back then, the internal arrangement of courts was different from the current one, which entered into force in 2013.

The EUO has proceeded with the redesign and execution of additional works (EUR 0.45 Mil), necessary for assuring the additional working space to accommodate changes in compliance with the New Law of Courts (entered into force on January 2011,) in buildings **A** and **B**, financed by EUO. However, although the Prosecutorial Institutions were affected by the new Law on Courts, Building C (financed by the GoK) is built as per initial Employer's Requirements, not taking into account the needs of the new Law on Courts.

According to the old judiciary legislation, it was envisaged to place the following institutions in the Palace of Justice: Constitutional Court, Kosovo Judicial Council, Supreme Court, Court of Commerce, High Court of Offence, Prishtina District Court, Prishtina Municipal Court, Prishtina Court of Offence, Special Prosecution, State Prosecution, Prishtina District Prosecution, Prishtina Municipal Prosecution and Liaison Institutions[9]. All of these had to function in five separate buildings within the Palace of Justice.

However, changes in the judiciary of January 2013 established the Court of Appeal and the Basic Court, which include Court of Offence, Municipal Court and the District Court, organized into many departments.

Built on a 2.5 hectare parcel of land, composed of 5 buildings with a surface of 50,000 m2, the Palace of Justice complex will put under one roof all judicial and prosecutorial institutions spread throughout Prishtina: Kosovo Constitutional Court, Kosovo Supreme Court, Prishtina Basic Court, Court of Appeal, Prishtina Basic Court, Court of Appeal, State and Special Prosecution, Appeal and Basic Prosecution of Prishtina. Nonetheless, it should be mentioned that irrespective of the fact that the Constitutional Court was supposed to move to the Palace, Special Prosecution would move instead. As for the Constitutional Court - it was confirmed by the CC that they will move to the PoJ by June 2015 at the latest.

9 http://www.kgjk-ks.org/?cid=1,174

The Ministry of Public Administration, which manages all state buildings, informed us that the complex in question is the product of a joint EU-Kosovo Government project, and managed by the European Union Office in Kosovo and MPA. The overall value of the project is 27,453,504.52 Euro. In this amount, the funding value for construction by the EU is 22,582,846.00 Euro, while the Government of the Republic of Kosovo has given 4,870,658.52 Euro. In addition, the EU has financed the feasibility study and the design of PoJ in the amount of EUR 0.8 mil; plus the supervision of the PoJ in the amount of EUR 2.6 Mil.

Irrespective of the fact that Ministry of Public Administration says that technical acceptance of the building has been done, it turns out that the Palace of Justice has many deficiencies and the staff that will be working in it has many objections. That is why there are doubts if this Palace will really be able to solve the technical issues that courts have had so far.

There are defects identified, however there are no critical system issues; the Beneficiary will still need to fully understand how the entire systems are meant to function (such as HVAC, BMS and DMS). The issue with BMS and DMS is still the non-appointment by the Beneficiary of key staff who would be responsible for such systems, in particular related to the security of the buildings in terms of door access, CCTV security and fire systems. Currently, a contractor is providing daily transfer of know-how to Beneficiary staff. There are indeed minor issues with two elevators, spare parts are awaited. All other minor issues with elevators are related to adjustments of doors. The EUO Engineer is in the process of updating the snag defects list in permanent bases.

1. Location of the Building Construction

One of the concerns regarding the Palace of Justice building rises from the location that it has been built on, which is located 4 kilometres away from Prishtina's centre. To the Union of Judicature Employees, the biggest problem is the organized trip of employees to and from work. Regarding the organized transport of employees, the Union has made constant requests to the Ministry of Public Administration, Ministry of Justice, and to the Judicial and Prosecutorial Council, which promised that collective transportation from the centre to the Palace and back will be organized.

However, now that they have moved to the new building, the Kosovo Judicial Council responded to employees that they are not in position to organize the transport. Ministry of Public Administration has also informed the Union of Judicature Employees that they are not obliged to provide transport to employees, but, according to this Ministry, Judicial and Prosecutorial Councils of Kosovo are obliged to do this.

"Judicial Council is not able, nor does it have the budgetary capacities to cover the transport. We would do this, but we do not even have the legal ground that allows us to cover the transport. It is being thought about urban lines with convenient prices for citizens," was the KJC response.[10]

This problem was also addressed in the meeting of Kosovo Prosecutorial Council held in February2015, where the minister Hajredin Kuçi was also present. Minister Kuçi had promised that the Ministry of Justice will solve the issue of transport for these employees. In the same meeting, the Director of the Prosecutorial Council Secretariat Shkelzen Maliqi raised his concern about how such a problem will be solved when there are no funds for it. Two weeks after the meeting,

10 Enver Peci, KJC Chairperson

when contacted by BIRN monitors, he asserts that issues for solving this matter are still big.

However, the Union of Judicature Employees said that they are categorical in this regard.

"If transport is not provided than it will become an issue and we will face trouble. These days, employees have called for action, but for objective reasons we have decided to wait for a response by the Minister of Justice".[11]

Built 4 kilometres away from Prishtina centre, the Palace of Justice also lacks food stores in its vicinity, which is also an obstacle for employees working in this building.

"People take food from their homes, as there is nothing that they can eat here".[12]

In reality, no employee says that he/she is pleased with relocation to this building, because of its distance and non-enabling of public transport; however, employees were forced to move as they were ordered by the Government to transfer to the Palace of Justice building.

"The donor that gave the money needed to see the result achieved and it had the justification which said that 'if they do not transfer, we will halt all IPA assistance', and this was the reason why all our institutions had to mobilize and commence work".[13]

2. "Justice Close to the Citizen"

The principle "justice should be brought closer to the citizen" exists in every country of the world. In Prishtina, the opposite has happened with construction of the Palace of Justice.

"It was very hard for us to get to the Court. Obviously, this is creating costs. It would be way better if the Court was closer to the town," said one of the citizens that went to give his testimony in a case in court. [14]

The KJC head says that this matter was decided in 2008/09.

"I was not in the process and I do not know how it was decided. My feeling about this matter is that in any country of the world, courts are in the centre of the town. It is a notary fact. However, the justification was that "Prishtina e Re" with all the institutions, including the governmental ones, will transfer to this part. When they will move here, I do not know, but this one of responses that was given."

Lack of transport creates big problems. The cost for citizens will be high. Many of the witnesses will not be able to afford this, taking the economic situation in the country into account. Even if a means of transport will exist, it will be a problem for the opposite party, since travelling for kilometres with a transport might create conflicts that are almost inevitable.

11 Asllan Rusinovci, Chairperson of the Union of Judicature Employees
12 Asllan Rusinovci, Chairperson of the Union of Judicature Employees
13 Enver Peci, KJC Chairperson
14 Elez Elezi, citizen of Smira village

"I consider that this Palace should have been built somewhere elsewhere, as it is in the civilized world, where problems that have trouble approach the Court with ease, as citizens' rights are realized in here".[15]

Worried about the lack of transport, employees announced that they will quit work if a solution is not identified for them at the earliest time possible. Their concern has been further increased by the fact that a solution was found for judges and prosecutors, while they are now at the fate of mercy.

"Transport was secured to all Prosecutors and Judges of Supreme and Appeals Court. Furthermore, this was done by official vehicles, while nothing was decided for employees. This is disastrous".[16]

The building located far from the town's centre also presents a problem for lawyers. Their offices are mainly concentrated in the centre. Aside from the lack of infrastructure at the Palace, an additional problem that they will have is their closeness to give assistance to their clients, which is a right guaranteed by law.

3. Staff Accommodation in the Palace

As of January this year, the Palace of Justice has opened its doors for judges, prosecutors and the support staff. From 02 February, the Court of Appeal provides its services and holds court sessions in the "B" building of the Palace of Justice. Apart from the Court of Appeal, the Supreme Court and the Prosecutions have also been settled in the Palace, but the General Department of Prishtina Basic Court is facing greater difficulties with relocation, while it still continues work at the old building in town's centre.

Basic Court's non-transfer is also causing problems to Prosecution's work.

"As the Prosecution, with all the departments, we have transferred upon an order of the Ministry of Justice; however, it is concerning that the General Department of the Basic Court has not been transferred and this is causing us problems, as the prosecutors of this department are forced to travel and they are losing time in their travel."[17]

Aside from difficulties with the transfer of the General Department of the Basic Court of Prishtina, accommodation of EULEX staff, who will be placed at the Palace of Justice, is also a concerning fact, because of the amount of judges and prosecutors they have. The end of EULEX mandate seems to be the only solution at the Palace.

"I am hoping that with the end of EULEX mandate, the issue of Palace of Justice and the number of staff, as well as judges of all levels in the municipality of Prishtina, will be solved."[18]

15 Ramiz Krasniqi, lawyer

16 Sadri Llumnica , representative of the Appellate Prosecutor and Basic Prosecution of Prishtina

17 Imer Beka, Chief Prosecutor of Prishtina Basic Prosecution

18 Enver Peci, KJC Chairperson

4. 28 Courtrooms

The "D" building has been particularly built for courtrooms; specifically, it will include 28 courtrooms. The venue of holding court sessions has constantly been a finding of BIRN monitoring. According to data that come out of the BIRN monitoring, it turns out that in 2014 there were cases when trials were held in offices of judges and not in the courtrooms. Lack of courtrooms was one of the reasons for this.

Basic Court of Prishtina was one of the courts that lacked courtrooms, which impacted the lack of transparency for persons interested to take part in the trial. Disregard for the obligation to record hearing sessions, which is also determined with the Kosovo's Criminal Procedure Code[19], is yet another very concerning finding for the Prishtina court. Even now, equipment for audio and video recording of hearing sessions is missing in the "D" building of the Palace of Justice.

Currently, the Basic Court of Prishtina alone has 52 judges. Furthermore, another 20 judges, who are ready for appointment, are expecting to be appointed at this Court but are delayed by the KJC's lack of quorum, which is waiting for functionalizing by the Assembly of Kosovo. With addition of this number of judges to the Basic Court, also having in mind those of the Court of Appeal, the application of Article 208 of the Criminal Procedure Code of the Republic of Kosovo will hardly be applied with 28 courtrooms.

During this year, BIRN will also continue to follow the work of courts and see how holding of trials in courtrooms will be respected, and how many of them will be followed with audio and video recording.

5. Other issues at the Palace

BIRN monitors have researched, met and interviewed many parties of interest involved in the works at the Palace of Justice. Kosovo Police members, who were assigned to secure law and order at the premises of Courts and Prosecutions at the Palace of Justice, do not consider the transfer to the Palace as completed. This is obviously true because the transfer to the Palace is still an ongoing process.

According to the parties our monitors spoke with (police, lawyers, prosecutors and judges) lack of special spaces for placement of the accused that are brought to court to be tried is one of their biggest concerns. Missing windows, issues with elevators, water leaks from the ceiling, non-functioning of the heating system, and so on, are among other technical problems.

On the other hand, the high level of security is considered as a positive thing at the Palace of Justice. Postal and banking services that will be provided within the complex are the other novelty.

According to Imer Beka, Chief Prosecutor of Basic Prosecution in Prishtina, the biggest and the most concerning issue is that defence rooms do not exist in the building. Another issue is that its windows cannot be opened. Ventilation in the building presents yet another concern for the Chief Prosecutor. According to Chief Prosecutor Beka, some intervention must take place in the building that the Prosecution he leads was placed in, as there are insufficient working conditions.

19 Article 208 of the Criminal Procedure Code of the Republic of Kosovo

C. PROCEDURAL VIOLATIONS

Along with difficulties and problems in implementation of changes, procedural violations of provisions on legal proceedings during court hearings have continued to be identified in Kosovo judiciary, irrespective to the fact that it has been two years since the New Criminal Code and Criminal Procedure Code have entered into force.

While the Kosovo Criminal Procedure Code literally envisages the cases when courts must respect different procedural actions during the court hearing,[20] BIRN monitors have identified that procedural actions, which are also stipulated in criminal procedures provisions, are not always respected.

Among numerous procedural violations during this year, BIRN has identified violations such as:

- Problems with adequate translation
- Non-reading of the rights of the witness and incorrect management of cases
- Disrespect of legal deadlines stipulated with the Criminal Procedure Code
- Non-inclusion of statements in the minutes
- Disrespect of legal deadlines for announcement of judgements
- Non-reading of the indictment in the initial hearing

The below-mentioned procedural violations were the most frequent ones that BIRN monitors have noted. It was not a choice of which procedural violations must be monitored, but our monitors during the hearings identify any irregularity, and those listed on this annual report were repeated from hearing to hearing, being the most frequent ones.

