



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

**Monitoring Department**

**Legal System Monitoring Section**

**Monthly Report – October/November 2008**

## **The failure of prosecutors to promptly and effectively investigate and prosecute alleged election fraud cases breaches their “due diligence” duty**

As of November 2008, one year has passed since Kosovo’s last general and municipal elections. The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that credible allegations of election fraud committed during the 17 November 2007 elections have not led to effective and timely criminal investigation or prosecution of alleged perpetrators. As of 12 November 2008, the OSCE is not aware of any proceeding which has reached the trial stage. The only region in which an indictment alleging crimes related to election misconduct has been confirmed is Gjilan/Gnjilane.

According to the United Nations Guidelines on the Role of Prosecutors, prosecutors shall perform an active role in criminal proceedings, including the initiation of prosecution.<sup>1</sup> Similarly, the domestic law in Kosovo requires that “[t]he public prosecutor shall initiate an investigation against a specified person, on the basis of a criminal report or other sources, if there is a reasonable suspicion that that person has committed a criminal offence which is prosecuted *ex officio*.”<sup>2</sup> The investigation should normally be completed within a period of six months, extendable only in cases involving complex and severe crimes.<sup>3</sup>

On 30 November 2007, the Election Complaints and Appeals Commission (ECAC) issued a judgment finding that irregularities were committed in 31 polling stations throughout Kosovo and voided the electoral results in such polling stations.<sup>4</sup> The Central Election Commission (CEC) later voided results from an additional three polling stations based on a recommendation of the Count and Results Centre.<sup>5</sup> An ECAC decision dated 13 December 2007 annulled the results of nine more polling stations.<sup>6</sup>

On 20 March 2008, upon completion of its investigation into electoral irregularities, the ECAC sent its findings to the Office of the Public Prosecutor of Kosovo for further investigation and possible prosecution of election-related crimes.<sup>7</sup> The ECAC forwarded more than one hundred case-files<sup>8</sup> with materials related to the alleged

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<sup>1</sup> Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

<sup>2</sup> Article 220(1), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 (“Provisional Criminal Procedure Code”).

<sup>3</sup> Article 225 of the Provisional Criminal Procedure Code.

<sup>4</sup> See Election Complaints and Appeals Commission, case No. ECAC 07/263C, Judgment, 30 November 2007.

<sup>5</sup> See CEC Recommendation to certify the Election Results for the Municipal Assemblies in Kosovo, CEC letter to the Special Representative of the UN Secretary-General, dated 18 December 2007.

<sup>6</sup> See ECAC Decision 07/419C. See also the CEC Recommendation to certify the Election Results for Mayors in Kosovo, CEC letter to the Special Representative of the UN Secretary-General, dated 18 December 2007.

<sup>7</sup> These crimes include preventing exercise of the right to vote (Article 176, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (“Provisional Criminal Code”)); violating the free decision of voters (Article 177); abusing the right to vote (Article 178); violating confidentiality in voting (Article 179); election fraud (Article 180); and destroying voting documents (Article 181).

<sup>8</sup> Some of these ECAC files, with different case numbers, referred to irregularities committed in the same polling station. Also, in some cases it was unclear whether illegal conduct had occurred, as the

offences, including original investigation report forms, poll books, recount result forms, and final voters lists. Ballot boxes containing the relevant ballots were not transferred, but kept “in quarantine” under the authority of the CEC, readily available for the prosecution upon request.<sup>9</sup>

On 2 April 2008, the Public Prosecutor, without undertaking any investigative action,<sup>10</sup> forwarded all the material received from the ECAC to municipal prosecutors for investigation.

The OSCE is aware that municipal prosecution offices examined 36 cases involving at least 57 persons, who allegedly actively manipulated the electoral process or at the very least acquiesced in the misconduct. In ten of these cases, all in the Gjilan/Gnjilane region, the court confirmed the indictment and defendants await trial. The remaining 26 cases are still at the investigation stage.

Of concern, in most of the 36 cases of alleged electoral misconduct, prosecutors conducted insufficient – if any – investigation. They have failed to perform basic investigative actions, such as interrogating suspects and witnesses, or requesting the police to collect more information and evidence, to ascertain possible individual responsibility. The following serve as examples:

In six cases investigated by the Gjakovë/Đakovica Municipal Prosecution, in early June 2008, the prosecutor interrogated ten defendants, and then sent the case files to the police for further investigation, but without specific instructions. The police still have not returned the case files, and no further investigation has occurred.

In ten cases in the Gjilan/Gnjilane region involving alleged election fraud committed in Viti/Vitina, the municipal prosecutors filed indictments against 20 suspects. The indictments are based exclusively on the ECAC’s findings without any alleged facts based on additional investigation by the police or prosecutors. The sole exception is one case in which the prosecutor interrogated the defendants prior to the filing of the indictment. Although allegations contained in the indictments were largely unsupported by facts and evidence, indictments against 19 defendants have up to now been confirmed.

In seven of eight cases in the Prishtinë/Priština region, prosecutors simply sent the ECAC’s case files to the police for further investigation without any instruction. In one of the eight cases the prosecutor also ordered an expert opinion to determine signature authenticity. Only in three cases did prosecutors interrogate suspects and witnesses.

