



Organization for Security and Co-operation in Europe

MONITORING DEPARTMENT

Legal System Monitoring Section

Monthly Report – June 2008

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

(1) Attacks and threats against judges, which are due to insufficient court security, and threaten the independence of the judiciary and rule of law in Kosovo; and

(2) Incorrect determination of the value of the matter in controversy, which affects the rights to a tribunal established by law and appeal.

Attacks and threats against judges

The OSCE Mission in Kosovo (OSCE) is concerned that insufficient measures to safeguard the personal security of judges in Kosovo may limit their independence and threaten the rule of law.¹

According to the United Nations Basic Principles on the Independence of the Judiciary, the security of judges “shall be adequately secured by law.”² Moreover, the Committee of Ministers of the Council of Europe held that “all necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.”³ Consequently, public authorities such as the Ministry of Justice and the Ministry of Interior have a duty to ensure that adequate security is provided for judges and prosecutors.

However, the OSCE has recently observed attacks and threats against judges:

On 14 April 2008, two persons entered the office of a judge of a court in the Mitrovicë/Mitrovica region, and physically attacked him. The police arrested the two individuals (a father and his son). Later that same day, a third person went to the municipal court president’s home and threatened to injure him if he did not release two suspects (his brother and his father).⁴

On 7 May 2008, two persons approached a judge at a court in the Pejë/Peć region and threatened to injure him. Allegedly, the defendant threatened the judge

¹ The OSCE has previously reported on the problem of insufficient security for judges. See OSCE *Report on the Administration of Justice in Kosovo* (March 2002), page 19 and OSCE *Review of the Criminal Justice System in Kosovo*, (December 2006), pages 13-14.

² Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985), and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), Principle No. 11. See also Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, Resolution 1989/60 of 24 May 1989, Procedure No. 5.

³ Recommendation R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (adopted by the Committee of Ministers on 13 October 1994), Principle III (“Proper working conditions”).

⁴ Police arrested the third person, who also faces prosecution.

because he refused to return a driving license, which had been confiscated, to one of the attackers.⁵

On 9 July 2007, a judge in the Prizren region issued a judgment convicting seven defendants for robbery. On 25 September 2007, the brother of one of the defendants visited the judge's husband at his place of employment and threatened to injure him if his wife (the judge) did not release the suspects.

On 27 February 2007, a court in the Prishtinë/Priština region sentenced a former Kosovo Liberation Army commander to four months of imprisonment for obstructing an official person in performing official duties⁶ and threats.⁷ More specifically, the court established that on 14 November 2005, the defendant approached a Prishtinë/Priština region execution judge who was executing an eviction for illegal occupation of a building since June 1999. The defendant grabbed the execution judge by his tie, ripped it off, and said, "I am going to drag and liquidate you." After some delay in enforcing the judgment, the defendant finally started serving his sentence on 8 May 2008.

These examples show that judges in Kosovo are particularly vulnerable to threats and attacks. This not only affects their personal security but also may limit judicial independence, such as the ability to render an impartial verdict. The outcome of a legal dispute should only be dictated by the correct application of the law to the facts and not by external pressure.

While the attacks against judges in Kosovo are deeply concerning, it is promising that criminal proceedings have been initiated against the alleged perpetrators. This will help dissuade others from threatening and attacking judges in the future.

Another means of preventing attacks against judges is to provide increased security in court facilities such as security guards, metal detectors and separate entrances for judges and court staff. Unfortunately, at present court security in Kosovo is generally inadequate.⁸ Judges who handle highly sensitive criminal cases - such as those involving organized crime, war crimes or trafficking in persons - require special, 24-hour close protection.

Consequently, it is the position of the OSCE that:

- The Ministry of Justice and the Kosovo Judicial Council must increase security in courthouses and public prosecution offices by measures such as installing and using

⁵ Following the incident, on 23 May 2008 the municipal public prosecutor filed a summary indictment against the two persons for the offence of threat (Article 161(1), Provisional Criminal Code).

⁶ Article 316, Provisional Criminal Code.

⁷ Article 161, Provisional Criminal Code.

⁸ For example, although a security guard is typically present at the entrance to courts, limited or no security is provided within the building. If a metal detector is present, often it is not working or there is no effort to ensure that all visitors and items are properly screened. Usually, there are no surveillance cameras on the court premises.

metal detectors, creating separate entrances for judges and prosecutors and providing surveillance cameras.

- In the most serious cases, police must provide 24-hour close protection for judges and prosecutors.
- Individuals who attack or threaten judges, prosecutors or court staff should be prosecuted. Courts should consider the gravity of the act when determining the punishment.

Incorrect determination of the value of the matter in controversy

In August 2007, the OSCE reported on several civil proceedings in which attorneys and courts failed to correctly determine the value of the matter in controversy. Of concern to the OSCE, continued monitoring has revealed that this problem persists. This month's report again addresses the issue and re-emphasizes the problems associated with failing to properly determine the value of the claim.