As far as legal procedures that were marked during BIRN monitoring are concerned, we will initially start with explanation of our findings generally, thus addressing the substance of the problems in order to create a general idea in regard to procedural violations, then continue with specific cases and addressing other legal procedures while mentioning them.

Throughout the session monitoring carried out by BIRN monitors, we have noted different procedural violations.

The issue of translation is yet another concerning problem when it comes to procedural violations. We consider that inadequate translation in the language that the defendant understands, or non-translation of certain words is in contradiction with the basic rights of the defendant, such as in this case the language in which the defendant speaks; more precisely, this comes into contradiction with Article 14, paragraph 2 of the Kosovo Criminal Procedure Code.

Postponement of hearings in distant time periods from each other, as well interviewing of witnesses in contradiction with the Kosovo Criminal Code are the other violations that were noted during the monitoring carried out by BIRN monitors.

Non-reading of the rights of the witness and incorrect management of cases go to the prejudice of the defendant. The case we chose as illustration of this problem is known as the case of Besniks in Basic Court of Gjakova (B.H. and B.R.) who, at their minor age, committed the criminal offence of theft in co-perpetration in relation to Article 23. B.R. has over 90 indictments filed by the Basic Prosecution in Gjakova, the General Department of this Prosecution, mainly for the criminal offence of serious theft. B.H. was mainly involved in the same case, excluding the cases when other

20 Kosovo Criminal Procedure Code; http://www.kuvendikosoves.org/common/docs/ligjet/Kodi%20i%20procedures%20penale.pdf.

defendants were also involved. The same ones are serving their sentence for earlier offences that have taken the form of final verdict. In the last procedure monitored by BIRN monitors against the defendants B.H. B.R. Sh.M. and A.S., of 17.12.2014, the four cases joined in a procedure with the case number 43/12, 596/12, 109/12, 341/11 for the criminal offences of serious theft, B.H. stated in the courtroom that he has accumulated prison sentences of 12 years 6 months so far. Meanwhile, B.R. said that he still has not completed the cases of 2012.

By making a calculation, the damages caused by the defendants do not exceed the value of over 15.000 (fifteen thousand Euros) as each indictment states: For example, *has broken the stand glass and has stolen 5 packs of cigarettes, cash at the value of 50 Euro, and similar*. The lowest sanction that the Court might issue for these criminal offences is 6 months of imprisonment.

As per calculations, for 90 criminal offences of 6 months of imprisonment each, there are 540 months of imprisonment, respectively 45 years. The Court could have tried the "Besniks" case in a single procedure by joining all the procedures and issuing them a unique sentence, which would also result with economization of the procedure, having in mind that the law provides all this. On the other hand, following the practice that the Court has started, for damages at the value not higher than fifteen thousand Euros, the sentence is resulting in one stricter than for the criminal offence of murder.

The fact of essential violations of criminal proceedings is also concerning. One such example BIRN monitors found in the case with number P.no.45/14 when the Presiding Judge had also earlier taken actions in the same case as pre-trial judge, which directly comes into contradiction with the Kosovo Criminal Procedure Code and with Article 384 paragraph 1 sub-par.1.1, all this related to Article 39 of KCPC.

Disrespect of legal deadlines stipulated with the Criminal Procedure Code is also a problem that should be underlined. In one of the cases monitored by BIRN with case number P.no.19/2014 announcement of the judgement was postponed for 26.11.14, while the trial was considered closed on 20.11.14. We consider that this is in contradiction with Article 366 paragraph 1, according to which, the time for announcement of the judgement should be made by a maximum of three days after completion of the trial.

Meanwhile, the translation problem that was mentioned above seems to go beyond that, taking into account that we also have the case of non-statement of the words that the defendant said in the minutes. While the defendant F.M. was giving his statement in front of the trial panel and he was interviewed by the prosecution, his words for about 20 minutes were not recorded at all in the minutes.

D. WHERE? WHO? WHY? Case specifics.

SINA CASE - SYSTEM FAILURE

Skender Sina from Gjakova[21] was accused on 16 November 2005 by the Municipal Prosecution in Gjakova of that time, that at the capacity of official person he had taken bribes in the amount of 20.000 Euro, by which he committed the criminal offence of "accepting bribes" from Article 343 par.1 of KCPC; however, this accusation against Sina has been passed on to the Kosovo Special Prosecution, where the indictment was further extended.

21 http://www.drejtesianekosove.com/sq/Emisione/Ryshfeti-ne-Gjakove-1068

Trial start

On 26 October 2007, the case with P.no 77/2007, related to Skender Sina, was heard in Municipal Court in Deçan, and Skender Sina was sentenced to 12-month imprisonment by this Court. A complaint was filed against this Court's verdict at the Peja District Court, as the second instance court, and the same court decided to return the case to retrial regarding the disciplinary part. The second instance court also requested verification of material evidence that were in the case notes. The second instance's instruction was that an audio recording made by the defendant was to be sent for analysis to the forensics lab to verify its authenticity, as well as to verify it the voice in that audio was of the defendant.

Waiting for the prescription

After this decision of District Court in Peja, this case was left in the drawers of the Municipal Court in Deçan, still, BIRN monitors were informed about this and after researching and broadcasting this case in the "Justice in Kosovo" show, the judge that had sentenced Sina to one-year imprisonment in 2007, currently Basic Court judge, decides to call a session regarding this case again after seven years, and he sets the session for 5 February2014. As it was noted by the case notes, the date of 5 February coincided with the date when this case would undergo complete prescription, as ten years had passed from the day that prosecution alleged that the criminal offence was committed. Although it was expected that the judge would decide to prescribe the case in this session, the procedure continued only when the public prosecutor requested a change of the indictment, by which he changed the moment when the criminal offence was committed, thus extending the life of this case for several more months.

Negligence regarding this case

In the case dossier that was presented on the 5 February session, the case judge concluded that he had requested the laboratory of forensics, as an independent agency, to carry out the audio recording analysis; however, he got a negative response from this laboratory that this analysis can be done in Kosovo. Due to this, the judge informed that he had addressed the Department for International Legal Assistance at the Ministry of Justice, but up to the 5th February session they did not give any response to Court, be it positive or negative.

The requested response was received only when the "Justice in Kosovo" show published facts that demonstrated the negligence of the Ministry of Justice in treating court requests. A day after the research was broadcast, the Ministry of Justice sent an explanation letter to justice institutions to explain this case. Among other things, this explanation read that: "the Ministry of Justice explains to the State Prosecutor and Kosovo Judicial Council that on 17.12.2012 it was requested from it to provide international legal assistance by the Municipal Court of Deçan regarding the existence of the Laboratory that does the audio recording expertise, called 'Forensic Bilmiler Net-Scientific Research and Sharing Portal' in Turkey and to get informed about the conditions under which this expertise is done, regarding a legal dispute that is being treated by this court."

After receiving this request, the Department for International Legal Cooperation at the Ministry of Justice, based on its legal competencies, came to the conclusion that this request does not fall under the legal scope of this department (this request should have been sent to the Laboratory of Forensics in Prishtina, where, depending on the agreements that they have with other countries, would send it for expertise). Nonetheless, the Department for International Legal Cooperation at the Ministry of Justice, being always ready to support judiciary institutions, addressed the request of Municipal Court of Deçan to competent authorities in Turkey on 06.02.2013, but it still has not received a response from them".

In its explanation, the Ministry of Justice accepted the fact that for more than two months from 17.12.2012 until 06.02.2013 it did not address the court's request. Furthermore, in its explanation, the Ministry of Justice admitted that it still has not received a response for the request addressed to the Turkish laboratory. Lacking this response regarding the expertise, while the case prescription time was approaching, Basic Court of Peja – Deçan branch, on 17 March 2014, decided to sentence Sina once again with one-year imprisonment[22] with the greatest risk of bringing the case to retrial for the same reason as the first time, due to lack of audio recording expertise.

After appealing the decision of Basic Court of Peja (Deçan branch), the Court of Appeal in Prishtina cancelled the decision and brought the case to reinstatement, as the voice expertise was not done to it.

Second return of this case to Retrial

After returning this case to retrial, court hearings commenced but the same problems occurred again. The Ministry of Justice again demonstrates negligence and does not take measures for completion of the requested expertise. However, the case judge was forced to address the Ministry of Justice several times to seek assistance about the expertise for this case, with the aim that this case not to be prescribed.

7.500 Euros for the Expertise

With the aim not to prescribe this case, the Ministry of Justice finally decided to make this expertise at a company from Turkey, and on 10 October, the sound expertise was done[23]. After the negligence expressed for a long period of time and completion of the requested expertise from the commencement of the hearing, the experts' report was that the sound matching is 60%.

Releasing judgement

After 10 years of trials, the Court's decision came in, whereas on 22 October the trial panel issued the releasing judgement for Skender Sina[24]. It was justified that the expertise was not at the adequate level, as it concluded only 60% sound matching, which, according to the presiding judge, is insufficient evidence.

We can state that the result regarding this case came due to the negligence of the Ministry of Justice and the Laboratory of Forensics, where for about 10 years they were not able to ensure completion of a very necessary expertise for the case in question.

In this case, apart from the Ministry of Justice, the Courts and Prosecutions that dealt with case also share a considerable portion of negligence, as they left in their drawers for 6-7 years, until "Justice in Kosovo" reported about this case.

Finally, the Sina case will have the fate of a prescribed case, as the case prosecutor has filed the complaint, irrespective of the fact that Sina was declared not guilty at the first instance. However, the case has already been prescribed, as more than ten years have passed since the commitment of the criminal offence.

OTHER

Basic Court in Prishtina Pno.271/13, Accused: N.U. and others.

In absence of the defendant O.J. the trial is postponed. According to the judge, the defendant O.J. is in Belgrade for medical treatment. *"I spoke with her on the phone. She is in Belgrade and it seems that she is being treated there,"* judge Sedek said. Here we note the missing adequate information. This is only one of the many cases when the Judge understands

22 http://gazetajnk.com/?cid=1,1018,7822

23 http://live.kallxo.com/sq/MTL/7500-Euro-Ekspertize-nga-Stambolli-ne-Rastin-Sina-2566

24 http://live.kallxo.com/sq/MTL/Pas-10-Viteve-Gjykim-Lirohet-Skender-Sina-2758

that the party is not in the country, only on the day of the trial.

Monitoring in the criminal case: "Abuse of official position or authority" from Article 339 par.1 criminal offence "Falsifying of documents" from Article 332 par.1, as well as the criminal offence "Legalization of false content" from Article 334 of CCK P.no.460/13

Initially, the judgement of this case started with delay, due to the delay of the defendant H.H. Throughout the court session, the defendants; H.H. N.K and V.I. who are institutional representatives, stood with their 'legs crossed' in front of the judge, not showing respect toward the judiciary institution. The fact that the judge never warned the defendant for court's disrespect is even more surprising (judges or the trial panel should always react in such cases, and they usually do so.)

Monitoring in the criminal case: 'Murder" from Article 146 of CCK and the criminal offence: Attempted murder that resulted with light body injuries from Article 146 related to the Article 2, and related to Article 153 par.1 and 2 of CCK P.no.130/14

BIRN monitors consider that the main problem was the interviewing of the forensic expert F.B, irrespective of the fact that the case was returned to retrial. The Prosecutor who was not earlier prosecutor of this case (the case was handled by EULEX Prosecution), insisted on making questions to the experts, but the latter did not respond with the justification that he was not prepared and that he needed to be given time in order to respond. Having in mind the fact that the invitation for this case was sent to the expert on time, and he was presented in court to declare himself regarding this case, he was obligated to make a declaration about the case, and not as he continuously did, saying that he declared himself once about this case and that he completely stood behind his earlier declaration. This approach is negligence toward the court, and as such it constitutes a procedural violation.

