



**Organization for Security and Co-operation in Europe  
MISSION IN KOSOVO**

**Monitoring Department**

**Legal System Monitoring Section**

**Monthly Report - April 2008**

## Summary

The report highlights violations of domestic law and human rights standards. The criminal section focuses on the failure of prosecutors to investigate and prosecute alleged unjustified use of force by police officers (thus possibly violating the right to dignity), while the civil section focuses on the failure of courts to contact the competent administrative body or use reasonable alternative means to locate the defendants before appointing temporary representatives (thus possibly violating the right to a fair trial).

### **The failure of prosecutors to investigate and prosecute alleged unjustified use of force by police officers may violate right to dignity**

The OSCE Mission in Kosovo (OSCE) is concerned that prosecutors have not investigated allegations that police officers unnecessarily used force against defendants during arrest and while in custody.

According to the European Court of Human Rights any recourse to violence against a person deprived of his/her liberty (not made strictly necessary by the conduct of detainee) “diminishes human dignity”,<sup>1</sup> and thus violates Article 3 of the European Convention on Human Rights.<sup>2</sup> Furthermore, any damage to physical integrity while in police custody is *prima facie* attributable to state authorities.<sup>3</sup>

Allegations of police abuse must be investigated. Otherwise, as the European Court of Human Rights recently stated, “the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.”<sup>4</sup>

However, the OSCE monitored cases where the police allegedly ill-treated defendants, and prosecutors failed to investigate such allegations:

In a case before the Vushtrri/Vučitrn Municipal Court, two defendants faced charges of aggravated theft<sup>5</sup> and receiving stolen goods.<sup>6</sup> During the investigation, one of the defendants confessed to the police that he committed the alleged crimes. However, at the trial session of 18 May 2007, the defendant stated that the police had forced him to confess the crimes by

---

<sup>1</sup> See *Tekin v. Turkey*, 22496/93, Judgement, 9 June 1998, paragraph 53; *Ribitsch v. Austria*, 18896/91, Judgement, 4 December 1995, paragraph 38.

<sup>2</sup> Article 3 of the European Convention of Human Rights states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

<sup>3</sup> See *Bati and others v. Turkey*, A. 33097/96 and 57834/00, Judgment, 3 June 2004, paragraphs 136 and 138.

<sup>4</sup> European Court of Human Rights, *Dzeladinov et al. v. The Former Yugoslav Republic of Macedonia* 13252/02, 10 April 2008, paragraph 69. According to the Court, “Where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be an effective official investigation”, which has to be “thorough” and “expeditious” (*Id.*, paragraphs 69-71).

<sup>5</sup> Article 253(1)(1), Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (“Criminal Code”).

<sup>6</sup> Article 272(1), Criminal Code.

physically assaulting him.<sup>7</sup> Allegedly, while in custody, two police officers struck his head with iron bars, resulting in severe injuries and causing him to lose consciousness for four hours. The defendant provided the names of the officers and offered to substantiate his claim with a medical report. To date, the public prosecutor has not initiated an investigation against the police officers.

In another case before the Municipal Court in Prizren involving charges of attacking official persons performing official duties<sup>8</sup>, the defendant alleged and provided evidence of unjustified and excessive use of force by the police officers while conducting a search of the defendant's house and subsequently while in custody. The defendant claimed that during the arrest in his home, police officers physically assaulted him so severely that he lost consciousness and required hospitalization the same day. He also alleged that the police officers beat him when he was handcuffed in the police car and while in custody at the police station. The defendant provided photos and a medical report to the court as evidence of mistreatment. On 30 January 2008, the presiding judge announced the verdict, finding the defendant guilty and sentencing him to three months of imprisonment. Of note, in the verdict, the court considered mitigating circumstances for the defendant "*the injuries sustained and the deterioration of the health of the accused.*" There has been no prosecutor investigation into the claims of police abuse.