In 12 cases of alleged election misconduct committed in the Prizren region, the municipal prosecutor’s office has failed to interrogate any of the alleged

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results suggested technical errors rather than election fraud. Consequently, prosecutors opened and processed fewer cases than the number of ECAC files received.

<sup>9</sup> See letter from Judge Norbert Koster, Chief Commissioner, Election Complaints and Appeals Commission, to Hilmi Zhitija, Public Prosecutor of Kosovo.

<sup>10</sup> OSCE interview with Mr. Hilmi Zhitija, Public Prosecutor of Kosovo, 25 September 2008.

perpetrators or conduct any significant investigation. According to prosecutors, some suspects could not be located by the police. However, this excuse is weak, especially for those defendants who are public municipal officials.

Many prosecutors interviewed by the OSCE have stated that they received insufficient information from the ECAC to initiate criminal investigation or prosecute individuals. Some materials only briefly indicated the type of irregularities which occurred in the polling station, without information regarding potential suspects or witnesses. Only a few files contained formal complaints lodged by eyewitnesses.<sup>11</sup> In addition, prosecutors complained that members of the ECAC were unavailable for more information and clarification.<sup>12</sup>

Through its direct monitoring of these criminal investigations, the OSCE can confirm that some of the case-files received by prosecutors contain limited information and no suggestions regarding how to proceed with the investigation. In addition, the OSCE noticed that prosecutors, despite repeated attempts, could not reach the ECAC investigators for clarification<sup>13</sup> since the ECAC had since been dissolved.<sup>14</sup>

Despite these investigative challenges, prosecutors have ultimate responsibility over criminal investigation and must vigorously investigate, and if the evidence permits, prosecute individuals suspected of electoral misconduct. The criminal report and the ECAC files are the starting points. To ensure they meet the due diligence requirement, prosecutors should leave “no stone unturned.”

Unfortunately, in many of the suspected election fraud cases, the OSCE found that prosecutors did not meet their professional obligations. The ECAC transmitted all information in its possession to the Public Prosecutor of Kosovo, who forwarded it to the competent municipal prosecutors in a timely fashion. In some regions, however, prosecutors failed to question any suspect or undertake meaningful investigation. The failure vigorously to investigate and prosecute election fraud cases may encourage impunity and lead to a repetition of misconduct in future elections. This could lead to the invalidation of ballots, delayed election results, and weakened public confidence in the electoral process. Thus, the development of democracy and the rule of law in Kosovo might be weakened.

In light of the above, the OSCE recommends that:

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<sup>11</sup> OSCE interviews with municipal prosecutors from different regions between July 2008 and September 2008.

<sup>12</sup> According to Article 148 of the Provisional Criminal Procedure Code, “All public entities shall be bound to provide the necessary assistance to the court and other competent authorities participating in criminal proceedings, especially in matters concerning the investigation of criminal offences or the location of perpetrators.”

<sup>13</sup> Another possible source of information is the Central Election Commission’s field staff: Municipal Executive Officers (formerly known as Municipal Election Officers), Municipal Election Commissions, Chairs of the Polling Station Committees or members of the Polling Station Committees. Very little, if any, support, guidance, or assistance has been sought from this group.

<sup>14</sup> Although the 2007 ECAC no longer exists, a new ECAC has been established. Apparently some of the same individuals from the prior ECAC work for the current one. Thus, they could be a source of information.

- The Kosovo Judicial Institute in co-operation with the Central Election Commission should provide training to judges and prosecutors on legislation related to elections and how to handle election fraud cases.
- The relevant electoral bodies, such as the Central Election Commission, the Election Complaints and Appeals Commission, Municipal Election Commissions, Polling Station Committees, should co-operate with prosecutors investigating alleged electoral malfeasance.
- Prosecutors should promptly investigate alleged cases of election fraud using all available means. If there is supporting evidence, the cases should be prosecuted vigorously.
- When referring a case to the police for additional investigation, prosecutors should provide the police with specific instructions regarding requested investigative actions, and should supervise their timely implementation.

### **Poor reasoning in civil judgments violates the right to a reasoned decision**

As the OSCE previously reported, decisions in civil disputes often fail to contain sufficient reasoning.<sup>15</sup>

Parties in civil and criminal trials have the right to a reasoned decision.<sup>16</sup> A reasoned decision “demonstrate(s) to the parties that they have been heard (...) It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.”<sup>17</sup> Reasoned decisions are particularly important because they enable parties to appeal. Without reasons justifying a court decision, the appealing party cannot properly challenge the basis of a court’s decision.<sup>18</sup>

Following the requirement of a reasoned decision, the Law on Contested Procedure requires a final decision to contain an explanation including the facts and evidence upon which it is grounded.<sup>19</sup> The court shall also specify the legal provisions on which

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<sup>15</sup> OSCE Mission in Kosovo, Department of Human Rights, Decentralization, and Communities: Legal System Monitoring Section, May 2007 Monthly Report (“Insufficient reasoning of decisions in civil disputes violates domestic law and affects the right to a fair trial”).