Monitoring in the criminal case: "Removing or damaging official stamps or marks" from Article 414 of Criminal Code of Kosovo, an offence that envisages sentence with fine or imprisonment up to three years P.no. 1545/14

The main problem in this hearing was the transfer of the defendant to Suhareka detention centre, which resulted with additional costs and delay of one hour 10 minutes, while the defendant was being brought from Suhareka detention centre. The hearing session for setting the detention measure was planned to be held at 10:30hrs, while it commenced at 11:40hrs.

Monitoring in the criminal case: Abuse of official position from Article 339 of CCK P.no.115/12

The main problem in this court session was the engagement of the lawyer, who for two consecutive sessions had authorization from his colleague. In this case the second lawyer was engaged according to official duty, and not privately. In this case, the second lawyer should have informed the Bar Association for his non-presence, and the Association should have determined another lawyer according to the official duty, and not as he did by engaging the other lawyer. Furthermore, we consider that the main problem here was the tolerance expressed by the trial panel against this irregularity.

Monitoring in the criminal case: "Abduction" from Article 194 par.1 of CCK and the criminal offence "fraud" from Article 335 par.1 of the CCK P.no.45/14

The main problem during this court session was the fact that the presiding judge earlier had also taken action in this case as pre-trial judge, which directly comes into contradiction

with the Kosovo's Criminal Procedure Code and the Article 384 paragraph 1 sub-par.1.1, all this related to Article 39 of the KCPC. In relation to this, the prosecutor warned the presiding judge. This caused the hearing to stop. It was decided that the case should proceed further to the Court President for changing and assigning the new presiding judge in this case.

Monitoring in the criminal case; Aggravated murder in co-perpetration, from Article 147 par 1 sub-par.7 related to Article 23 of CCK. Criminal offence of unauthorised ownership, control or possession of weapons from Article 328 par.2 of CCK, as well as the criminal offence, Assistance in committing the criminal offence Aggravated Murder from Article 147 par.1 sub-par.7 related to Article 25 of the CCK P.no. 217/13

The main problem during this session was the fact that the accused, F.M., gave his statement in front of the trial panel while he was being questioned by the defence. His words, for about 20 minutes were not included in the session minutes at all. Irrespective to the reaction of lawyers and the prosecution, the presiding judge did not conclude any word in the minutes. The presiding judge said that she did this because the same words were also stated by the defendant in the prosecution, while the defence and the prosecutor said that there were changes in the defendant's statement which were not mentioned at all in the minutes. However, we consider that even in the cases when words of the lawyer, prosecutor and the judge match with each other, still they need to be inserted separately in the minutes, because these are words of different parties and must be preserved as such.

Monitoring in the criminal case: The two accused A.B. and B.U., due to charges for commitment of the criminal offence: Aggravated murder in co-perpetration from Article 147 par.1 sub-par.7 related to Article 23 of the CCK. Meanwhile, the third accused person who is in freedom charged for the criminal offence: Giving assistance to perpetrators after commitment of the criminal offence from Article 305 par.3 related to par.1 of CCK P.no.19/2014.
The problem in this case is the fact that while the second accused person was giving his final statement, he called the accused a CRIMINAL, and the trial panel did not react to this, while the prosecutor reacted and he exchanged words with the other accused person, who also accused the prosecutor that he did not carry out investigations properly. We consider that this should not have been allowed to happen by the trial panel, which is composed of three professional judges. Another violation that should be noted in this case is the fact that judgement announcement was postponed for 26.11.14, while the trial was considered closed on 20.11.14. We consider that this is in contradiction with Article 366 paragraph 1, according to which, the time for announcement of the judgement should be made by a maximum of three days after completion of the trial.

The court hearing held on 23 May 2014, in the civil case Obstruction of Possession Cnr137/14, where the accuser, at the capacity of the party, was constantly interrupted by the third parties in relation to accuser's testimony. This caused the lawyer representing the defendant to ask the judge to maintain law and order, and not allow third parties to influence the accuser's testimony. The lawyer also complained about non-inclusion of statements in the minutes. On several occasions during the session, he requested that everything is noted down in the process, as much of his statement were not being noted in the minutes, and that is why the minutes are not the same as the ones stated in the session.

The other session was also held with the same parties on 30.10.2014, but with a different number, as the case was returned to retrial now with the number Cnr-398/14, which has procedural issues during the session

development. The main problem during this session was inadequate management of the session by the judge and non-inclusion of statements in the minutes. During the session, the accuser and a party from the public, who was with the accuser, were very loud in the session, while the judge was very tolerant toward them. In some cases he did not even warn them, as they are not allowed to speak in the session, nor the accuser, when he/she has a lawyer, without the permission of the judge, let alone a party from the public. The accuser, together with the party from the public, threatened the lawyer, while on persistence of the lawyer this was noted in the minutes, since the judge did not even want to note this action in the minutes. Only after the lawyer's persistence, the judge turned the accuser and the party out of the courtroom, because of threatening the lawyer. The lawyer also complained several times for not noting his statements in the minutes.

In the case of misuse of official position in relation to R.M., with case number P/nr. 171/13, the defence of the accused M.K. and the final statement of the accused was planned to be heard. Nonetheless, just because one of the trial panel members was engaged in another case, which, as it was said, had to be held in Prishtina, the trial panel decided to not attend Tuesday's session. This is negligence of the trial panel, taking into account the office and importance of the case, even more when a public person is in question, knowing that each delay in court will create further the delay in the appealing procedures of the case. 27 February 2015 was set for the final judgement expected to be made regarding this case. However, unable to finish with the final statement of the accused, even the case prosecutor will give her concluding statement, the trial panel decided that in this case they will proceed with final statement of the defence, while it also set two dates in March 2015. 14 March 2015 has remained as the day when the fate of M.K. and five other Prizren municipal officials was to be decided.

"Fraud" case with case number P.no. 444/13 brings out inadequate translation of the accused party as the main problem, as words of the accused were not being translated (by the legal interpreter). We consider that this is in contradiction with basic rights of the accused, such as translation in the language that the accused speaks, is in contradiction with Article 14 par.2 of the Kosovo Criminal Procedure Code, which states:

"Any person participating in criminal proceedings who does not speak the language of the proceedings shall have the right to speak his or her own language and the right to be informed through interpretation, free of charge, of the evidence, the facts and the proceedings."

Furthermore, the defendant J.M.M.R. while being interviewed by his lawyer, at the moment that he was invited to identify his signature on his statement given to police, said: '*It is true that this is my signature, but prior to signing the statement, I was not aware what it contained, as it was not read or translated to me once again prior to the signing.*' This comes into direct contradiction with the Article 207, paragraph one of the KCPC. This session also started with delay, as the defendants, brought from the detention together with the defence lawyer, waited for 25 minutes until the Court secured the interpreter from English into Albanian, and vice-versa. Furthermore, irrespective to the fact that defendants' statements were planned to be taken for this day, none of them could complete their testimonies, since the interpreter could not stay at the court after 13:00hrs, as he was obliged to hold speeches in a school, where he is engaged with monthly payment. This is in contradiction to the principle of fair, impartial trial and within a reasonable time, a right that is stipulated not only with the KCPC, but also with the European Convention on Human Rights. Due to all of this, we consider that Kosovo's Criminal Procedure

Code has also been violated, more precisely the Article 5, paragraphs 2 and 3 of this Code.

On the other hand, monitoring of EULEX sessions by our monitors has evidenced significantly less procedural violations. Nonetheless, they were not inexistent and some of them we will mention under:
In the "Passports Case" with case number Pkr. 1046/13 where the accused are N.V. and 8 others, already convicted, after giving the final statement by the Prosecutor and the defence lawyers, the case prosecutor has also given a sort of response in the final statement of the defence lawyers, thus withdrawing the lawyers' response. This session was held on 2 December.

Out of all sessions monitored with EULEX judges during this year, this was the only case that after the final statement by the defence lawyers of the accused, the Prosecutor continued with presentation of his final statement, where he commented and responded to claims by the defence lawyers of the accused.

At the same time, another phenomenon has come up in almost all the sessions led by EULEX judges, which is the very high tolerance that they offer to defendants. The defendants usually ask the floor to make questions to the witnesses; however, they do not make questions but use this time to make numerous comments, thus taking the precious time of the Court.

Another violation that was made is the non-reading of the indictment. This happened in a case in Ferizaj with case number Pkr. 116/14, where the defendants were being accused of drug trafficking. Lawyers of the defendants requested that the indictment is not read in this case, and the Judge acted as asked. We are aware of the right of the defendants to not read them the indictment, but not also in the initial hearing cases, as this is mandatory.

This same violation was attempted in yet another case in Ferizaj, with case number Pkr. 295/09, where B.M. is the defendant. In this court case, the defence lawyer requested the Judge not to read the indictment, but the damaged party opposed this and demanded the reading of the indictment. Lawyers of the defendants said that defendants have the right to give up indictment reading, but they forgot that this does not apply for the initial hearing. Fortunately, in this case, upon intervention of the damaged party, the indictment was read. We consider that this tendency aims to obstruct media from fair information regarding the offence that certain defendants are accused of.

With all the above, it is notable that procedural violations are still evident in court sessions. Last year's justification that judges and prosecutors need additional training regarding changes of the Criminal Code and Criminal Procedure, does not stand this year, therefore the high number of evidenced violations in the procedure of court proceedings remains a concerning fact.

IV. NUMBER OF JUDGES AND PROSECUTORS

The judicial system, namely the courts, being representatives of the embodiment of the principle of justice, as one of the three main pillars of our state, more than anything else, should have functionality, which will provide an effective and efficient performance of duties arising as a challenge to them.

In the group of elements necessary to achieve a satisfactory functionality of our courts, among others, are their staff (professional staff), before which all tasks for a fair, speedy and impartial trial are presented. The influx of new cases filed in court and cases accumulated and awaiting trial, are a negative element that adds pressure and can have a stressful and negative influence on the performance of the incumbent judges, who for objective reasons and the backlog of cases could not achieve proper functionality. This happens because of the urgency of resolution of the accumulated cases in the courts, which require priority in their resolution; but also new cases presented should not be neglected.

In most instances, cases heard by judges exceed the overall normal rate; however, there is a remaining latency in the progress of work in the courts, always for the reason of lack of judges in our courts. Despite the efforts for speedier procedure to review and adjudicate cases, to minimize the costs (principle of cost efficiency), correctness, fairness and dedication, these tasks become more difficult than when each judge is allocated almost an insurmountable number of cases. To achieve the maximum embodiment of the principle that the court is a pillar of justice and efficiency, the reasons that cause delays and stalling should be avoided or improved, together with enabling detailed access to cases, which can be achieved with an increase in the number of judges, professional associates and prosecutors.

With the increase of the number of judges, professional associates, and prosecutors, conditions will be attained for each of them to perform their tasks at maximum within their competence on the basis of the legal framework, thus exercising with professionalism and fairness their obligations, and in doing so the entire chain of the justice system will work in full coordination and have the results from which our country and our citizens will benefit.

For problems and negative consequences that such an insufficient cadre of judges and prosecutors is causing, observations were made from the real situation in our main courts and prosecutor offices, where complaints are mainly dealing with the consequences arising from such deficiencies, and which can be divided as follows:

- Lack of judges and professional associates causes: Delay in proceedings, inability to reduce the accumulated number of cases in the courts, aging/statutory limitation of cases, increase in complaints by individuals who are parties to certain issues because the proceedings remain pending ... etc.
- Insufficient number of prosecutors cause: problems in scheduling hearings because the same prosecutors receive summons from different courts/judges (branches) at the same time, causing delays and postponements of hearings. Another problem due to this deficit is echoed in the impossibility of preparing indictments.

If the courts were to have a sufficient number of professional associates, then the judges would be able to conduct hearings and adjudicate within a speedier timeframe, with a greater efficiency and ease.

If all Basic Prosecutor Offices would have a sufficient number of prosecutors in all

departments, in particular the General Department, there would be no postponement of hearings, or their delay, because there would be no influx/burden of cases for prosecutors, because coordination between the Court and Prosecution Office would be at an appropriate level and not exceeding the norm, as usual.[25]

BIRN monitors, in their regular monitoring in Kosovo courts, have stressed that at all levels there is an urgent need to increase the staff, in particular in the courts with increased influx in the number of cases. The main demand lies in addition of professional associates, because the current situation represents a negligible number of them compared to what is recommended by the Kosovo Judicial Council (1 Professional Associate for two judges).

