

**Human Rights and Communities Department**

**Legal System Monitoring Section**

**Monthly Report – May 2009**

## **Prosecutors' failure to promptly and effectively investigate and prosecute alleged election fraud cases breaches their "due diligence" duty**

The Organization for Security and Co-operation in Europe (OSCE) is concerned that election frauds allegedly committed during the 17 November 2007 elections may go unprosecuted. This may amount to a breach of prosecutors' due diligence duty under domestic and international law. It may also constitute a violation of international human rights standards.

In its previous report on this issue,<sup>1</sup> the OSCE noted 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. The OSCE then issued a series of recommendations to address the identified deficiencies in the handling of these cases. The present report analyzes the latest developments in the processing of election fraud cases by all municipal public prosecution offices which had received such cases.

### **Background**

On 17 November 2007, assembly, municipal assembly, and mayoral elections were held in Kosovo. International election observers concluded that the elections were conducted generally in line with international and European standards, despite a series of shortcomings mainly related to election administration, the involvement of the international community, the Kosovo Serb non-participation, and an alarmingly low voter turnout.<sup>2</sup>

While the organization and conduct of elections was overall positively evaluated, some voting irregularities had nonetheless been registered at particular polling stations. The alleged irregularities consisted mostly of incidents of voter intimidation, voting abuses and manipulations, destruction of ballots, and falsification of voting results.

The Election Complaints and Appeals Commission (ECAC), an independent body established to review and adjudicate election complaints, collected and analysed all the reports alleging voting irregularities. On 30 November 2007, ECAC issued a judgment finding that voting irregularities were committed in 31 polling stations throughout Kosovo and voided the electoral results in said polling stations.<sup>3</sup> Overall, ECAC invalidated ballots in 1.3 percent of the polling stations, as well as 34.000 mailed votes. A 13 December 2007 ECAC decision annulled the results from nine additional polling

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<sup>1</sup> See the Legal System Monitoring Section (LSMS) Monthly Report of October-November 2008.

<sup>2</sup> See the *Final Report of the Council of Europe Election Observation Mission V in Kosovo (CEEOM V)*, of 28 March 2008.

<sup>3</sup> See Election Complaints and Appeals Commission, case No. ECAC 07/263C, Judgment, 30 November 2007.

stations.<sup>4</sup> The Central Election Commission (CEC) later voided results from three additional polling stations based on a recommendation of the Count and Results Centre.<sup>5</sup> Re-runs were not organized as a re-vote was determined not to have a determinative influence on the final outcome of elections.

On 20 March 2008, after completing its investigations into reported electoral irregularities ECAC sent its findings to the Office of the Public Prosecutor of Kosovo for further investigations and possible prosecution of election-related crimes.<sup>6</sup> The ECAC forwarded more than one hundred case-files<sup>7</sup> with materials related to the alleged 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, available for the prosecution upon request.<sup>8</sup>

On 2 April 2008, the Kosovo Public Prosecutor without undertaking any investigative action<sup>9</sup> forwarded all the materials received from the ECAC to the territorially competent municipal prosecutors, who were tasked to investigate allegations of electoral irregularities and, if need be, prosecute the suspects.

Bearing in mind the need to hold accountable those guilty of electoral malfeasance and considering the impact which such criminal investigations could have on deterring such crimes in future elections, the OSCE has closely monitored the investigations undertaken by municipal public prosecutors in these cases.

### **The importance of free and fair elections and the need to prosecute election fraud**

Free and fair elections are a fundamental precept of a democratic society, and there are many political and legal documents reflecting this important principle.<sup>10</sup> The European

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<sup>4</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 Secretary-General, dated 18 December 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 Secretary-General, dated 18 December 2007.

<sup>6</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, with subsequent amendments (hereinafter, Criminal Code of Kosovo)); 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>7</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 results suggested technical errors rather than election fraud. Consequently, prosecutors opened and processed fewer cases than the number of ECAC files received.

