



Monitoring Department

Legal System Monitoring Section

Monthly Report - July 2008

Executive summary:

This monthly report highlights violations of domestic law and international human rights standards, and focuses on two issues:

1. the imposition of detention on remand without a hearing in the presence of the defendant;
- and
2. the failure of courts to maintain accurate trial minutes.

1. Imposition of detention on remand without a hearing in the presence of defendant violates the right to liberty and domestic law

The OSCE Mission in Kosovo (OSCE) is concerned that in several monitored cases courts imposed detention on remand without holding a hearing in the presence of the arrested person.

According to international human rights standards, every arrested person has the right to be “brought promptly before a judge.”¹ Thus, the defendant must physically appear before a judge, typically in a “detention hearing.”²

The right of every arrested person to be physically brought before a judge safeguards against police mistreatment and against the arbitrary assertion of state power. It also ensures that every arrested person has an opportunity to object to the deprivation of his/her liberty.³

Domestic law establishes similar guarantees. According to the Provisional Criminal Procedure Code, detention can be imposed only after a hearing.⁴ The arrested person must be brought before a pre-trial judge and informed of his/her rights.⁵ Defence counsel must be present at the hearing,⁶ and the defendant must have the opportunity to respond to the prosecutor’s reasons for requesting detention.⁷

Despite these legal provisions, the OSCE observed cases where judges imposed detention on remand without holding a hearing involving the defendant or his counsel.

¹ Article 9(3) of the International Covenant on Civil and Political Rights and Article 5(3) of the European Convention on Human Rights have an identical language: “Anyone arrested or detained [on a criminal charge] shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release [...]”

² See Article 282, Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 (“Provisional Criminal Procedure Code”). The case law of the European Court of Human Rights clearly indicates that when the prosecutor asks for detention on remand against an arrested person “a hearing is required.” (see European Court of Human Rights decision, *Wloch v. Poland*, 27785/95, Judgment, 19 October 2000, paragraph 126). The Court also found a violation of Article 5(3) of the Convention even where an arrest warrant was issued by a court in the presence of the defence counsel, but without the defendant himself brought before the court (see *McGoff v. Sweden*, 9017/80, Judgment, 26 October 1984, paragraph 27).

³ According to the European Court of Human Rights, “The very purpose of Article 5 [is] to protect the individual from arbitrariness.” (*Kurt v. Turkey*, 15/1997/799/1002, Judgment, 25 May 1998, paragraph 122).

⁴ See Article 282(1), Provisional Criminal Procedure Code.

⁵ Article 282(2), Provisional Criminal Procedure Code.

⁶ Article 282(3) Provisional Criminal Procedure Code. According to Article 282(4), if the defendant does not engage a defence counsel, the court must provide one *ex officio*.

⁷ Article 282(5), Provisional Criminal Procedure Code.

In a case before a court in the Prizren region, on 11 May 2008 the police arrested a defendant on charges of grievous bodily harm.⁸ On 14 May 2008, the prosecutor filed an indictment containing a motion for detention. On the same date, a three-judge panel ordered detention on remand for one month. Neither the defendant nor his defence counsel were heard.

In a case before the same court in the Prizren region, on 4 January 2008 the police arrested a defendant for allegedly attacking officials performing official duties.⁹ On 7 January 2008, the prosecutor filed an indictment containing a motion to impose detention on remand. On the same date, the court, without holding a hearing in the presence of the defendant and his defence counsel, issued a decision imposing detention on remand for one month.

In a case before a municipal court in the Prishtinë/Priština region, on 15 July 2008 the police arrested a defendant on charges of aggravated theft,¹⁰ causing light bodily harm¹¹ and damage to movable property.¹² On the same day, the prosecutor interrogated the defendant and filed an indictment containing a proposal for detention on remand. A panel of the municipal court imposed detention on remand for one month, without hearing the arrested person or his defence counsel.

In the above cases, courts ordered detention on remand without a hearing in the presence of the defendants or defence counsel. This violated domestic law and international human rights standards.

Some judges and prosecutors have argued that courts need not to hear the arrested person (or defence counsel) if the prosecutor's application for detention is contained in an indictment¹³ filed before the expiry of the 72-hour deadline for police arrest.¹⁴ Arguably, the three-judge panel here should decide "on paper" based on the prosecutor's proposal contained in the indictment. Thus, physically bringing the arrested person before a judicial authority is not necessary.