Due to the current situation of personnel in our courts, there is a need for immediate intervention to increase their number and the essential needs/proposals for main courts consist in the following:

- Basic Court in Prizren - there is a lack of personnel and professional associates. Because two of the judges have passed away, one has left the position in question, and the need exists to add at least 2 others, it can be concluded that an increase of at least 5 judges is needed. Due to changes in positions or leaving of professional associates, they risk being reduced to their minimum number. Greater need for associates in this court (together with branches of this court), imposes for a number of at least 15 professional associates.

The same situation of lack of such personnel is also seen in the Basic Court of Gjilan, where lack of professional associates and immediate need to increase their number is also observed.

- Basic Court of Mitrovica – with respect to the number of judges, this court is in a better position than other courts, but the problem remains in the number of professional associates, a total of 3 (because 2 have left), and this hinders the work of judges. It is emphasized that this court needs at least 15 associates. Another problem that this court faces is the presence of prosecutors in hearings (more specifically their absence due to inability to appear caused by the large number of cases presented to them at the same time). Problems in particular occur in drafting indictments.

- Basic Court in Peja – this court encounters the same issues due to the lack of judges, namely one in Peja and one in Klina; therefore, first, the number of vacant posts has to be filled. Another problem that is causing many difficulties is the insufficient number of prosecutors, and these problems lead to difficulties, especially in branches: Klina, Deçan and Istog. In these branches there is one professional associate for each, and there is a need to add two professional associates in each of them.

- Basic Court in Gjakova - as in all other aforementioned courts, is affected by an insufficient number of professional associates. This court has a total of 4 (one of whom may eventually leave). Due to the influx of cases and impediments to the work of judges, there is a need for the addition of three other associates. In both Rahovec and Malisheva branches, there is 1 professional associate. The professional associate in Rahovec may leave and the need for an additional associate is noted, whereas in Malisheva there is a need to add 2 other associates, in addition to the existing one. In this court - Basic Court in Gjakova - 6 judges have left their positions to date (vacancies must be filled), and two additional judges are needed to achieve a speedier management and treatment of the large number of cases. The branches in Rahovec and Malisheva were found to have similar problems, where in Rahovec from the total of 6 judges, 3 are expected to reach the retirement age, and the need

25 This was a recommendation we took from judges of Basic Courts, based on their needs they find during their work

to add an additional judge, besides the number of 6 judges, is noted; in Malisheva there are 4 judges and the need to add another one is highlighted. This court has problems with absence of prosecutors and there is a need for their increase, even in a ratio of one prosecutor to one judge.

- Basic Court in Ferizaj - feels an inevitable need for an increase, respectively doubling the number of judges. Currently this court has 15 judges and an immediate need to increase their number is observed.

All of the aforementioned courts have had this problem continuously for years, and this problem is well known by the Kosovo Judicial Council (hereinafter KJC). From the information received by the KJC, it can be ascertained that at all levels of the courts of the Republic of Kosovo, on 31 December 2014, there were 317 judges, including 11 judges of the Special Chamber of the Supreme Court.

In February 2015, the number of judges at all levels of courts is 316. From the monitoring in court, from the position of the courts who request additional judges and professional associates, it is apparent that this number is insufficient to achieve a working level that is satisfactory to the judiciary.

With the budget on courts, according to the KJC, it is foreseen that the number of judges is to be 404 (including 12 judges of the Special Chamber of the Supreme Court).

To alleviate the burden and pressure that is caused to the current judges, KJC, on information provided, announces that the recruitment procedure is being conducted for 40 judges, who are expected to begin their work in the courts of the Republic of Kosovo.

If the recruitment procedure finishes quickly, (because recruitment was delayed due to lack of funds), 40 of the judges who will begin work after the completion of this procedure would assist in mitigating this backlog (in view of a review of higher number of cases thereby reducing the backlog in all Basic Courts), but nonetheless for an effective improvement, steps must be undertaken quickly to fill the number of judges, at least to the rate prescribed by the courts budget, i.e., 404.

In addition, the KJC is also aware of the small number of professional associates in our courts (according to information from the KJC, a total of 98), but it is indicated that due to budgetary constraints, their number cannot be increased. If we take into account such notice, that for financial reasons the number of associates will remain the same as it is currently, we can immediately understand that the judiciary will in continuity be plagued by the problems mentioned in the aforementioned analysis, and the ones faced with those will be judges, who have an immediate need for associates, a need which could not be fulfilled, thus enabling the continuation of delays and other irregularities.

For the chain of the justice system to function correctly and usefully, we mentioned proper coordination as a significant factor, where the regular functioning of the Basic Prosecutors Offices of Kosovo plays the important role here.

It seems that the lack of personnel is not a problem that has affected only the courts, but from the factual situation, we understand that this is a problem faced also by all Basic Prosecutions, which unfortunately interferes with negative consequences to all hearings held in the court, causing delays and their postponement. Almost every prosecutor of the Basic Prosecutions has a multiplied number of cases allocated to them, making it impossible to coordinate with the courts, appearing timely to summoned hearings, regularly drafting indictments and exercising proper commitment to all cases.

That these prosecutions have a significant shortage of prosecutors can be seen from their exact number, as follows:

- **Basic Prosecution in Prishtina** has a total of 41 prosecutors, of whom 22 were male and 19 were female. 40 prosecutors are Albanians and one from the Serb community.

The lowest number of prosecutors is found in Department for Juveniles.

- **Basic Prosecution in Prizren** has a total of 12 prosecutors, of whom 6 were male and 6 were female.
- **Basic Prosecution in Peja** has a total of 14 prosecutors, of whom 7 were male and 7 were female. A total of 13 prosecutors are Albanian and 1 is of the Bosnian community.
- **Basic Prosecution in Mitrovica** has a total of 10 prosecutors, of whom 5 were male and 5 were female. In total 8 prosecutors are Albanian, 1 is from the Bosnian community and 1 is of the Turkish community.
- **Basic Prosecution in Gjilan** has a total of 16 prosecutors, of whom 12 were males and 4 females.
- **Basic Prosecution in Gjakova** has 11 prosecutors, of whom 8 were male and 3 were female.
- **Basic Prosecution in Ferizaj** has 11 prosecutors, of whom 10 were male and one is female.

- **STATE PROSECUTORS OFFICE** - In total 3 Prosecutors, 2 male and 1 female.
- **APPEALS PROSECUTORS OFFICE** - In total 8 prosecutors, 7 males and 1 female, of which 7 are Albanians and 1 is of the Bosnian community.
- **SPECIAL PROSECUTORS OFFICE** – A total of 13 prosecutors, 10 males and 3 females, of which 12 are Albanians and 1 of the Bosnian community.

The current number of prosecution offices (specifically up to 23.02.2015) is a total of 139 prosecutors, of whom 89 were male and 50 were female. In total 133 prosecutors are Albanian, 2 are from the Serb community, 3 are from the Bosnian community and 1 is of the Turkish community.

The aforementioned review of the personnel of the Basic Prosecution Officers in Kosovo clearly shows that the number of prosecutors is quite small, almost to insufficiency, and when considering the fact that the same prosecutor is summoned at the same time to different sessions of the Basic Court, and adding to this the summons from the branches of the court, we can conclude that it is unlikely that a single prosecutor can manage, follow and be present at all hearings when summoned.

Such an overload on the prosecutors, because of the high number of cases, is causing disorder in the whole judicial system, and this is determined by the expression of concerns by judges. An example of the many problems that are caused as a result of the small number of personnel in all Basic Prosecutions is found at the branches of the Basic Court of Gjilan, specifically in the Courts of Kamenica, Viti and Novoberde, courts which adjudicate on criminal matters one day a week, because the Prosecution does not send prosecutors on other days, when they need them. The damage caused to the relationship between Court and Prosecution is clearly visible, due to this insufficiency; every citizen who is a party to the proceedings is affected by these problems of our judicial system, causing thus a collective dissatisfaction and decreasing the confidence in the fundamental institution of the judiciary – the Court.

From the findings of the Chief of Prosecutors of Basic Prosecutions, it is highlighted that there is a good spirit of cooperation with the Kosovo Prosecutorial Council (hereinafter KPC) and that there is an explicit willingness on the part of this institution, but without any effective change, because the number in these prosecutions remains the same, but even if it would be changed according to the plan of the KPC, it would still be insufficient to make a significant and efficient improvement of the personnel of Basic Prosecutions, which consequently would reduce the norm of cases for each of the current prosecutors because these Prosecutions would need to almost

double the staff – respectively the number of prosecutors.

This problematic situation is found especially in the Basic Prosecution Office in Prizren and the Basic Prosecution Office in Peja, after analysing the factual situation (in particular observations by courts and their relations with prosecutors).

In the Basic Prosecution Office in Prizren, difficulties and insurmountable numbers of cases are observed, considerably in the General Department. Depending on the need for a quicker and efficient management of cases, an urgency was felt to increase the number of prosecutors, thus to add 4 or 5 young prosecutors.

The Basic Prosecution Office in Peja also has problems with an insufficient number of prosecutors, especially in the Department of Juvenile Justice, where one prosecutor quadruples the usual norm of cases, which makes the work impossible. General Department has the same problems and an improvement could be made if the proposal that the number of prosecutors should equate to the number of judges in the Basic Court in Peja (with branches), is implemented.

Basic Prosecution Offices in Prizren and Peja have been selected as illustrative examples, to clearly illustrate shortcomings and deficiencies encountered in all other prosecutions, which directly complicates and slows down the work of the courts, which for the conduct of the proceedings should have a better coordination and cooperation, as defined in the legal framework, because of the importance of each body separately in the presentation of evidence, review and adjudication on the issues under review.

From all that was mentioned above, the common denominator for the cause of problems in the system of Courts and Prosecutions is the lack of personnel and the need for immediate efforts by the Kosovo Judicial Council and Kosovo Prosecutorial Council, to increase the number of Judges and Prosecutors.

Since the KJC and KPC emphasize that they are aware of the problems that are present in the judicial system and that despite the willingness to intervene towards an improvement of this situation, this is impossible due to budget, and the path is opened to seek possible alternatives that would find a way to achieve what it is currently not done due to budgetary constraints; however, it is proven that damages are caused as a consequence of this.

In the course of analysing the situation, possibilities and impossibilities for change or improvement of this situation, a referral to an alternative proposal that would give result is needed, and that is:

The creation of vacancies by the Kosovo Judicial Council (positions for judges and professional associates), by transferring the security staff of the courts to the responsibility of private companies. According to information, there are about 300 officials who work as security for premises, and if they will not be paid from the budget line (salaries and per diems), the Kosovo Judicial Council will be able to employ additional staff, interns and professional associates. We consider such an alternative as reasonable due to the financial/budgetary inability, and if a more reasonable management is done with existing resources, this could create opportunities for increasing the number of professional associates; showing that small but useful improvements can be made in the judicial system in Kosovo.

Regarding the recommendations on increasing the number of judges, it would be valuable that, inter alia, evaluation of judges' performance (and prosecutors) together with continuous training for judges (and prosecutors) - would be essential to promote a satisfactory working level. The simple increase of number of judges alone cannot provide satisfactory working level. It is also a question of quality of work (rather than just number of judges)."

V. CONSTITUTIONAL COURT DECISION THAT PROVOKED DISCUSSION[26]

Extension of the mandate of international judges in the Constitutional Court of the Republic of Kosovo

Re-appointment and extension of mandate

At first glance, based on the title of this legal analysis, any jurist would respond to this title by arguing how it is possible to have reappointments and even more so extension of mandates in the Constitutional Court?!

Based on this fact, we initially find it reasonable to clarify the mandate of the judges appointed to the Constitutional Court of Kosovo, the exemptions provided for by the Constitution for the appointment of international judges, and also the recent decision for re-appointment and extension of the mandate of EULEX judges by decree of the President of the country.

According to the Constitution of Kosovo, the Constitutional Court consists of nine judges, who are appointed by the President of the Republic of Kosovo upon the proposal of the Assembly, for a nine-year term, without the possibility of extension.[27]

The Constitution of Kosovo, which entered into effect on 15 June 2008, has also provided transitional provisions, due to international supervision of the implementation of the Comprehensive Proposal for the Kosovo Status Settlement. In this respect, the transitional provisions provided for the mandate of international judges who will not be appointed by the President, but by the International Civilian Representative, who should decide for international judges, after consultation with the President of the European Court of Human Rights. Three judges should not be citizens of Kosovo or any neighbouring country.[28]

The exclusive right of the International Civilian Representative, under the transitional provisions of the Constitution of Kosovo, was to determine when the term of the international judges expires. Under these provisions, the International Civilian Representative, on June 12, 2009, appointed three international judges, for a term of three years.[29]

About five months prior to the expiration of the mandate of these international judges, a few days before the end of international supervision, the International Civilian Representative reappointed three judges for second terms until 31 August 2014.

