



**Organization for Security and Co-operation in Europe**

**Mission in Kosovo**

**Department of Human Rights, Decentralization and Communities**

**Legal System Monitoring Section**

**Monthly Report – May 2007**

**Current system of detainee transportation results in unnecessary delays which extend pre-trial detention periods and may violate the right to a trial within a reasonable time**

The Department of Human Rights, Decentralization and Communities of the OSCE Mission in Kosovo (OSCE) is concerned that the current system for transporting detainees by the centralised Prishtinë/Priština Prisoner Escort Unit (PEU) causes unjustified delays in criminal proceedings and unnecessarily extends the duration of detainees' pre-trial detention. This may also contribute to a violation of the right to a trial within a reasonable time.

The escort/transportation service of detainees in Kosovo is currently based on a Standard Operating Procedure (SOP) approved by the Department of Public Order on 11 March 2005.<sup>1</sup> The SOP designates the PEU, which is under the chain of command of the Department of Justice (DoJ), as the only competent body to escort detainees to and from detention facilities to courthouses.<sup>2</sup>

Domestic law requires that judicial authorities carry out proceedings without delay.<sup>3</sup> Moreover, when a defendant is held in pre-trial detention, the duration of custody must be kept to the "shortest time possible,"<sup>4</sup> and "all agencies participating in criminal proceedings [must] proceed with special urgency."<sup>5</sup> Similarly, international standards require that when the defendant is in custody, the concept of "reasonable time" by which everyone has a right to be tried<sup>6</sup> must be interpreted under a more rigorous standard.<sup>7</sup>

Despite these legal requirements, the OSCE has monitored several cases in which the failure by the PEU to provide transportation of detainees led to postponements of sessions. This caused unnecessary delays in judicial proceedings.

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<sup>1</sup> The directive, as amended in 2006, establishes that courts requiring police assistance in escorting detainees for hearings or other court sessions must contact the Planning Unit of the PEU no later than seventy-two hours before the scheduled hearing. Since the PEU does not provide "static security," the Kosovo Police Service (KPS) is responsible for detainee security during the hearings. According to information available to the OSCE, the directive was not implemented for more than two years. Relevant authorities started to implement the requested procedure following a written reminder sent by the Director of Operations on 21 March 2007.

<sup>2</sup> For example, the PEU, which is based in Prishtinë/Priština, has responsibility for the transportation of a detainee to and from the Prizren Detention Centre to the Prizren District Court, even though the two institutions are approximately 50 metres away from each other. LSMS is also aware of several situations where the detainees, due to lack of transportation back to the detention centre, were left in the Prosecutor's office for several hours. In one case, on (...) a detainee even spent the night in the KPS Station detention cell; the local wardens had to buy him food from personal funds.

<sup>3</sup> Art. 5(2), UNMIK Regulation No. 2003/26, *On the Provisional Criminal Procedure Code of Kosovo* (PCPCK), 6 July 2003.

<sup>4</sup> Art. 5(3), PCPCK.

<sup>5</sup> Art. 279(2), PCPCK.

<sup>6</sup> See Art. 5(3) and 6(1), European Convention on Human Rights (ECHR), and Art. 14(3)(c), International Covenant on Civil and Political Rights (ICCPR).

<sup>7</sup> See European Court of Human Rights (ECtHR), *Abdoella v. the Netherlands*, 12728/87, 25 November 1992, para. 24.

In a case before the District Court in (...) involving the trial of three defendants accused of a (...),<sup>8</sup> the court postponed the session of (...) because the PEU failed to bring the accused on time from the detention centre in (...). The presiding judge noted that delays caused by detainee transportation problems had already occurred in the same case.

In a case before the District Public Prosecution in (...) involving an investigation against (...) defendants for the criminal offence of (...)<sup>9</sup> three defendants were summoned to be interrogated on (...). Although the prosecutor had sent a timely request for detainee transportation<sup>10</sup> to the (...) detention centre authorities, the PEU did not bring the defendants to the investigation session. Consequently, the court postponed it.

In a case involving the re-trial of (...) defendants charged with (...) according to the 1977 Kosovo Criminal Code<sup>11</sup> before the District Court in (...), the court postponed the session of (...) because the PEU failed to bring the accused from the (...)detention centre to the courthouse.

In a case before the District Court in (...) involving the trial of a defendant charged with two counts of (...),<sup>12</sup> the presiding judge announced that the first trial session, scheduled for the (...), would be postponed for a month because the PEU could not bring the defendant from the detention centre in (...).<sup>13</sup>

In the above cases, the failure of the current transport and escort system to ensure the presence of detainees before the judicial authorities has resulted in undue delays in judicial proceedings.<sup>14</sup> This has unnecessarily prolonged the time spent by the detainees in pre-trial detention, and may contribute to the violation of the defendants' right to a trial within a reasonable time.<sup>15</sup>

In light of the above, the OSCE recommends that:

- UNMIK Police and the DoJ revise the current centralized system of escort/transportation of detainees by the PEU to ensure that detainees will be transported to judicial proceedings on time.