However, this interpretation of the law conflicts with international standards and domestic law, which provide for a detention hearing in the presence of the defendant and his/her defence counsel. Including the request for detention within the indictment does not relieve the judicial authorities from holding a hearing on the request for detention on remand. Article 306(4) of the Provisional Criminal Procedure Code does not suspend the general requirement of Article 282 that detention can only be imposed following a hearing.

⁸ Article 154, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 ("Provisional Criminal Code").

⁹ Article 317, Provisional Criminal Code.

¹⁰ Article 253(1)(1), Provisional Criminal Code.

¹¹ *Id.*, Article 153(2).

¹² *Id.*, Article 260(1).

¹³ As allowed by Article 306(4) of the Provisional Criminal Procedure Code.

¹⁴ Article 212(4), Provisional Criminal Procedure Code.

Failure to bring arrested persons before a judge violates their fundamental right to liberty. Moreover, a judicial deliberation taken without hearing the defendant also violates the right to defend oneself and the principle of equality of arms.¹⁵

Consequently, the OSCE is of the view that:

- Courts must always schedule and hold a detention hearing in the presence of the defendant and defence counsel before deciding on the prosecution's proposal for detention on remand against an arrested person.
- In the context of an actual case or controversy involving detention issues, the Kosovo Supreme Court should clarify that Article 306(4) of the Provisional Criminal Procedure Code shall be read in conjunction with Articles 282 and 287(1), and does not relieve the courts from holding a detention hearing (involving the defendant and defence counsel) before imposing detention on remand.

2. Failure of courts to maintain accurate trial minutes violates domestic law and international human rights standards

The continuing failure of courts to maintain accurate minutes¹⁶ of court proceedings violates domestic law and affects rights established under international human rights standards. While the OSCE previously reported on this issue, the continuing problem merits reporting on the topic again.¹⁷

Courts must maintain typewritten minutes of all actions taken at court hearings,¹⁸ including the name of the court, composition of the court, "place where the action is taken," date and time, "title of the disputed issue," and names of those present.¹⁹ During proceedings, the president of the panel "tells aloud to the recorder what to put in the [minutes]."²⁰ Minutes should note what action was taken and whether the hearing was open to the public in addition to whether the court informed parties of their right to use their own language.²¹ The statements, motions, and proffered and received evidence of the parties involved and

¹⁵ The European Court of Human Rights has ruled that: "In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings [aimed at ascertaining the lawfulness of one's detention] should in principle meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial." (*Shishkov v. Bulgaria*, 38822/97, Judgment, 9 January 2003, paragraph 77). Fair trial requirements include the principles of adversarial proceedings and equality of arms (see Article 6, European Convention on Human Rights).

¹⁶ A leading unofficial English translation of the Law on Contested Procedure, Official Gazette Socialist Federal Republic of Yugoslavia no. 4/77, by the Kosovo Law Centre refers to documentation of what was said and who is present during the trial hearing as "records." Arguably, the more accurate term is "minutes," which is used throughout this monthly report. See definition of "minutes" in Black's Law Dictionary (Eighth Edition) and Oxford Advance Learner's Dictionary (Sixth Edition, Ed. by Sally Wehmeier).

¹⁷ See OSCE, *Legal System Monitoring Section Monthly Report*, October 2007 ("Failure to maintain accurate and complete court records in civil proceedings violates applicable domestic law.")

¹⁸ Article 123(1), Law on Contested Procedure, Official Gazette Socialist Federal Republic of Yugoslavia no. 4/77; Article 182, Rules on Internal Activity of the Courts, Official Gazette Socialist Autonomous Province of Kosovo no. 7/81. The Supreme Court instructs courts on recordkeeping. Article 31, Law on Regular Courts, Official Gazette Socialist Autonomous Province of Kosovo no. 21/78. The Law on Contested Procedure also addresses the maintenance of records of panel conferring and voting, but that issue is not addressed here. See Article 128.

¹⁹ Article 124, Law on Contested Procedure. See also Article 7(2), Law on Regular Courts ("Announcement of the composition of panel [sic] of judges" ensures publicity of the courts' work).

²⁰ Article 126, Law on Contested Procedure.