Exceptions to the mandate of the judges of the Constitutional Court, as shown, were made regarding international judges. However, despite these exceptions, the Constitution of Kosovo nowhere foresees the term reappointment, or extension of the mandate of judges, whether domestic or international.

The right to appoint international judges was guaranteed to the International Civilian Representative through transitional provisions of the Constitution, until the end of international supervision of independence, which ended on

26 It should be noted that this analysis was conducted during December 2014.

27 Constitution of Kosovo, Article 114, paragraph 2.

28 Ibid, see Article 152 paragraph 4.

29 Judges appointed by the ICR, were: Robert Carolan, Snezhana Botusharova- Diocheva and Almiro Simoes Rodrigues.

10 September 2012. However, the President of the country, by decree, extended the mandate of international judges even after completion of their already extended mandate by the International Civilian Representative, and even more so, after the end of international supervision of independence.

End of Supervised Independence

September 10, 2012, marked the end of one chapter and the beginning of a new chapter for Kosovo. From September 2012, supervision of the independence of Kosovo ended, and together with that the mandate of the International Civilian Representative as the highest and special legal force; from this date a new chapter for local institutions was opened, and together with it new responsibilities were added. The Constitution of the Republic of Kosovo now forms the primary basis of the legal framework of the country.

After the expiration of mandate of three international judges, on 31 August 2014, President Jahjaga issued the Decree no. DKGJK-001-2014, to confirm the extension of the mandate of international judges to the Constitutional Court of the Republic of Kosovo[30], but the extension of their mandate was done without the proposal by the Assembly of Kosovo, as provided in paragraph 11 of Article 65, which states the Assembly of the Republic of Kosovo has the power "to propose the judges of the Constitutional Court" and in paragraph 2 of Article 114 of the Constitution of Kosovo, it is stipulated: "Judges are appointed by the President of the Republic of Kosovo upon the proposal of the Assembly for a nine year term, without the possibility of extension".

Completion of the supervision of the independence of Kosovo also brought the amendment of the Constitution of the Republic of Kosovo.

The existence of 13th Amendment, which was repealed by Article 152 of the Constitution[31], referring to temporary composition of the Constitutional Court, clearly represents a prohibition to realize the selection of judges of the Constitutional Court by an international organization, which virtually means non-continuation of the international presence in the court.

In the present case, the extension of mandate of three international judges, even after constitutional prohibitions, sends the Republic of Kosovo back in the political sense, because of the process of concluding the international supervision. This process, which was finalized in September of 2012, aimed at removing the international presence in institutions, including international judges in the Constitutional Court.

Given the fact that the Constitution explicitly stipulates that the appointment of judges

30 Decree of the President of the Republic of Kosovo, a document provided to BIRN by request for access to public documents, dated 29.09.2014, with protocol number 764.

31 Article 152 of the Constitution of Kosovo "Temporary Composition of the Constitutional Court. Until the end of the international supervision of the implementation of the Comprehensive Proposal for Kosovo Status Settlement, dated 26 March 2007, the Constitutional Court shall be composed as follows:

1. Six (6) out of nine (9) judges shall be appointed by the President of the Republic of Kosovo on the proposal of the Assembly.
2. Of the six (6) judges two (2) judges shall serve for a non-renewable term of three (3) years, two (2) judges shall serve for a non-renewable term of six (6) years, and two (2) judges shall serve for a non-renewable term of nine (9) years. Mandates of initial period judges shall be chosen by lot by the President of the Republic of Kosovo immediately after their appointment.
3. Of the six (6) judges, four (4) shall be elected by a two-thirds (2/3) vote of the deputies of Assembly present and voting. Two (2) shall be elected by majority of the deputies of the Assembly present and voting including the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of Communities that are not in the majority in Kosovo.
4. Three (3) international judges shall be appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights. The three (3) international judges shall not be citizens of Kosovo or any neighbouring country.
5. The International Civilian Representative shall determine when the mandates of the international judges expire and the judges shall be replaced as set forth by the Constitution".

to the Constitutional Court may be made only upon the proposal of the Assembly of Kosovo[32], this constitutional bypass cannot be justified by the decree of the President, on the basis of international agreement in the form of correspondence between the Republic of Kosovo and the European Union, which was ratified on 23 April 2014, in which correspondence, by the President, amongst others, is said:

...after the end of supervised independence, the EULEX can appoint its judges and prosecutors, who will replace those whose terms expire. These appointments are carried out in the manner described below: According to Article 84 of the Constitution of the Republic of Kosovo, I have the power to appoint and dismiss the prosecutors and judges on the proposal of the nominating bodies. Article 20 of the Constitution of the Republic of Kosovo allows the Republic to delegate powers to certain international organizations on specific issues

The method of finding this solution, taking into account the nature of the letter, which is outside the constitutional nature, among others constitutes the systemic inability to consolidate the institutions, in this case the Constitutional Court, but also as an adaptation of the highest legal act to political circumstances.

Transfer of Sovereignty

According to point 1 of **Article 20** of the Constitution of Kosovo, the Republic of Kosovo is allowed, based on ratified agreements for certain issues, to pass state powers to international organizations. One such action was undertaken by the President of the country, by which it transferred the authority to EULEX Kosovo, for extension of mandate of three international judges.

In the correspondence of the President of the Republic of Kosovo with Baroness Ashton, dated 14 April 2014, inter alia, the President, as the representative of the state in this case, expressed its will on the basis of Article 20 of the Constitution of the Republic of Kosovo to transfer some competences, so called for specific issues.

However, the transfer of competences to EULEX Kosovo by the President of the country, how right it is, by the fact that the mission and duties of EULEX are defined by Joint Action adopted by the Council of the European Union in 2008, according to which EULEX may act only within the institutions created under SCR 1244.

Since the Constitutional Court is not an institution created under 1244, it is clear that the power to appoint the judges of this court by EULEX would bring the latter outside of the framework of the Joint Action, because the Constitutional Court is not a regular court, such as Basic Courts and Prosecutions to which EULEX mission has provided assistance.

Viewed from another perspective, the logic of the transfer of competence for the appointment of three international judges to the Constitutional Court relates directly to the created situation and the inability of the Assembly to replace these with local judges, in the regular manner and procedure.

We have said that the transfer of competencies is healthy, as it is provided for by Article 20 of the Constitution of Kosovo, but there are two issues under which this requirement should be seen in this case. The first is the existence of a constitutional amendment[33] that removed the international composition of the Constitutional

32 The Constitution of the Republic of Kosovo, article 65 point 11 and Article 114 point 2.

33 Amendment 13.

Court; and the second is that this method of solving the issue brings us back to the situation before the end of international supervision of independence.

Above all, the letter of President Jahjaga intends to delegate to EULEX only the power of appointment of judges, not the power of their proposal, which still remains guaranteed competence for the Assembly of Kosovo, under the Constitution of the Republic of Kosovo[34].

Hierarchy of Laws in the Republic of Kosovo

The Constitution of the Republic of Kosovo, in Article 19, defines the modalities of implementation of international law, namely the relation of Kosovo laws with international agreements. The Constitution of the Republic of Kosovo, in line with the principles of international law, recognizes the supremacy of international treaties in relation to the laws of the Republic of Kosovo.

Constitutional Courts of the region have a role similar to that of Kosovo in relation to the ratification of international agreements. For example, the Constitutional Court of Croatia, under the Constitution of Croatia, has no competence to evaluate international agreements. This is defined in the Decision *UI/1583/2000*, where Croatia's Constitutional Court rejected the request for assessment of the constitutionality of a law on ratification approved by the legislators. But Croatia's Constitutional Court found that it is competent to assess the constitutionality of the act of ratification of the international agreement, but not for evaluation of the international agreement itself, which is part of the act of ratification.

The Constitution of Slovenia also defines the supremacy of the Constitution in relation to international law, moreover, in terms of the Slovenian Constitutional Court; Article 160 [Powers of the Constitutional Court] contains relevant provisions regarding international agreements.

More specifically, paragraph 2 of the article says:

"In the process of ratification of agreements, the Constitutional Court, upon the proposal of the President of the Republic, the Government or a third of the deputies of the National Assembly, issues an opinion on the compatibility of an agreement with the Constitution. The opinion of the Constitutional Court is binding on the National Assembly".

In line with the Constitutions of the countries in the region, Article 19, paragraph 1, of the Constitution of the Republic of Kosovo states that international treaties, after ratification and publication in the Official Gazette, become part of the domestic legal system and can be applied directly, with the exception of cases where for their implementation the enactment of a law is required[35]. Such is the case with the agreement achieved through the correspondence between President Jahjaga and the EU High Representative, Catherine Ashton.

This correspondence was ratified in the Assembly of Kosovo, with 2/3 of the votes of the assembly members, as the law no. 04 / L-274, and as a result of this ratification, the President of Kosovo issued the Decree with no. DKGJK-001-2014. However, after the ratification of this agreement, the relation of this agreement with the domestic law of the Republic of Kosovo is presented for discussion. Article 19, par. 2,[36] of the Constitution of

34 The Constitution of the Republic of Kosovo, Article 65 point 11.

35 International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are applied directly, except when they are not self-executing and their implementation requires the promulgation of a law.

36 Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo

Kosovo, regulates this report. Our Constitution recognizes the supremacy of international treaties ratified in relation to the laws of the Republic of Kosovo.

Nevertheless, the Constitution of the Republic of Kosovo stands above the international agreements and international agreements are subject to the supremacy of the Constitution. This is clearly defined by the Constitutional Court. In the decision (KO 95/13), on the request of the assembly member Visar Ymeri and others, the Court establishes a legal standard, specifying that:

The provisions of an international agreement that are self-executable, are of the higher legal order than Kosovo legislation, but remain in a lower legal order to the Constitution of Kosovo, as defined by Article 19 of the Constitution of Kosovo.

Thus, we can conclude that in the Republic of Kosovo, the Constitution is the highest legal act, to which the international agreements are subjected, and in our case, the agreement concluded between the Republic of Kosovo and the European Union, realized through the correspondence of the President with Baroness Ashton.

However, on the other hand, also in the case KO 95/13, the Court states that: *"no article of the Constitution provides for assessing the constitutionality of the content of international agreements by the Constitutional Court"* par. 99, and the Court notes that *"it is not authorized to assess the international agreement, as such in accordance with the Constitution"*.

By comparing these findings of the Court, found in the same decision, (KO 95/13), naturally the question arises if an international agreement is not in accordance with the Constitution, given that international agreements are subject to the Constitution, then if Constitutional Court does not asses the constitutionality of international agreements, then who does?!

EULEX mandate

The mission and duties of the EU Mission for the European Rule of Law in Kosovo, EULEX Kosovo, are defined by the *Joint Action*, 2008/124/CFSP, adopted by the Council of the European Union on February 4, 2008. *Joint Action* clearly defines the competence of EULEX and its relationship with the Kosovo authorities, institutions and bodies, by stipulating that: "Kosovo authorities, institutions and bodies referred to in this Joint Action are institutions established under Resolution 1244 of the Security Council of the United Nations, dated 10 June 1999.

Kosovo authorities, institutions and bodies referred to in this Joint Action are the institutions (hereinafter the Kosovo institutions) created on the basis of Resolution 1244. They include, inter alia, the Kosovo Police Service, the judiciary and the associated Ministries of Justice.

In Annex 1, paragraph 5, and Annex 2, paragraph 5, SCR 1244 stipulates the establishment of the interim administration, which will ensure conditions for a peaceful and normal life of the citizens of Kosovo. On the basis of these provisions, the Special Representative of the Secretary-General declared the Constitutional Framework for Provisional Self-Government, the purpose of which was to establish self-government in Kosovo until the final settlement and the establishment of provisional institutions of self-government in the legislative, executive and judicial areas.