<sup>8</sup> See the Letter from Judge Norbert Koster, Chief Commissioner, Election Complaints and Appeals Commission, to Hilmi Zhitija, Public Prosecutor of Kosovo.

<sup>9</sup> OSCE interview with Mr. Hilmi Zhitija, Public Prosecutor of Kosovo, 25 September 2008.

<sup>10</sup> See the OSCE *1990 Copenhagen Document*; see also the UN Human Rights Committee’s *General Comment 25*, interpreting the principles for democratic elections; see also the *Code of Good Practice in*

Court of Human Rights (ECtHR) itself, in the case-law on the right to free elections,<sup>11</sup> has repeatedly confirmed that free elections enshrine “a characteristic principle of an effective democracy and [are] accordingly of prime importance in the Convention system”<sup>12</sup> and that they are “crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law”.<sup>13</sup>

The European Court has also held that the right to free elections comprises two aspects: “the active aspect, i.e. the right to vote and the passive aspect, i.e. the right to stand as a candidate for election”.<sup>14</sup>

Both the active and passive aspects of the right to vote need to be carefully safeguarded and protected if elections are indeed to be free and fair. One of the ways this can be accomplished is through effective investigations into cases of electoral malfeasance, and through rigorous prosecutions of persons suspected of being involved in such offences.<sup>15</sup>

As with all crimes, prosecutors have a duty to use due diligence when they investigate and prosecute election-related criminal offences. This prosecutorial obligation is enshrined in both international documents and domestic law. Thus, the United Nations Guidelines on the Role of Prosecutors states that prosecutors must perform an active role in criminal proceedings, including the initiation of prosecution.<sup>16</sup> Similarly, the Kosovo Code of Criminal Procedure requires that “The 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>17</sup> The investigation should normally be completed within a period of six months, extendable only in cases involving complex and severe crimes.<sup>18</sup>

### **The handling of election fraud cases by Kosovo municipal public prosecutors**

As mentioned earlier, ECAC conducted its own preliminary investigations into the incidents of alleged electoral malfeasance and then transmitted its findings to the Office of the Public Prosecutor of Kosovo which then distributed the cases to the competent municipal public prosecution offices based on the territorial jurisdiction rule.

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*Electoral Matters* developed by the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe.

<sup>11</sup> The right to free elections is enshrined in Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>12</sup> See *Tănase and Chirtoacă v. Moldova*, ECtHR Judgment of 18 November 2008, paragraph 100.

<sup>13</sup> See *Yumak and Sadak v. Turkey*, ECtHR Grand Chamber Judgment of 08 July 2008, paragraph 105.

<sup>14</sup> See *Ždanoka v. Latvia*, ECtHR Grand Chamber Judgment of 16 March 2006, paragraphs 105 and 106.

<sup>15</sup> The *Code of Good Practice in Electoral Matters* developed by the Venice Commission – v. footnote 10 – provides in section 3.2 that authorities must prevent and penalise incidents of voter intimidation as well as any kind of election frauds.

<sup>16</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>17</sup> Article 220(1), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments (hereinafter, Kosovo Code of Criminal Procedure).

<sup>18</sup> Article 225, Kosovo Code of Criminal Procedure.

The OSCE is aware that municipal public prosecution offices examined 36 cases involving at least 57 persons who allegedly had actively manipulated the electoral process or at the very least acquiesced in misconduct.

To date, no trial has been held in any of the election fraud cases despite the fact that one-and-a-half years have elapsed since the alleged incidents took place. Overall, eight cases have been dismissed, 16 investigations are either stalled or still pending,<sup>19</sup> and 12 indictments have so far been confirmed and are currently awaiting trial. The stage of criminal proceedings varies considerably from one region to another.<sup>20</sup>

The Gjakovë/Đakovica Municipal Public Prosecution Office investigated ten election fraud cases. In early June 2008, prosecutors interrogated ten defendants and sent the case files to the police for further investigation but without specific instructions. After examining police reports, defendant statements, and “other documents from the case file”, in January 2009 prosecutors terminated investigations in all ten cases citing the lack of reasonable suspicion that the suspects committed election fraud.<sup>21</sup> In some cases prosecutors also made reference to the fact that the CEC’s official website contained no official decision contesting the results of elections in the Gjakovë/Đakovica municipality.