<sup>16</sup> Although not expressly required under Article 6 of the European Convention on Human Rights (the Convention), the European Court of Human Rights recognized the right to a reasoned decision in both civil and criminal cases as implied by the right to a fair trial. *See Van de Hurk v. Netherlands*, Judgment of 19 Apr. 1994, Series A, No. 288; (1994) 18 EHHR 481, para. 61 of the judgment. *See also Suominen v. Finland*, 37801/97, 24 July 2003, paragraphs 34-38; *Ruiz-Torija v. Spain*, Judgment of 9 Dec. 1994, Series A, No. 303-A; (1994) 18 EHHR 553; and *Hiro Balani v. Spain*, Judgment of 9 Dec. 1994, Series A, No. 303-B; (1994) 19 EHHR 566.

<sup>17</sup> *Suominen v. Finland*, 37801/97, 24 July 2003, paragraph 37.

<sup>18</sup> *See id.* at paragraphs 34-38.

<sup>19</sup> Article 338(1), Law on Contested Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982 (12 February 1982) (hereinafter, Law on Contested Procedure). As the 1982 Law on Contested Procedure applies to all cases monitored for this report, that law will be addressed here. The principles established in that law continue to apply.

the decision relies.<sup>20</sup> The lack of reasoning in a decision constitutes a breach of procedural law and serves as a ground for appeal.<sup>21</sup>

In addition to the requirement of a reasoned decision, the Law on Contested Procedure sets out minimal evidentiary rules applicable in disputes. Evidentiary rules promote reasoned judgments by ensuring that parties present sufficient and relevant evidence and that judges rationally assess that evidence. The Law on Contested Procedure requires parties to “present all facts upon which their claims are based and offer evidence in support of these facts.”<sup>22</sup> If neither party presents evidence important for reaching a decision, the court itself may adduce it.<sup>23</sup> Courts may *sua sponte* seek out evidence “if the results of the hearing and adduction of evidence show that the parties tend to claim what they are not entitled to [...]”<sup>24</sup> These evidentiary rules do not cover the admissibility or weight of a particular piece of evidence. Rather, they address obligations of courts, parties, and witnesses when it comes to the adduction of evidence. For example, judges must “fully and truthfully establish the disputed facts upon which” the claim is based.<sup>25</sup> Judges also have discretion to decide which evidence tends to prove plaintiff’s case.<sup>26</sup>

When no other evidence is available or when “it finds that it is necessary for the purpose of determination of important facts in addition to the evidence adduced”, courts may call the parties themselves.<sup>27</sup> Any person called as a witness must respond and testify (some exceptions apply),<sup>28</sup> but only persons with knowledge of the facts can serve as witnesses.<sup>29</sup> Witnesses must always be asked how they obtained the information about which they are testifying.<sup>30</sup> If the court believes the witness does not have knowledge of the facts, it can decide not to take testimony.<sup>31</sup>

The following cases demonstrate the pattern of faulty reasoning and deviation from procedural rules typical in property cases:

In a 2007 Gjilan/Gnjilane region case, the Kosovo Albanian plaintiff asked the court to confirm his preferential right to purchase a particular piece of immovable property and annul a purchase contract on the same property between a Kosovo Serb respondent and a Kosovo Albanian respondent. The court issued a judgment refusing the claim which contains a description of the evidence presented, but does not mention any legal provision on which it is based.

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<sup>20</sup> *Id.* Article 338(4).

<sup>21</sup> *Id.* Article 354(2)(13). Under the Law on Contested Procedure, a “substantial breach on the point of practice and procedure exists if the court, while conducting the proceedings, has not applied, or has wrongly applied some provision of this Code, and that has or might have, affected the passing of a lawful and fair judgment.” Article 354(1).

<sup>22</sup> *Id.* Article 7(2). *See also id.* Article 219.

<sup>23</sup> *Id.* Article 7(3). *See also id.* Article 225.

<sup>24</sup> *Id.* Article 7(4).

<sup>25</sup> *Id.* Article 7(1).

<sup>26</sup> *Id.* Article 8.

<sup>27</sup> *Id.* Article 264(2).

<sup>28</sup> *Id.* Article 235(1).

<sup>29</sup> *Id.* Article 235(2).

<sup>30</sup> *Id.* Article 244(2).

<sup>31</sup> *Id.* Article 9.

In a 2008 confirmation of ownership case in the Pejë/Peć region, the Kosovo Albanian plaintiff claimed to have purchased property from the Kosovo Serb respondent pursuant to an unverified 1981 purchase contract. The plaintiff testified that he paid the full purchase price and that he has been using the property since 1981 without interference. As the respondent was presumed to live outside of Kosovo, the court appointed a temporary representative without conducting any search. The court ruled for the plaintiff on 11 April 2008. It cited no legal provision in its decision. Nor did it refer to any evidence presented.

Consequently, the OSCE recommends:

- Judicial decisions should include a description of the presented evidence, the proven facts, and the relevant law, including the specific name of the law and article number, upon which a decision is based.
- To address the lack of reasoning in many court decisions, evidentiary rules should be developed that address the admissibility and weight of evidence.