According to the Constitutional Framework, issued in accordance with Resolution 1244, Kosovo institutions and bodies are defined, including judicial institutions. In the list of institutions that are part of the judicial system, in part 4, 9.4.4, determines, the Supreme Court, District Courts, Municipal Courts and Minor Offences Courts. What is not included in the list is the Constitutional Court. Also, according to the Constitutional Framework, Kosovo did not have any institution or body predecessor

to the Constitutional Court. Furthermore, the Constitutional Framework provisions relating to the judicial system do not include any body, which in any way exercises the role of the Constitutional Court.

Joint action has been amended and supplemented several times, first in 2009, then in 2010, in 2012 and most recently in 2014. However, all these amendments that were made to the initial Joint Action, (Council Joint Action, 2008/124/CFSP of 4 February 2008), did not change the EULEX mandate, which is clearly specified to be within the legal framework of the United Nations Resolution, i.e. Resolution 1244. Consequently, the mandate of the European Union Mission in Kosovo, EULEX, clearly has a neutral position towards Kosovo's status, and this neutrality is not modified in any of the instances of the amendments that were made to the Joint Action. On the other hand, the Constitutional Court is a judicial institution, the highest judicial institution of the Republic of Kosovo, which ensures that all laws and other legal acts comply with the Constitution of Kosovo. Appointment, proposal or any involvement of EULEX regarding judges of the Constitutional Court and the Constitutional Court itself, an institution, which is derivative and guardian of constitutionality in the Republic of Kosovo, we consider to be outside the legal framework of EULEX actions in Kosovo.

Apart from the legal framework set by the EU, the Assembly of the Republic of Kosovo has adjusted the responsibilities of EULEX in Kosovo, with the approval and ratification of a series of laws, which, ultimately are amended by Law no. 04/L-273, amending and supplementing the laws that relate to the mandate of the European Union Rule of Law Mission in Kosovo, dated 23 April 2014. By this law, without going at all in its content, we note that the law narrows the legal scope and powers of EULEX, in relation to the initial laws regulating the scope of EULEX.

Was the request inadmissible?

The Constitution of the Republic of Kosovo in Article 113 par. 2 and the Law on the Constitutional Court of the Republic of Kosovo in Article 29, stipulate who can bring an issue to the Constitutional Court on the matter of compliance with laws, decrees of the President or the Prime Minister and Government regulations, with the Constitution.

On the basis of these legal provisions, the Ombudsperson sent a petition to the Constitutional Court of the Republic of Kosovo on the issue: repeal of Decree of the President of the Republic of Kosovo no. DKGJK-001-2014 dated 31 August 2014 "to confirm the extension of the mandate of international judges in the Constitutional Court of the Republic of Kosovo". To the Court, the Ombudsperson addressed the question:

Can this deviation from the Constitution be justified on the basis of an international agreement between the Republic of Kosovo and the European Union, ratified on April 23, 2014?

The Constitutional Court, pursuant to Article 29 of the Law on the Constitutional Court, and by virtue of paragraph (1), point c), and paragraph (2) of rule 36 of the Rules of Procedure of the Constitutional Court, on 13 November 2014, unanimously decided to declare the request of the Ombudsperson as inadmissible. The Constitutional Court took the decision based on Article 29 of the Law on the Constitutional Court. In this provision, clarification of an application to the Constitutional Court is provided. Article 29 of the Law on the Constitutional Court in paragraph 1 also states who has the right to submit petitions to the Constitutional Court, and that this right is enjoyed by the Ombudsperson in accordance with Article 113 paragraph 2 of the Constitution of Kosovo. Paragraph 2 of the same article, requires specifying whether the disputed act

is contested in its entirety or only for a portion of it, even paragraph 3 of the same article determines the requirement to specify the objections raised against the constitutionality of the challenged act.

The Ombudsperson, in its application submitted to the Court explicitly detailed and described and specified his request, therefore anyone who would read the request can notice that the Ombudsperson disputes the "*Decree for confirmation of extension of mandate of international judges of the Constitutional Court*", a formulation that exists nowhere in the Constitution of the Republic of Kosovo. Another provision, on which the Court reasoned its judgment, is Rule 36 of the Rules of Procedure of the Court, which in par. (1) c) states: "*the request is submitted within four months from the date of delivery of the last effective legal remedy to the applicant*", and the application of the Ombudsperson has met this criterion, as it was delivered within the prescribed period.

Also par. (2) of the same rule, provides that:

The Court will declare an application as manifestly unfounded, if satisfied that: (a) the request is not justified prima facie, or (b) the acts listed in no way justify a claim for violation of a constitutional right, or (c) the Court finds that the applicant is not subject to any violation of the rights guaranteed by the Constitution; or (d) the Applicant does not sufficiently prove his claim.

Now let's analyse each of the points of paragraph 2 of Rule 36 of the Rules of Procedure of the Court. Point a) provides that "the request is not justified *prima facie*" where prima facie is a Latin expression that means, at first glance, an issue should be clear from the facts. The application of the Ombudsperson, in all respects has been fairly and accurately justified, and the Court has not given any explanation of why it is rejected "at first glance".

Point b) of the same paragraph provides that "*acts listed in no way justify a claim for violation of a constitutional right*", if the court supports its decision on this point then by this point the request of the Ombudsperson should have been rejected, since the Decree of the President is in accordance with the Constitution and that there is no constitutional violation.

Point c) states that "*the Court finds that the applicant is not subject to any violation of the rights guaranteed by the Constitution*". Reasoning based on this point cannot be done in our case, since under Article 113, paragraph 2 of the Constitution of the Republic of Kosovo, the Ombudsperson is guaranteed this right.

Point d) of the same paragraph provides that "*the Applicant does not sufficiently prove his claim*". The Ombudsperson has sufficiently argued his claim, and clearly specified that it requires assessing the constitutionality of the Decree issued by the President but not the assessment of the constitutionality of the international agreement[37].

Under the provisions upon which the Court called to support its decision, namely Article 29 of the Law on the Constitutional Court of the Republic of Kosovo, and pursuant to paragraph (1) c) and paragraph (2) of rule 36 of the Rules of Procedure of the Court, we consider that none of these requirements of these provisions were not met, for the Court to declare as inadmissible the application of the Ombudsperson. Moreover, it is immediately apparent in the decision of the Constitutional Court that the reasoning of the Constitutional Court contains contradictions.

37 See paragraph 36 of the ruling of the Court which provides that, "*In addition, the Court recalls that the applicant claims that he is challenging the constitutionality of the Decree, but not the constitutionality of the International Agreement on which the Decree is based.*"

In paragraph 34, the Court Ruling on inadmissibility states that:

The Ombudsperson challenges the Decree no. DKGJK-001-2014, issued by the President of the Republic of Kosovo on August 31, 2014. Therefore, the applicant is authorized party and has the right to refer the matter to the Court under Article 113.2 and Article 135.4 of the Constitution

From this formulation the Court asserted that the request of the OI meets the criteria required for application to the Court, and the Court itself, later referring to the article 29 of the Law on the Constitutional Court, in which provision definition of the application is stipulated, supports its decision for inadmissibility of the request of the OI. Also, the Court, in the reasoning of its decision, calls upon paragraph 2 of Rule 36 of the Rules of Procedure, but the Court does not specify any of the points of this paragraph, and thus cannot stand because the application of the OI has not cumulatively fulfilled all these to be considered unfounded.

Therefore, under the provisions of the Rules of Procedure of the Court and the Law on the Constitutional Court, the Court had to accept the application of the Ombudsperson as admissible, as the application of the Ombudsperson has met all criteria set by the Law on the Constitutional Court and the Rules of Procedure of the Constitutional Court. As we are aware that a decision on the application could not have been taken (as we will explain below) until 2016 when the mandate of international judges would end (for the second time) and new judges appointed, thus enabling the establishment of a quorum for decision in connection with the application, the Court should at least have come up with such a statement and show why it cannot presently decide on the application in question.

Lack of quorum

We will present hypothetically the issue of the quorum of the Court, what would happen if the Court would not render the application of the OI as inadmissible. Constitutional Court, in order to issue decisions, and to decide on a matter, must have a certain quorum, as regulated by the Law on this court.

Article 19 of the Law on the Constitutional Court determines decision-making, and it reads:

1. *The Constitutional Court decides in a panel consisting of all present judges of the Constitutional Court.*
2. *The Constitutional Court shall have a quorum if present are seven (7) judges.*

The Constitutional Court of Kosovo for various reasons never completed the number of nine judges as required by the Constitution in Article 114, paragraph 1, but always acted with 8 judges, and if here we add the exclusion of Judge Kadri Kryeziu (see case KI124/14), then the Court would remain only on 7 judges. The Constitutional Court at the time of submission of the application by the Ombudsperson had eight judges, 1.Prof. dr. Enver Hasani, 2. Prof. Dr. Ivan Čukalović, 3. Robert Carolan, J.D, 4. Dr. Altay Suroy, 5. Almiro Rodrigues, 6. Prof. Dr. Snezhana Botusharova-Doicheva, 7. Kadri Kryeziu, 8. Arta Rama-Hajrizi.

For the sake of explanation of the case we are assuming that the Court will declare the application of the Ombudsperson as admissible. Bearing in mind the exclusion of Judge Kadri Kryeziu, and exclusion of international judges, after the Ombudsperson in his request attacked the Decree of the President by which their mandate was extended in this case, three international judges would not have had the right to participate in the panel, therefore the Constitutional Court will remain with only four judges, and there would be no quorum under Article 19 par. 2 of the Law on the Constitutional Court.

Therefore, if it would happen that the Court would render the application of the OI as admissible, and accepted to decide on the merits of this claim, the Court would be presented with the problem of quorum.

With the decision of the Court, to assess the application of the Ombudsperson as inadmissible, the Court chose the easier way, perhaps the only way to remove the ball from its court.

Attack on the Decree - not on the international agreement

The attack on the Decree and not on the international agreement is confirmed by the Court itself in paragraph 36 of the decision of inadmissibility, which stipulates that:

Also, the Court recalls that the applicant claims that he is challenging the constitutionality of the Decree, but not the constitutionality of the International Agreement on which the Decree is based.

The Court further in paragraph 45 of the ruling, tries to link the decree to the international agreement by saying:

The Court notes that the applicant's arguments mainly relate to the content of the International Agreement concluded between the Republic of Kosovo and the European Union through the exchange of letters, ratified by the Assembly on April 23, 2014, although the applicant asserts that he challenges the constitutionality of the Decree only. Therefore, the applicant has not supported his claim and does not prove that the Decree is unconstitutional.

With this, the Court claims that "*the applicant has not supported his claim and does not prove that the decree is unconstitutional*". Also in this paragraph of the Courts' decision, one can see an insistence of the Court to qualify and place the application of the OI against or challenging the international agreement, despite the fact that the Ombudsperson clearly presented his claim and specified the application, as mentioned above in par. 36 of the decision of the Court.

The court also at other points continues "as having decided the issue on its merits," not ruling on the inadmissibility by stating in paragraph 47, "*as regards the procedure followed by the President, the Court concludes that the Decree is in compliance with the Constitution*". The Court in this paragraph in a way declared itself regarding the constitutionality of the Decree of the President. Even though the Court ruled that application is inadmissible, in this paragraph the court declares itself as if it has decided on the merits of the case that the decree is in compliance with the Constitution, which is contrary to the decision in inadmissibility since the Court did not accept to adjudicate on this issue.

The Court, by taking a decision on inadmissibility of the application of the Ombudsperson, giving some conclusions, which do not even remotely meet the standards of reasoning as it should be, because if the court will not take a matter for adjudication it should consider the criteria that are specified in the Rules of Procedure of the Constitutional Court, respectively rule 36 mentioned above. Moreover, the Court selectively refers only to those parts of the OI application, to justify its decision, although, where the Court calls upon, there is no dispute.

Based on all that we said above, we come to the conclusion that the extension of mandate of three international judges by Decree of the President of Kosovo, after the end of the mandate of the International Civilian Representative, who had exclusive rights to the appointment and determination of the mandate of international judges with the transitional provisions of the Constitution of the Republic of Kosovo, and after the completion of international supervision of independence, the Decree directly contradicts the Constitution of the Republic of Kosovo,

namely point 11 of Article 65 which guarantees the Assembly of Kosovo the power to propose the judges of the Constitutional Court, and point 2 of Article 114, which guarantees to the President the right to appoint judges, upon the proposal of the Assembly.

