



Organization for Security and Co-operation in Europe

MONITORING DEPARTMENT

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Lack of ruling to initiate investigations breaches domestic law

The OSCE Mission in Kosovo (OSCE) is concerned that in several monitored cases the prosecution offices conducted an investigation without rendering a ruling prior to initiating investigations, as prescribed by law.

The Provisional Criminal Procedure Code of Kosovo (Criminal Procedure Code)¹ establishes that “investigation[s] shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom an investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected.”²

However, the OSCE monitored several cases where prosecutors performed investigative actions without issuing a ruling prior to initiating investigations:

In the course of investigations against two Kosovo Albanians suspected of committing the crime of light bodily harm³ against a Kosovo Serb, on 3 and 4 December 2007 the municipal prosecutor conducted investigative actions (hearing of the two defendants, order for physical examination of the victim). On 12 December 2007, he issued a summary indictment against the defendants. However, he never issued a ruling to initiate investigations.

In a case involving a defendant suspected of trafficking in human beings⁴ and rape,⁵ in November 2007 a District Prosecutor conducted investigations which led to the arrest of the defendant. On 26 November 2007, a pre-trial judge of the the District Court imposed one month detention on remand against the suspect. The Prosecutor issued a ruling to initiate investigations only three days later, on 29 November 2007.

In several cases investigated by the Municipal Prosecution Offices in a region in 2007, prosecutors conducted routine investigative actions (such as interrogation of defendants, injured parties and witnesses) without issuing a ruling to initiate investigations. In one case in particular, involving the alleged crimes of accepting bribes⁶ and abusing official position or authority,⁷ a Municipal Prosecutor said she intentionally failed to issue a ruling because she wanted first

¹ Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003.

² Criminal Procedure Code, Article 221(1).

³ Article 153, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (Criminal Code).

⁴ Article 139, Criminal Code.

⁵ Article 193, Criminal Code.

⁶ Article 343(1), Criminal Code.

⁷ Article 339, Criminal Code.

to be sure about the qualification of the offences she was investigating.⁸ Only after interrogating the injured party and the defendant on 23 October 2007 did she issue a ruling which she backdated to 8 October 2007.

The ruling to initiate investigation is not a mere formality. On the contrary, it acts as a guarantee for the defendant in that: (1) it determines the moment from which the six-month deadline for completing the investigations must be calculated,⁹ (2) it prevents the prosecutor from initiating investigations where no reasonable suspicion exists,¹⁰ (3) it confines the investigative powers of the prosecutor to the offence(s) indicated in the ruling,¹¹ and (4) it ensures that a pre-trial judge is designated and notified of the ongoing investigations,¹² thus preventing a prosecutor from conducting investigations of which the judicial authorities are not aware.¹³

By performing investigative actions prior to issuing a ruling to initiate investigations, Prosecutors violated domestic law with implications which are not only formal but also substantive.

In light of the above, the OSCE recommends that:

- Prosecutors issue a ruling to initiate investigations before undertaking any investigative action;
- Pre-trial judges ensure that a ruling to initiate investigations is part of the case file before they decide on issues at pre-trial proceedings.

Failure of the presiding judge to maintain order during civil trial sessions violates domestic law

The OSCE is concerned that the failure of some presiding judges to maintain order in the courtroom during civil proceedings negatively affects the course of the proceedings and possibly the dignity of the court.

⁸ On the contrary, the *rationale* of Article 221 of the Criminal Procedure Code is to allow the Prosecutor to initiate investigations only in the presence of a reasonable suspicion that a specific defendant has committed a specific offence.

⁹ Clearly, in the absence of a ruling it is impossible to determine (and thus, monitor compliance with) the duration of the investigations, which is limited (with possibility of extensions) to six months (see Article 225, Criminal Procedure Code). The timely issuance of a ruling to initiate investigations thus also helps minimize delays in the investigations.

¹⁰ According to Article 221(1), Criminal Procedure Code, the ruling must set forth “the circumstances and facts warranting the reasonable suspicion of a criminal offence.”

¹¹ Article 222(1), Criminal Procedure Code. The prosecutor can however expand the investigations to other crimes or to other suspects, but only with the authorization of the pre-trial judge.

¹² In fact, according to Article 221(1) of the Criminal Procedure Code, “a stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.”

¹³ Sending a stamped copy of the ruling to the pre-trial judge can also serve the purpose of determining the court having jurisdiction (see Article 33(1), Criminal Procedure Code).

For a proper flow of the trial proceedings the presiding judge must ensure that court sessions take place in an orderly fashion. According to the Law on Contested Procedure,¹⁴ it is the “[...] duty of the presiding judge to make sure that order in the courtroom is maintained and the dignity of the court is preserved.”¹⁵ Moreover, “[i]f a person participating in the proceedings or a person present at the proceedings [...] disturbs the work of the court or does not obey the orders of the presiding judge, [...] the presiding judge shall issue a warning. If a warning proves unsuccessful, the panel may remove the previous [sic] warned person from the courtroom or impose the [sic] fine [...]”¹⁶

Despite these provisions, the OSCE monitored cases in which the presiding judge failed to maintain order in the courtroom during civil proceedings:

In a case before a Municipal Court, six plaintiffs filed a claim for confirmation of ownership. At the 3 April 2007 trial session, the plaintiffs’ lawyer started several discussions irrelevant to the purposes of the case. Moreover, the lawyer interrupted defendant’s representative and witnesses when they were giving their statements. Despite the fact that the lawyer’s attitude and behaviour disrupted the proper flow of the proceedings, the judge failed to undertake any measures to restore order in the courtroom.

In another case before a Municipal Court, a plaintiff filed a claim for eviction. At the 1 February 2007 trial session, one of the defendants started quarrelling with the plaintiff’s representative while the second defendant shouted at the plaintiff. While this was happening, the presiding judge was talking to the legal clerk and took no measure to restore the order in the courtroom.

In both examples, the presiding judges failed to undertake any action foreseen by the law (such as warning or fining the parties) in order to ensure orderly court proceedings, thus contravening their positive obligation to ensure the proper course of the trial. This may also negatively affect the dignity and credibility of the court itself.

Consequently, the OSCE recommends that:

- Judges maintain order during civil trial sessions including, where appropriate, applying measures foreseen by the law for disciplining the parties.

¹⁴ Law on Contested Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 4/77-1478, 36/80-1182, 69/82-1596.

¹⁵ Article 317, Law on Contested Procedure.

¹⁶ Article 318, Law on Contested Procedure.