According to the Law on Contested Procedure, the composition of the trial panel and the right to appeal before the Supreme Court depend on the value of the claim.⁹ The law only permits appeal before the Supreme Court in property disputes if the value of the dispute indicated in the claim exceeds 818.07 Euro.¹⁰ Similarly, a single judge adjudicates disputes on property claims if the value does not exceed 818.07 Euro. If the value exceeds this amount, the court is composed of one judge and two lay judges.¹¹

The European Convention on Human Rights (the Convention) guarantees the right to a fair trial before an "independent and impartial tribunal established by law."¹² In interpreting this right, the European Court of Human Rights (the European Court) held that the right to a fair trial also applies in appeal proceedings if domestic law provides for a right to appeal.¹³

Articles 35 to 40 of the Law on Contested Procedure describe in detail the determination of the value of the matter in controversy. Generally, if the claim asks for an amount of

⁹ Law on Contested Procedure, Articles 41-43 and 383-383. Official Gazette of the Socialist Federal Republic of Yugoslavia, Nos. 4/77, 36/80, 69/82, 58/84 and 74/87.

¹⁰ Articles 382 and 383, Law on Contested Procedure; Section 2(i)(j), UNMIK Administrative Direction No. 2001/10 implementing UNMIK Regulation No. 1999/4 On the Currency Permitted to be Used in Kosovo, 21 June 2001; and Section 3, UNMIK Administrative Direction No. 2001/24 amending UNMIK Administrative Direction No. 1999/2 implementing UNMIK Regulation No. 1999/4 On the Currency Permitted to be Used in Kosovo, 21 December 2001.

¹¹ The general rule is that courts sit in a panel in civil proceedings except certain courts that sit in general sessions and in property cases where the value of the claim is less than 818.07 Euro. Articles 41, 42, 43, Law on Contested Procedure; Section 2(i)(a), UNMIK Administrative Direction No. 2001/10, 21 June 2001, and Section 3, UNMIK Administrative Direction No. 2001/24, 21 December 2001. *See also* Article 8, Law on Regular Courts, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 21/78.

¹² Article 6(1), European Court of Human Rights.

¹³ European Court of Human Rights, *Tolstoy Miloslavski v. the United Kingdom*, 18139/91, Judgment, 23 June 1995, paragraph 59.

money, this amount will be relevant in determining the value of the matter in controversy without interest rates, trial costs, contracted penalties and other secondary claims. If the claim does not ask for an amount of money, the value of the matter in controversy indicated by the plaintiff in the statement of claims shall be taken as relevant. However, if “[t]he plaintiff has assessed the value of the dispute obviously too high or too low, thereby causing uncertainty about [...] the composition of the court or right to revision, the court shall quickly and in an appropriate manner check the accuracy of the quoted value at the preliminary hearing at the latest, or if the preliminary hearing has not been held, at trial before entering into argumentation on the principal issue.”¹⁴

Despite these clear provisions, the OSCE continues to observe civil proceedings where attorneys, parties and judges failed to correctly assess the value of the matter in controversy.¹⁵ The following cases - in which the first main sessions all occur in 2008 - serve as examples:

In a case before a court in the Gjilan/Gnjilane region, the plaintiff asked the court to confirm his ownership of an apartment purchased in 1999 for 10,000 DM.¹⁶ In his court filing, the plaintiff cited the value of the claim at 200 Euros. A court composed of a single judge presided over the first session. Given the 10,000 DM purchase price of the apartment, the value of the matter in controversy should be considerably higher than 200 Euros, and the case should have been held before a panel.

In a case filed before a court in the Pejë/Peć region on 14 February 2008, the plaintiff asked the court to confirm his ownership of a 6.784-square-metre property. He noted the value of the claim as 500 Euros, though a property that size is typically worth at least 30.000 Euros. The court’s file noted the participation of lay judges, though the case should be tried by a single judge, if the value is in fact 500 Euros.

In a case before a court in the Prizren region concerning confirmation of ownership of real property, the plaintiff cited the value of the claim at 500 Dinars (in current terms, 6.25 Euros). The court continued with the proceedings without addressing the issue of the understated value of the claim.

In the cases described above, the courts failed to correctly determine the value of the matter in controversy. This not only violates domestic law, but also the right to a tribunal

¹⁴ Article 40, Law on Contested Procedure. Additionally, the Law on Contested Procedure requires the court to “immediately upon receipt of the pleadings” determine in what composition it should judge a particular case (Article 15, Law on Contested Procedure). Throughout the proceedings, courts must “pay attention to whether the resolution of the dispute lays within the court’s jurisdiction” (Article 16, Law on Contested Procedure).

¹⁵ Based on OSCE research, it appears that plaintiffs may understate the value of the claim to decrease the amount of court fees owed. The higher the value of the claim, the larger the amount of a filing fee owed. Article 18, Decision on Payment of Court Fees No.09/77-2/05, Department of Judicial Administration, Prishtinë/Priština, 8 December 2004.

¹⁶ 10,000 DM equals 5,112.92 Euro (1 Euro is 1.95583 DM) at the final conversion rate of 1 January 1999.

established by law as recognized under international human rights standards. In all three cases, the failure of the court to check the accuracy of the plaintiff's declared value of the claim affected the right of the defendant to a tribunal established by law. In the event a party decides to appeal the final outcome to the Kosovo Supreme Court, the value of the claim must exceed 818.07 Euro. Understating the value of the claim may prevent otherwise-eligible cases from being appealed to the Supreme Court.

In light of the continued erroneous assessment of the value of the dispute, it is the position of the OSCE that:

- Judges must check the accuracy of the value of the matter in controversy indicated by the plaintiff in the statement of claim and ensure proper court composition.
- Lawyers must carefully consider the nature of claims when indicating the value of the matter in controversy.
- The Kosovo Judicial Institute should provide additional instruction on the responsibility of judges to check that the stated value of the controversy is accurate.
- The Kosovo Chamber of Advocates should provide training to attorneys on the responsibility to accurately state the value of a dispute.