Also, the existence of Amendment 13, which was repealed by Article 152, which referred to temporary composition of the Constitutional Court, represents a clear prohibition to realize the appointment of judges of the Constitutional Court by an international organization, which virtually means non–continuation of international presence in this court.

In the present case, the extension of mandate of three international judges, even after constitutional prohibitions, sets the Republic of Kosovo back in the political sense, because of the process of concluding the international supervision. Disregard for the Constitution of the Republic of Kosovo, by Decree of the President, on the basis of international agreement in the form of correspondence with the European Union, we consider as finding a solution to emerge from the political situation, which in this case constitutes an institutional inability to consolidate institutions, in this case the Constitutional Court, but also as an adaptation of the highest legal act to political circumstances.

The logic of the transfer of competence for the appointment of three international judges in the letter from President Jahjaga, intends to delegate to EULEX the power of appointment of judges, but not the competence of their proposal, which as we concluded remains guaranteed by the Constitution as the exclusive right of the Assembly of Kosovo. EULEX under its mandate, as defined by Joint Action, has no right to be involved in any matter related to the Constitutional Court, because EULEX is neutral towards the status of Kosovo, as defined by the legal framework EULEX, which is SCR 1244 of the United Nations.

Regarding international agreements, implemented with correspondence, our Constitution, clearly recognizes the supremacy of international treaties ratified over the laws of the Republic of Kosovo.

However, the Constitution of the Republic of Kosovo remains the highest legal act, which is higher than the international agreements and international agreements are subject to the supremacy of the Constitution. This fact is clearly defined in the interpretation of the Constitutional Court in decision (KO 95/13), on the application of the assembly member Visar Ymeri and others.

The application of the Ombudsperson, which challenged the Decree issued by the President of the Republic of Kosovo, as the applicant, we conclude that OI is an authorized party to refer this matter to the court, as this right is guaranteed by paragraph 2 of Article 113 and point 4 of Article 135 of the Constitution.

Moreover, we can conclude that the Constitutional Court, by rendering a decision of inadmissibility of the application of the Ombudsperson, has given some conclusions without sufficient reasoning, for the fact that if the court would not have taken the case under consideration, it should consider the criteria set by the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, namely it should consider Article 36, quoted above, of these Rules of Procedure.

VI. BENCH BARS

Bench Bars, otherwise known as Roundtables, organized by the Kosovo Bar Association, have been organized for two years now, but this year for the first time BIRN has reached agreement with the Kosovo Bar Association (hereinafter KBA) to monitor them. These roundtables gather lawyers, judges, prosecutors and police officers who discuss the problems faced during the course of their work.

These roundtables provide a good example of the realization of that goal, since many of the problems discussed during them are problems that are observed during monitoring of court hearings, ranging from ex officio representation by lawyers, cases pending in north Mitrovica, the relationship of the court with the media, equality of the parties, and others.

During this period roundtables held in Prishtina, Prizren, Gjilan, Ferizaj, Mitrovica and Gjakova were monitored.

Our teams, which have monitored the roundtables held, have come to the conclusion that the problems discussed during the roundtables mainly differ from place to place. As issues that distinguish each of the regions based on the problems of discussions, are:

- Ferizaj and Gjakova seem to have a problem with fees of ex–officio lawyers;
- Gjilan seems to have problem with the method of application of detention on remand. There are cases of attempted murder where the defendant remains in detention only a month, while there are defendants who remain in detention for seven months in cases of threats. It should be stressed that this problem is common to all of Kosovo;
- Prizren has problems with obtaining data for the previous criminal record of defendants and the non-presence of the injured party at all stages of criminal proceedings. For example, there are many cases where the injured party is not summoned at all during the preliminary procedure, although this is not in compliance with applicable laws;
- The main problem discussed in the roundtable held in Prishtina was failing to render timely decisions on detention;
- Mitrovica, on the other hand has other problems related to insufficient premises for work which prevents the normal functioning of judiciary, backlog in the north and the impossibility of access to cases ,and the small number of judges.

But the problems that seem common to almost all regions around Kosovo mainly deal with the Criminal Code and Criminal Procedure Code of Kosovo. These meetings have identified major problems with unlawful delivery of legal aid (Article 419 of the CPC). This article explicitly states:

1. *Whoever, without authorization from a client provides legal assistance shall be punished by a fine or by imprisonment of up to two (2) years. 14*
2. *Whoever provides legal assistance without qualifications, licensing or in any other manner contrary to law shall be punished by a fine or by imprisonment of up to three (3) years.*
3. *Whoever commits the offense in paragraphs 1 or 2 of this Article for remuneration shall be punished by a fine and by imprisonment of up to five (5) years.*
4. *For the purposes of this law "legal assistance" shall be defined as set forth in the Law on Bar*

As a consequence of this, something should be done to amend Article 86 of the Law on Contested Procedure, and persons who violate Article 419 of the CPC are to be brought to justice.

Proceedings for juveniles are seen to be an important part of discussions between the aforementioned actors. Instances of non-compliance between what Juvenile Justice Code stipulates and the practice are observed by BIRN monitoring. This problem, however, is presented in the majority of roundtables, in which it was requested that juveniles should be provided with special care and attention at all stages of the procedure.

Another problem noted by BIRN monitoring and explored on the other side of the coin at roundtables is the first and second hearing in criminal proceedings. However, the problems presented from the other aspect (the perspective of judges, prosecutors and lawyers) deal mainly with the summonsing of the injured party at all stages of the proceedings, and equality of arms. According to discussions in Prizren by lawyers, judges, and prosecutors, it is concluded that there is no equality of arms between the prosecutor and defence counsel in the presentation of witnesses at different stages.

BIRN monitoring reported that in 65% of cases monitored there were no lay judges. In roundtable discussions held at the municipalities of Kosovo, it was concluded that the cause of the difficulties in forming panels of 3 professional members is the insufficient number of judges.

Problems with the involvement of lawyers ex officio are an addition to the findings of the BIRN monitoring. This is not a minor problem, which is occurring during litigation, thus the actors participating in these roundtables requested that lawyers engaged ex officio in police are to continue in the case before the prosecution and the court.

Despite the fact that two years have passed after the entry into force of new versions of CC and CPC, the problem of wrong techniques of interrogation of the parties remains.

One of the problems discussed by judges, prosecutors, lawyers and police officers gathered at roundtables held in the municipalities is the wrong legal qualification of offenses. As it was mentioned above, this is one of the findings of the monitoring of the courts which BIRN has previously reported.
Improper coordination between prosecutors and judges remains one of the problems that seem to follow the system year after year. Decisions to extend detention come just before the expiration of the detention, which causes problems for the courts. Cases are also presented where the prosecutor request for extension of detention is submitted to the court at the last moment.

VII. POSITIVE OBSERVATIONS FROM THE COURTS

Despite the fact that the Court Monitoring Report presents flaws encountered during the monitoring process, and draws attention to them in an effort for further improvement, BIRN monitors also present many positives deriving from the court system and which are worth mentioning.

PRISHTINA: At the Basic Court of Prishtina, the Lipjan Branch, we have found that the judges are mainly open and willing to respond to BIRN questions and requests, both for recording and also accessing the case files. Another feature that is worth mentioning is the fact that the Court of Appeals in Prishtina sends out the plans for monthly schedules of sessions, which in turn, greatly facilitates the work of BIRN monitors.

PRIZREN: In all monitored sessions, BIRN monitors are given a copy of the minutes and whenever the need arises, they may also take the case file (indictments, judgements) - the latter, having been provided to BIRN monitors.

MITROVICA: Whereas working conditions in the Court of Mitrovica Branch in Vushtrri are poor, and there are numerous problems, we must emphasize that during EULEX sessions in the northern part of Mitrovica there is understanding for recording and cooperation between BIRN monitors, and fair communication.

FERIZAJ: At the Basic Court of Ferizaj, it is worth praising the fact that in almost all situations when information was requested, BIRN monitors were granted access, enabling them to review necessary documents. In addition, the Basic Court in Ferizaj, and more concretely the Information Office, is one of the rare Courts that handles the schedule of court sessions with great care and always sends out the schedule at the beginning of the month. The judges are also very cooperative and have granted BIRN monitors many facilities, and are willing to provide statements for all matters within the BIRN monitors' scope of work.

PEJA: The positive at the Basic Court of Peja is that the judges and staff, are very transparent, and willing to offer all documents requested by BIRN monitors, including minutes, decisions and judgements. In addition, most of the judges in this Court offer the possibility for recording. Other branches of this Court also are willing to allow recording.

GJAKOVA: At the Basic Court of Gjakova, cooperation has been on the rise this year- BIRN monitors have had access to sessions and to the minutes of the cases. In addition, it is worth emphasizing that the judges have shown great willingness to cooperate with the injured parties on scheduling the sessions.

GJILAN: It is worth noting that the Court in Gjilan sends out the schedules of sessions every month and cooperation with BIRN monitors is at a very satisfactory level.

As can be seen from the above, in general, cooperation between the courts and BIRN monitors is at a very satisfactory level; however, it must also be noted that this cooperation is a result of colossal and long work by BIRN monitors and the judges towards establishing the current relationship.

VIII. IMPLEMENTATION OF LAST YEAR'S RECOMMENDATIONS

Parliament of Kosovo » The Parliament of Kosovo must proceed in approving the Law on Offenses and the Law on Traffic Safety - **it is being proceeded** The Parliamentary Committee on Legislation and the Judiciary must monitor the implementation of court legislation.

Government of Kosovo: » The Government of Kosovo must ensure sufficient budget in compliance with the requests of the KJC- **this has not been achieved yet**.

The Ministry of Justice must amend and draft the Law on Offenses and the Law on Traffic Safety- **being processed**.

The Ministry of Justice must take into consideration the BIRN proposal related to the Law on Offenses and the Law on Traffic Safety- **being processed**.

The Kosovo Judicial Council: » KJC must increase the number of judges in all level of courts; **Number of judges on 31.12.2014 in all levels of courts in the Republic of Kosovo was 317 judges. This number does not include the 11 judges from the Special Chamber of the Supreme Court. Now, in February 2015, the number of judges in all court levels is 316. This number is not sufficient for the needs of the courts. The budget of the courts has foreseen 404 judges (including 12 judges from the Special Chamber of the Supreme Court). There is currently a recruitment process taking place for about 40 judges, which are expected to begin working in the Courts of the Republic of Kosovo soon.**

KJC must undertake the necessary measures against the courts which are found to violate procedural rights of the parties; » **Office of the Disciplinary Prosecutor is competent, based on the Law on the Judicial Council, to initiate procedures against judges who violate the code of ethics, or the procedural rights of the parties, whereas for the KJC there is a Disciplinary Commission which undertakes measures foreseen by law; therefore, these cases are being continuously addressed before the relevant mechanisms.**

The KJC must increase the number of professional associates, addressed in this report; » **The increase of the number of Professional Associates is impossible due to budgetary limitations.**

KJC must cooperate with the Ministry of Justice regarding the Law on Offenses; » **The Kosovo Judicial Council (KJC) is closely cooperating with the Ministry of Justice for the said draft-Law, and judges working in this specific field have been appointed to the committee.**

The KJC must issue concrete instructions which then oblige the court to arrange a court review at the precise moment when the party submits the complaint against a traffic fine; **It is expected that this issue shall also be addressed by the draft-law on Offenses, since based on the current rule, the Division on Offenses is overwhelmed and it is impossible for all cases to be processed. The new law shall regulate the procedure so the courts will become more efficient; thus, this issue will be regulated by the law and not by a KJC instruction.**

The KJC ensures that the tariffs for submitting complaints for an offense are increased; » **This matter also, is expected to be regulated by the Law on Offenses.**

The KJC ensures that the court flat rate is calculated in conformity with the expenses of the court and not as it is regulated currently,

amounting to 5 euros; **the flat rate will increase depending on the increase of expenses.**

The KJC is committed to include within the priority cases, the complaints against fines which have been imposed to foreign citizens and citizens of Kosovo, who drive vehicles with foreign registration plates (emigrants) » **This is a priority for foreign citizens and emigrants, therefore there will be no obstacles in this direction.**

The KJC must ensure compliance with the KBA agreements in appointing lawyers ex officio; » **KJC and KBA are cooperating in complying with the agreement; there are a few problems however - the manner of appointing lawyers ex officio is being improved and there are concrete achievements in many courts throughout the country.**