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<sup>8</sup> Art. 146, UNMIK Regulation No. 2003/25, *On the Provisional Criminal Code of Kosovo* (PCCK), 6 July 2003.

<sup>9</sup> Art. 139, PCCK.

<sup>10</sup> The prosecutor sent the request on 19 April 2007.

<sup>11</sup> Art. 74(2), Kosovo Criminal Code, of 1977.

<sup>12</sup> Art. 193, PCCK.

<sup>13</sup> The case file contained the court order for transportation of the detainee from the District Prison in Gjilan/Gnjilane.

<sup>14</sup> As the ECtHR has emphasized, "States are obliged to organize their legal systems so as to allow the courts to comply with the requirements of Article 6(1)" of the Convention, including that of trial within reasonable time (*Muti v. Italy*, 14146/88, 23 March 1994, para. 15).

<sup>15</sup> In fact, according to the ECtHR, a prolongation of the time spent in pre-trial detention may violate art. 5(3) ECHR if "the protracted proceedings are attributable neither to the complexity of the case nor the conduct of the [accused]" (*Kalashnikov v. Russia*, 47095/99, 15 July 2002, para. 120).

## **Insufficient reasoning of decisions in civil disputes violates domestic law and affects the right to a fair trial**

The OSCE is concerned that insufficient reasoning of decisions in civil disputes breaches domestic law and may affect the right of the parties to a fair trial.

Although not expressly required under Article 6 of the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) recognizes the requirement of a reasoned decision in both civil and criminal cases under the general right to a fair trial.<sup>16</sup> A well-reasoned decision is particularly important to enable a party to exercise the right to appeal. The appellant cannot properly challenge a lower court decision without knowing the underlying reasons for the adverse judgment.<sup>17</sup>

Following the internationally accepted requirement of a reasoned decision, the Law on Contested Procedure (LCP)<sup>18</sup> states that a final judgment must contain an explanation including the facts and evidence upon which it is grounded.<sup>19</sup> More specifically, the LCP requires judges to include in their reasoning the results of the evidentiary procedure, all facts together and individually, as well as evaluate all the facts on which it bases the decision.<sup>20</sup> The court shall also specify the legal provisions on which the decision relies.<sup>21</sup> The lack of reasoning of a judgment constitutes a substantial breach of the procedural law and serves as a ground for appeal.<sup>22</sup>

Despite these domestic and international law provisions, the OSCE has monitored several cases where decisions in civil disputes were not sufficiently reasoned.

In a property dispute before the Municipal Court of (...) concerning a claim for (...), the court rendered a judgment on (...) approving the claim of the plaintiff. The judgment only listed the evidence submitted to the judicial panel during the proceedings and did not evaluate the facts of the case. The judge also omitted the legal grounds on which he based his decision.

A second case before the Municipal Court of (...) concerned a dispute between two persons over the (...) owned by the (...) Municipality. The first instance court ruled in favour of one of the persons and decided to (...) the other. However the municipality requested that the appellate court halt the (...) because it disagreed with the court's assessment. On (...), the appellate court halted execution of the decision. However, the appellate decision only repeated the statements of the parties, and did not summarize or evaluate the proffered evidence, or provide any legal reasoning. The decision only

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<sup>16</sup> See ECtHR, *Hadjianastassiou v. Greece*, 12945/87, 16 December 1992, para. 33 and *Hiro Balani v. Spain*, 18064/91, 9 December 1994, para 27.

<sup>17</sup> See *Suominen v. Finland*, 37801/97, 24 July 2003, paras. 34-38.

<sup>18</sup> Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, and 35/91.

<sup>19</sup> Article 338 (1), LCP.

<sup>20</sup> See Tomislav Ralčić and Vitoje Tanasković, *Commentary on the LCP*, 1980, pages 552 – 553.

<sup>21</sup> Art. 338 (4), LCP.

<sup>22</sup> Art. 354 (2) item 13, LCP.

mentioned the right to property,<sup>23</sup> but did not cite the applicable domestic law or apply it to the facts of the case.

In these cases, the poor reasoning by judges violates domestic and international law. This also hindered the ability of a party to exercise the right of appeal.

Consequently, the OSCE recommends that judges:

- Issue reasoned decisions with specific reference to the relevant law and facts of the case.
- Weigh the reliability of and base decisions on evidence submitted during the proceedings.
- On appeal and as provided for by law, either amend the judgment or send the case back for retrial where the decision of the first instance court is unreasoned or omits key facts, fails to properly cite the relevant law, or does not apply the law to facts.

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<sup>23</sup> The judge based the decision on Article 1 of Protocol 1 of the ECHR, which foresees the right to property.