The Gjiilan/Gnjilane Municipal Public Prosecution Office investigated ten cases of election fraud suspected to have been committed in Viti/Vitina. Municipal prosecutors filed indictments against 20 suspects. Most indictments were based exclusively on ECAC’s findings without any other facts established through additional investigation, with the exception of one case in which the prosecutor interrogated the defendants prior to filing the indictment. Though largely unsupported by facts and evidence, indictments against 19 defendants were confirmed in June and July 2008. Because of serious court understaffing and a huge case overload at the Municipal Court in Viti/Vitina, trials still have not been scheduled in these cases – this despite the fact that the law requires the trial to start within one month at the latest from the confirmation of the indictment.<sup>22</sup>

The Prishtinë/Priština Municipal Public Prosecution Office investigated eight cases of election fraud. In seven of the eight cases, prosecutors sent the ECAC

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<sup>19</sup> While Article 225 of the Kosovo Code of Criminal Procedure prescribes a normal duration of 6 months for criminal investigations (with a possibility of extensions in complex cases), some investigations are still “pending” even after one-and-a-half years because prosecutors either did not conduct any investigations, or undertook some investigative actions (such as interrogations) without filing a Ruling to initiate investigations, as required under Article 221. Such circumvention of the duty to complete investigations within the legally prescribed period – a rather frequent practice, not limited to election fraud cases – is a separate matter of concern.

<sup>20</sup> Note that no election irregularities had been reported in the Mitrovica/Mitrovicë region.

<sup>21</sup> Article 224(1), Kosovo Code of Criminal Procedure. This ground was cited in each of the six cases.

<sup>22</sup> Article 319(2), Kosovo Code of Criminal Procedure.

case files to the police for further investigation without specific instructions. 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. Two cases have been dismissed, two indictments were confirmed by end-January 2009, and four are still pending investigation. The cases on which indictments were confirmed have not yet been scheduled for trial.

The Prizren Municipal Public Prosecution Office received 12 cases of suspected election fraud. Municipal prosecutors have not interrogated any of the alleged perpetrators nor have they conducted any significant investigations. According to prosecutors, some suspects could not be located by the police while some of the ECAC reports contain insufficient information to launch a criminal investigation. Some prosecutors said that they tried to obtain the address and other information on some suspects from the Department of Civil Administration, but to no avail.

The OSCE can confirm that municipal public prosecutors did face some challenges in handling these cases. Some of the reports which prosecutors received from ECAC contained limited information, describing only briefly the irregularities registered at one particular polling station. Only a few files contained formal complaints lodged by eyewitnesses, and there were also reports with no indication as to specific witnesses or direct perpetrators. Another investigative challenge facing prosecutors was the unavailability of ECAC members for more information and clarifications into ECAC's reports.<sup>23</sup> Also, the subject matter of election fraud itself is one which most municipal prosecutors had no prior experience in dealing with.

However, these investigative challenges are not insurmountable. ECAC reports are only the starting point in investigations, and prosecutors have the ultimate responsibility over criminal investigations. As such, they should vigorously investigate, and if the evidence permits, prosecute individuals suspected of electoral misconduct. Where there is a plausible allegation, item of information, or piece of evidence relevant to the identification of suspects, authorities are obliged under the law to effectively pursue further investigations with a view to an eventual successful prosecution of perpetrators. Investigations should normally be capable of establishing the cause of violations and lead to an identification of all those responsible with a view to holding them accountable.