KJC must ensure that all courts, and their branches, announce public reviews; » **KJC has provided monitors throughout courts, and has now appointed most of the information officers to supervise the publication of these schedules.**

KJC must ensure that court reviews begin on time and measures are undertaken against judges who delay and do not begin the session on time; » **KJC views the issue of court reviews beginning on time as highly important for the increase of the public confidence, and are therefore assessing reports in continuity and the KJC is constantly making an effort to improve this matter.**

The KJC must ensure that the courts and relevant branches hold trial sessions in the court rooms whenever the rooms are free and available for use; » **Now, in most of the court premises, there are model courts containing court rooms which are considered sufficient, therefore there is no need to hold trial sessions in the offices of judges and lastly, moving to the Palace of Justice, a premise of European standards, trial sessions will be held in court rooms.**

The KJC must undertake all necessary measures to prevent the usage of phones inside the court premise; » **There is improvement as for this year, there has been only 7% of usage, compared to last year, with 13 % of usage.**

The KJC must ensure that the code of uniform is adhered to during court trials; » **The code has been respected almost 100 %, with only 4% of lack of respect, whereas last year there was 34% occurrence of non-respect.**

The KJC must ensure that the court sessions are held in the court rooms, whenever this is possible; » **There is improvement from the previous year.**

The KJC must ensure that each court has a functioning system of notifications and announcements for court sessions on the billboard; » **this has been achieved, except in Peja.**

The KJC must ensure adequate translation for parties involved in the procedure during court reviews, if necessary; » **there are flaws, and there have been cases this year, when translation was not provided in the courts.**

The KJC must commit to activate and adhere to the system of audio and video recording of court sessions. **This has been achieved sufficiently. In 85% of monitored cases, audio and video recording has been used.**

The Kosovo Prosecutorial Council: » The Kosovo Prosecutorial Council (KPC) must increase the number of prosecutors in all levels; **this has not been achieved yet.**

The KPC must adhere to the agreement with the KBA, which addresses the engagement of lawyers ex officio, in preliminary proceedings; » **this has begun to be implemented this year.**

The KPC must ensure greater transparency of prosecutors and their willingness to be more communicative with the media and the citizens, while taking care not to jeopardize the court investigation and processes; » **this**

has not been achieved. Prosecutors are not transparent at all.

The KPC must undertake measures against prosecutors who are late for court reviews; » **this has not been achieved.**

The Supreme Court: » The Supreme Court of Kosovo must ensure clarification and correct interpretation of criminal provisions and procedures; » **being implemented.**

Court of Appeals: » The Court of Appeals must address all cases by order, based on dates of receipt; **there are still delays**.

Court of Appeals must not delay the cases in the proceedings; » **there is great effort being made towards improvement.**

Courts/ Judges: » Judges must adhere to the provisions of the Code of the Criminal Procedure addressing the interrogation of parties in review; » **it has been achieved- there were no cases this year.**

Judges must adhere to the provisions of the Code of Criminal Procedure addressing the introduction as per order; » **it has been achieved.**

Judges must adhere to the provisions of the Code of Criminal Procedure which address the reading of rights and obligations of the parties in review; » **this has not been sufficiently achieved.**

Judges must adhere to the provisions of the Code of Criminal Procedure which address the reading of the statement of oath for the witnesses; » **this has not been achieved.**

Judges must adhere to the agreements with the KBA and KPC upon the occasion of appointing lawyers ex officio; » **this has been achieved.**

Presidents of courts and those responsible for the branches must ensure that public court reviews are announced in a timely manner; » **this has been achieved, due to the monitors established throughout the courts.**

Presidents of courts must ensure that the court rooms are utilized upon availability; » **this has not been sufficiently achieved.**

The president of judges/ the head judge on the case must not use his/her cell phone during the court review; » **this has not been achieved, as out of 6% total usage of telephones, there is 2% usage of telephones by the judges.**

The president of the judges/ the judge on the case, must ensure progress of the court review by not allowing the usage of telephones during the court review, both by the parties and other participants in the trial; » **achieved, however, not sufficiently.**

Kosovo Police: »

The Law on Offenses is being drafted and a part of these recommendations have been included, according to our information. The law is expected to be presented to the Parliament during this year.

Kosovo Police must create a database for entering the fines imposed in traffic; »

Kosovo Police must draft the form of the traffic fine, whereas parties are given instructions for the right to complain; »

Kosovo Police must ensure that traffic offenders are aware that within eight (8) days, the fine will become final if there is no complaint submitted; »

Kosovo Police must appoint competent officers to enter the fines in the database; »

Kosovo Chamber of Advocates: » Kosovo Chamber of Advocates (KBA) must create the necessary mechanisms for engaging lawyers ex officio; » **achieved, through the issues Decisions.**

KBA must ensure adherence to the Decisions of lawyers based on ex officio; » This year, adherence to decisions has begun, however, still not at a satisfactory level.

KBA must ensure the proper functioning of the Regional Chambers, upon the occasion of appointing lawyers ex officio; » **significant improvements have been noted this year.**

A. Implementation of alternative measures for ensuring the presence of the defendant in the criminal procedure

BIRN, while monitoring in 2014, has noted that the most frequent measure imposed to ensure the presence of the defendants in the procedure is imposing the measure of custody. Despite the fact that the measure of custody is also foreseen by the Code of Criminal Procedure as the last and the gravest measure for ensuring the presence of the defendant, as the limitation of the person's freedom is discussed, a right guaranteed by the Convention for the Protection of Human Rights and Freedoms[38]; in practice, our courts impose this measure most frequently.

In addition to the measure of custody, the Kosovo Code of Criminal Procedure also foresees eight other measures[39]. One of the measures that is rarely or never applied is the measure of ensuring the presence of the defendant through bail.

Bail is usually set in money and this must be in line with the gravity of the criminal offense, and also adapted to the material condition of the person paying the bail; considering this fact the application of this measure would affect every person the same, and it would save the state from the expenses of keeping the person in custody, which is estimated to cost approximately 30 Euros per day.

Furthermore, the application of the measure of bail enables the temporary confiscation of the travel document of the person providing the bail, which we consider one of the most adequate measures to ensure the presence of the defendant in the procedure; a measure which is rarely applied.

Taking into consideration the fact that in our country there are criminal offenses also being perpetrated by foreign citizens, the application of bail to ensure the presence of these defendants is one of the most adequate measures. Bail, in the form of money, securities, or other mobile or immobile property, which could easily be transformed into money in case that the defendants run away, a decision of the court may assign that the value of the bail is given to the fund for victim compensation.

BIRN monitors, while monitoring sessions during this year, have assessed that the frequent application of the measure of custody is of great concern for the condemning policies of the court system in Kosovo and that this problem must be addressed as soon as possible for justice stakeholders in order to prevent its application in practice, but to also provide for the application of other measures to ensure the presence of the defendant in a procedure, in particular, the measure of bail.

As a consequence of this finding, in the coming year, one of the main focus areas for the Court Monitoring Report will be specifically cases of custody.

38 Article 5 Convention for the Protection of Basic Human Rights and Freedoms, Rome 4.XI.1950

39 Article 173 of the KCCP

IX. RECOMMENDATIONS AND ACKNOWLEDGMENTS

1. KOSOVO PROSECUTORIAL COUNCIL

- Conditions for the proper functioning of the special department for juvenile prosecutors must be provided;
- Offering additional training for prosecutors on interrogation as determined by the new Codes, relating to direct and indirect questioning;
- Improving the prosecutors' familiarity with the cases beforehand;
- Greater importance and care must be granted to cases of corruption;
- There must be investments made to the institute of negotiation;
- To provide professional associates for prosecutors;
- To provide transportation to the Palace of Justice for KPC employees;
- Number of prosecutors to be increased;
- To approve a distinct budget for designing and purchasing uniforms for the prosecutors;
- Creation of mechanisms which will hold prosecutors accountable for not coming to the court sessions on time;
- Creation of an official mechanism for recording telephone conversations between police officers and state prosecution;
- Additional control for victims' defenders and holding them accountable if they fail to defend the victims;
- Now that EULEX will not take over new cases, the responsibilities will be transferred to the Special Prosecution- the number of prosecutors in this Prosecution must be increased.

2. KOSOVO JUDICIAL COUNCIL

- Number of judges must be increased;
- Offering additional training for judges regarding interrogation as determined by the new Code related to direct and indirect questions;
- Using web-pages for announcing sessions-digitalization of courts;
- Undertaking disciplinary measures by the KJC whenever there are delays by the judges in beginning the sessions;
- To invest in the institute of negotiation and mediation;
- Digitalization of administration ;
- Greater importance must be grated to cases of corruption;
- Re-destination of the administration staff;
- Contracting services of physical security in the courts;
- Judges must be equipped with Laptops;
- Engagement of professional associates for judges;
- Engagement of paid interns at courts;
- Creation of unique database for entering criminal pasts;
- To oblige Prishtina Basic Court to recruit a spokesman.

3. MINISTRY OF JUSTICE

- Sort out the lack of clarity regarding unauthorized persons for legal representation according to the Criminal Code;

- To return the subsidiary suit in the new criminal code;
- Expedite the procedures in offering International Legal Aid;
- Providing regular transportation for the convicts from the correctional facilities to the courtroom and prosecution, and back.

4. KOSOVO BAR ASSOCIATION

- Sort out the lack of clarity regarding unauthorized persons for legal representation according to the Criminal Code;
- A more rapid specialization of lawyers;
- Offering additional training for techniques of interrogation, for lawyers;
- A better application of the system which prevents certain lawyers to engage other lawyers ex officio without the prior permit of the Bar Association ;
- Suspension of licenses for sentenced lawyers.

5. EULEX

- Contact with EULEX judges is impossible after the session. Something must be done in this regard;
- Larger commitment of local prosecutors in cases with which EULEX deals.

6. KOSOVO POLICE

- Improvement of transport for the defendants and lawyers from the South to the North of Mitrovica;
- Grant more importance and care to the cases of corruption;
- Grant priority to the realization of prosecution orders;
- Grant more priority to the implementation of instructions by the ordinances of the prosecution;
- Creation of an official mechanism for recording telephone conversations between police officers and state prosecution.

7. ASSEMBLY OF KOSOVO

- Urgent harmonization of code of juvenile justice with the CC and the KCCP;
- Return of the subsidiary suit in the new criminal code;
- Immediate increase of the budget for the Kosovo Judicial Council and the Kosovo Prosecutorial Council.

8. COURTS

- Greater care for the cases of corruption;
- Digitalization of the administration;
- Avoid scheduling 3-4 court sessions in one day for one judge without appropriate time coordination;
- To act with care when deciding the location of holding the sessions in cases of grave criminal acts, such as murder. Space must be bigger during these sessions- not to allow such session to be held in the judges' offices where the distance between the defendant and the prosecutor are not even half a meter away from one another;
- Undertake measures against the postponement of sessions for corruption cases, with great time distance from one another;
- Avoid scheduling court sessions with the same prosecutors- at the same time.

9. STATE PROSECUTION

- Election of chief prosecutor;
- Priority investigation of cases of corruption;
- Ensuring the presence of prosecutors in the court room in conformity with a plan drafted jointly with the courts;

- Additional care by prosecutors during the court session;
- Prosecutors must wear uniforms;
- Correct communication between the prosecutors and police;
- Greater care in safe-keeping confidential case materials;
- Greater care while safe-keeping materials provided from the telephone tapping and applying secret measures of observation;
- The prosecutor must more frequently conduct site inspections;
- Care in the timely drafting of requests for confiscating unlawfully gained property.

10. OFFICE OF THE DISCIPLINARY PROSECUTOR

- Initiating disciplinary procedures for judges and prosecutors who based on this report have been found to have violated procedures and code of ethics;
- Creation of mechanisms which ensure a better supervision of the justice system by the OPD;
- Increase of cases that are initiated ex officio by the Office of the Disciplinary Prosecutor.

BIRN is pleased to extend its gratitude to all the participants who took part in the roundtable discussions and provided feedback on the findings of the monitoring and were open to discussing issues encountered in the process.

ANNUAL COURT MONITORING REPORT

2014

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An EU funded project managed by
the European Union Office in Kosovo

Design by:
project.GRAPHICS