²¹ Article 124, Law on Contested Procedure; Article 13, Rules on Internal Activity of the Courts.

statements of witnesses and experts must be included in minutes in addition to any court decisions made during the session.²² Minutes must also “note the more important statements or communications that the parties or other participants give *outside* the hearing” (emphasis added).²³ For “less important statements and announcements,” courts should make an “official note.”²⁴ Minutes must be “properly maintained,”²⁵ They cannot be erased, amended, or changed, and anything crossed out must remain legible.²⁶

Parties have the right to read and comment on the minutes, whereas non-parties can read and comment on only the part of the minutes that contain their statements.²⁷ Any corrections or additions are included at the end of the minutes. Corrections or additions moved for but overruled can be included in the minutes at the movant’s request.²⁸ The president of the panel, the recorder, the parties or their representatives, and the interpreter must sign the minutes.²⁹ Witnesses, including experts, also sign their statements made before the court.³⁰

In addition, keeping accurate minutes promotes the right to appeal. Since courts use records from the main trial in second instance proceedings,³¹ an appellate court reviewing a lower court’s record cannot make a correct determination of lower court proceedings if the case file contains inaccurate information.³²

The accuracy of trial minutes also implicates the right to a “fair and public hearing” as guaranteed by the European Convention on Human Rights.³³

²² Article 124, Law on Contested Procedure.

²³ *Id.*, Article 123(2).

²⁴ *Id.* The law does not define “less important” and “more important,” which can lead to confusion as to the proper interpretation. In the event that the law does not require the taking of records or minutes, an “official note” can be made. The note must include the official action and the date and place it is taken. “This is especially valid for taking the statements [sic] or data with less importance from the parties or for different notices [sic] from the parties.” Article 183, Rules on Internal Activity of the Courts. Different requirements apply to proceedings on “disputes of minor value,” Article 463, Law on Contested Procedure. In addition to the information required by Article 124, court records must also contain: (1) “[D]eclarations of the parties which are important, particularly the ones by which one or the other party, in whole or in part, admits the claims, or denies the claims or the appeal, or alters or withdraws the claims [sic];” (2) “substance of the adduced evidence;” (3) “decisions against which the appeal is allowed, and which have been read at the trial [sic];” and (4) “whether the parties were present at reading the judgment, and if they were, whether they were instructed about the conditions of appeal.”

²⁵ Article 125, Law on Contested Procedure.

²⁶ *Id.*

²⁷ *Id.*, Article 126.

²⁸ *Id.*

²⁹ *Id.*, Article 127.

³⁰ *Id.*

³¹ *Id.*, Article 363.

³² Article 6(1), European Convention on Human Rights does not expressly create a right to an appeal in civil matters. Article 2 of the Seventh Protocol to the Convention and Article 14(5) of the International Covenant on Civil and Political Rights provide for a right of appeal only in criminal matters. However, in most countries that are parties to the Convention the possibility exists to appeal civil court decisions to provide parties with additional judicial safeguards. But see *Delcourt v. Belgium*, European Court of Human Rights, 2689/65, Judgment, 17 January 1970, paragraph 25; *Hoffmann v. Germany*, European Court of Human Rights, 34045/96, Judgment, 11 October 2001, paragraph 65.

³³ Article 6, European Convention on Human Rights. See *Axen v. Germany*, 11 October 2001, 8273/78, Judgment, 8 December 1983, paragraph 25 (“The public character of proceedings before the judicial bodies referred in Article 6 paragraph 1 [of the European Convention on Human Rights] protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 paragraph 1 namely a fair trial, the guarantee

Despite these requirements, courts consistently fail to maintain accurate minutes of proceedings:

In a contract annulment case in the Mitrovicë/Mitrovica region, the minutes for a November 2007 hearing indicate the plaintiff's presence though he had died the day before.

In a Prizren region divorce case, minutes from two hearings in April 2007 contain inaccuracies. In one hearing, the minutes state that the court attempted reconciliation of the parties as required by applicable divorce law. However, the following paragraph of the same hearing's minutes notes the respondent was not present. In a later session of the same case, the minutes indicate the presence of two lay judges who were not in attendance. The minutes also do not specify whether the session was open to the public, particularly important in divorce proceedings which domestic law requires to be closed.

In a damage compensation case before a court in the Pejë/Peć region, the minutes from a December 2007 session indicate absent lay judges as present.³⁴

In light of the continued failure to maintain accurate minutes of court proceedings, it is the position of the OSCE that:

- Judges, minute-keepers, attorneys, and other legal professionals must closely review trial minutes for accuracy before signing them.
- The Kosovo Judicial Institute should instruct judges on the legal requirements related to minute-keeping.
- The Kosovo Chamber of Advocates should educate attorneys on the importance of ensuring court recorders to prepare accurate trial minutes.

of which is one of the fundamental principles of any democratic society..") See also Article 7, Law on Regular Courts "The work of the courts is public," and that publicity is ensured by "open trials."

³⁴ In another session of the same case, the minutes note the presence of an UNMIK Department of Justice representative and OSCE monitor. As this case was open to the public, arguably the presence of named individual members of the public should not have appeared in the minutes.