It is clear that this obligation to conduct an effective investigation cannot be an absolute one in that many crimes remain unsolved despite reasonable efforts undertaken by law enforcement authorities. As such, the obligation to conduct an effective investigation is

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<sup>23</sup> The 2007 ECAC was dissolved in May 2008, and a new ECAC was established in August 2008 pursuant to the new Law on General Elections (*Official Gazette* no. 31 of 15 June 2008). As such, for a considerable time period municipal public prosecutors, despite repeated attempts, could not reach ECAC members to get more information on the election fraud cases. At the same time, some members of the former ECAC joined the new one, and as such they could have served as a source of information.

not one of result but one of means, and prosecutors and the police must ensure that they take all possible actions to competently and efficiently investigate election fraud, as they should do with any other crime.

The OSCE understands the practical challenges which prosecutors faced in some of these cases and is also aware of prosecutors' need to make operational choices and prioritise the investigation of other, more serious crimes. Nevertheless, it appears that some municipal public prosecutors have not done enough to discharge their obligation to conduct an effective investigation into the suspected election fraud.

Many ECAC reports contained specific names of individuals alleged to have been involved in election fraud or at least to have been present when and where the fraud was committed. Yet, in several regions there was no indication of any statements taken from relevant witnesses, including eyewitnesses and in some cases prosecutors even failed to interrogate suspects whose names were expressly provided in the ECAC reports.

The OSCE noted that in several cases prosecutors did not file a ruling to initiate investigations. They simply sent the file to the police (sometimes to the wrong unit, such as the Economic Crimes Police Unit), but most often without any specific instructions, which eventually resulted in the termination of the proceedings for lack of evidence. Some prosecutors advanced rather implausible excuses for not proceeding with their investigations. Such excuses included not being able to locate, for interrogation purposes, witnesses who in fact were employees in public municipal posts and who report to work every day. On the other hand, after conducting little or no investigations, some prosecutors charged suspects through indictments supported by little evidence. The final outcome of such prosecutions is rather uncertain.

All that indicates an apparent failure to effectively investigate and prosecute election fraud cases in some municipalities. This may amount to a breach of prosecutors' professional obligations and due diligence duties. It may also constitute a violation of international human rights standards, based upon which flagrant and serious deficiencies in the criminal investigation and prosecution of even less serious crimes, amount to a failure of authorities to fulfil their positive obligations to protect human rights.<sup>24</sup>

Effective investigation of election-related offences does not only ensure the accountability of those guilty of such crimes but also serves to deter similar misconduct in the future. Conversely, a failure to vigorously investigate and prosecute election fraud cases may encourage impunity and ultimately lead to a repetition of misconduct in subsequent elections. That may result once again in invalidation of ballots, delayed election results, or even a need to repeat elections, if frauds are committed on a wide scale. It should be borne in mind that any subversion of the electoral process is in effect a breach of public trust, which may weaken public confidence in the electoral process and hamper the development of democracy and the rule of law in Kosovo.

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<sup>24</sup> See *Blumberga v. Latvia*, ECtHR Judgment of 14 October 2008, paragraph 67.

## Conclusion

In light of the above, the OSCE re-affirms the recommendations made in its November 2008 Report.<sup>25</sup>

- Prosecutors should promptly and efficiently investigate alleged cases of election fraud using all available means. If there is enough supporting evidence, the cases should be vigorously prosecuted.
- When referring a case to the police for additional investigations, prosecutors should provide the police with specific instructions on the investigative actions that should be taken. Prosecutors should then supervise the police and ensure that it implements given orders effectively and in a timely fashion.
- The Kosovo Judicial Institute in co-operation with the Central Election Commission should provide training to judges and prosecutors on election law 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, and polling station committees must co-operate with prosecutors who investigate election fraud.

Furthermore, the OSCE also recommends that:

- The Central Election Commission should periodically request information from prosecutors on the progress in the investigation and prosecution of election fraud cases.
- EULEX prosecutors may wish to consider taking over cases of election fraud where Kosovo public prosecutors appear unwilling or unable to perform their duties and this unwillingness or inability may endanger the proper investigation or prosecution of said criminal offences.<sup>26</sup>

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<sup>25</sup> See the LSMS Monthly Report of October-November 2008.

<sup>26</sup> See Article 12 of the applied Law No. 03/L-053 On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, dated 3 June 2008.