In both cases described above, defendants alleged that the police abused them, violating their right to dignity. Of concern, the OSCE believes that neither the police nor the prosecutors investigated the alleged incidents, violating the duty to apply due diligence in investigating, protecting, and punishing human rights violations.<sup>9</sup>

Consequently, it is the position of the OSCE that:

- Kosovo Police Service officers must avoid using force against defendants unless necessary.
- Prosecutors must promptly investigate and, if appropriate, prosecute with the required due diligence police officers who allegedly mistreat or use excessive force against defendants.
- The Kosovo Police Service must initiate an internal investigation and, if appropriate, disciplinary proceedings against officers who allegedly use excessive and unlawful force in their job.

---

<sup>7</sup> Of note, the Provisional Criminal Procedure Code of Kosovo establishes that "forcing a confession or any other statement by the use of torture, force, threat or under the influence of drugs, or in any other similar way from the defendant or from any other participant in the proceedings shall be prohibited and punishable" (Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, Article 11(3)). Of concern, the official Albanian translation of the English version of this article of the criminal procedure code is not accurate.

<sup>8</sup> Article 317, paragraph 2 of the Criminal Procedure Code.

<sup>9</sup> UN Human Rights Committee, General Comment no. 31, *The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 26 May 2004 (CCPR/C/21Rev.1/Add.13), paragraph 8.

- It is recommended that the Kosovo Judicial Institute train prosecutors and judges on the rights of arrested persons, focusing on alleged mistreatment while in police custody.

**Failure of courts to contact the competent administrative body or use reasonable alternative means to locate the defendants violates domestic law and possibly the right to a fair trial**

The OSCE is concerned that the failure of the courts to comply with applicable law when appointing temporary representatives may lead to a violation of the right of the defendant to a fair trial. By conducting trials without the participation and knowledge of defendants, the persons involved are not given an opportunity to present their case, possibly violating the principle of equality of arms.

The principle of equality of arms is an important aspect of the right to a fair trial. According to this principle, a party “shall be given a reasonable opportunity of presenting his/her case to the court under conditions which do not place him/her under a substantial disadvantage *vis-à-vis* his/her opponent.”<sup>10</sup>

Applicable civil procedure law requires that “[t]he court shall give to each of the parties the opportunity to express itself regarding the claims and statements of the opposing party.”<sup>11</sup> In addition, the civil procedure law establishes the possibility of appointing a temporary representative for the defendant when his/her location is unknown, he/she does not have a representative and if the regular procedure for the appointment of a legal representative would take a long time, thus causing detrimental consequences to one or both parties.<sup>12</sup>

As noted in a previous OSCE report, *The Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties* (April 2005), the appointment of a temporary representative is considered a measure of last resort. The law also imposes an obligation on the court to proactively search for the defendant: “[i]f the party cannot find out the address of the person to whom the writ is to be served [...] the court shall try to obtain the required information from the competent administrative body, or to obtain the necessary information in some other way.”<sup>13</sup>

Thus, the courts are authorised and arguably required to use reasonable available means to locate an absent defendant in civil cases. The Central Civil Registry essentially constitutes the “competent administrative body” envisaged in the Law on Contested Procedure.<sup>14</sup> Furthermore, the appropriate body to summon parties outside Kosovo is the Department of Justice.<sup>15</sup> In addition, there are other possible means for locating absent respondents who may have been displaced, such as the regional and/or central

---

<sup>10</sup> See European Court of Human Rights, *Dombo Beheer BV vs. Netherlands*, 14448/88, Judgment, 27 October 1993, paragraph 33-34.

<sup>11</sup> See Article 5, Law on Contested Procedure (Official Gazette 4/77–1478, as amended by 15/1998).

<sup>12</sup> See Article 84 Law on Contested Procedure.

<sup>13</sup> Article 148, Law on Contested Procedure.

<sup>14</sup> Under UNMIK Administrative Direction No. 2002/16 Implementing UNMIK Regulation 2000/13 On the Central Civil Registry, UNMIK judicial authorities may request the disclosure of personal data from the Central Civil Registry to locate absent people.

<sup>15</sup> Department of Justice, Justice Circular 2003/03, *International Legal Assistance in Civil and Criminal Matters*, 5 September 2003.

offices of the United Nations High Commissioner for Refugees, the Kosovo Property Agency, the court liaisons offices,<sup>16</sup> or the UNMIK Office of Returns and Communities.

The OSCE has previously noted the failure of some courts to use the competent administrative body or, when necessary, reasonable alternative means to locate the respondents.<sup>17</sup> Since the publication of this report in 2005, the OSCE has monitored compliance of the courts with their obligation to locate absent parties. However, some courts still do not use all necessary and appropriate means. The following cases serve as examples:

In a case before Viti/Vitina Municipal Court, the Kosovo Albanian plaintiff claimed that he bought the contested property 30 years ago from Kosovo Serb defendants who allegedly left Kosovo to an unknown address. To find the address of the defendants, the court contacted the competent court liaison office, but not the Department of Justice.<sup>18</sup> The court appointed a temporary representative on 27 March 2008.

Regarding a property case before the Viti/Vitina Municipal Court, a Kosovo Albanian plaintiff requested confirmation of ownership of his property which his father allegedly bought 40 years ago from a Kosovo Serb (second defendant) who allegedly bought it from another Kosovo Serb (first defendant). Without any effort to locate the first defendant, on 27 December 2007 the court appointed upon plaintiff's proposal a temporary representative for him.<sup>19</sup> Two additional sessions were held on 23 January and 7 February 2008 without the presence, and most likely the knowledge, of the first defendant.<sup>20</sup>

In a third property case before the Municipal Court Gjilan/Gnjilane, the Kosovo Albanian plaintiff extended a lawsuit to include a Kosovo Serb defendant in the trial session dated 21 September 2007. In the same session, the court decided to appoint a temporary representative for this defendant without any effort to locate him. An additional session was held on 4 December 2007.<sup>21</sup>

The failure of some courts to make reasonable efforts may leave defendants unaware of court proceedings against them. As the temporary representatives do not meet with their clients, they have difficulty presenting evidence or adequately defending the defendants'

---

<sup>16</sup> However, since the declaration of independence by the Assembly of Kosovo, court liaisons offices throughout Kosovo (responsible for facilitating access to justice for non-Albanian communities) suspended their work. Reportedly, members of the Kosovo Serb community have pressured employees of the court liaison offices not to work for the Ministry of Justice of an "independent" Kosovo.

<sup>17</sup> OSCE Spot Report, *The Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties*, April 2005, pages 2-3.

<sup>18</sup> Employees of the court told the OSCE that they no longer contact the Department of Justice, as they usually do not receive an answer from the Department of Justice upon the court's request. They expressed doubt that the Serbian authorities co-operate with the Department of Justice.

<sup>19</sup> Of note, the plaintiff also declared that he will pay the costs of the defendant's temporary representative, which raises a potential conflict of interest.

<sup>20</sup> On 7 February 2008, the court approved the plaintiff's claim.

<sup>21</sup> On the same date, the court approved the plaintiff's claim. Of concern, the temporary representative of the defendant was not only passive during the proceedings, but also proposed that the court approve the claim as grounded – contrary to the interest of his client.

interests in court. Thus, absent defendants arguably do not have a reasonable opportunity to present their cases to the court, and consequently are under a disadvantage *vis-à-vis* his/her opponent. Thus, in many of these cases courts violate the principle of equality of arms. In addition, by failing to apply reasonable means to locate the defendants, the courts violated procedural rules for the appointment of a temporary representative.<sup>22</sup>

In light of the above, it is the position of the OSCE that:

- Judges must contact the competent administrative body or use a reasonable alternative means to locate absent parties before appointing a temporary representative.
- It is recommended that the Kosovo Judicial Institute conduct trainings so that all civil judges understand the procedures to follow, including the appointment of a temporary representative, when faced with absent defendants.
- The Judicial Inspection Unit must investigate cases in which temporary representatives have been appointed prematurely.

---

<sup>22</sup> The decision to appoint the temporary representative did not state the detrimental consequences for the parties in case a temporary representative is not appointed, as required by law. Furthermore, in some cases the decision to appoint a temporary representative is published only in a Kosovo Albanian newspaper, which a Kosovo Serb defendant is unlikely to read.