



Monitoring Department

Legal System Monitoring Section

Monthly Report - August 2008

Understaffing of UNMIK Department of Justice and uncertainty regarding the deployment of the European Union Rule of Law Mission in Kosovo cause unnecessary delays in criminal proceedings and affect rights to liberty of detainees and to a trial within a reasonable time

The OSCE Mission in Kosovo (OSCE) is concerned that UNMIK Department of Justice understaffing and uncertainty regarding the deployment of the European Union Rule of Law Mission in Kosovo (EULEX) has resulted in significant delays in criminal proceedings. This negatively impacts the rights of defendants to a trial within a reasonable time and to liberty for defendants in detention on remand.

1. Background

Under UNMIK Regulation 2000/64, as amended,¹ “[f]or the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice” the prosecutor, accused or defense counsel may request the UNMIK Department of Justice for an assignment of international prosecutors or judges or a change of venue in criminal proceedings. Thus, many serious criminal cases, including those involving allegations of war crimes or interethnic violence, involve international prosecutors and judges. The UNMIK Department of Justice is currently handling 82 cases involving 198 defendants where an indictment has been filed.²

It was anticipated that after 15 June 2008 UNMIK Department of Justice would gradually transfer its competencies to another institution.³ In light of this development, on 21 April 2008 the UNMIK Department of Justice sent an internal email entitled “Clarification of Processing and Handling of Cases” instructing that judges shall “continue to process cases and assign judges to the next step of the proceedings in new and pending cases so long as the in-court proceedings, e.g. confirmation of the indictment, judgment, etc., can be completed no later than 14 June 2008.”⁴

It is now expected that with the reconfiguration of UNMIK,⁵ the Department of Justice will transfer some competencies, including executive authority in criminal cases,⁶ to EULEX.⁷ Although UNMIK held “discussions [with EULEX] on future

¹ UNMIK Regulation 2000/64, *On the Assignment of International Judges/Prosecutors and/or Change of Venue*, as amended by UNMIK Regulations 2001/34, 2005/50, 2006/60, and 2007/21.

² DOJ Ongoing Case Transition Report No. 15, 31 July 2008. This figure does not reflect cases at the pre-trial stage.

³ Initially, it was expected that EULEX would assume many of UNMIK’s competencies. However, to date this has not occurred.

⁴ Internal UNMIK Department of Justice e-mail of 21 April 2008.

⁵ See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/354, of 12 June 2008, paragraph 19.

⁶ See Council Joint Action 2008/124/CFSP, *On the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO*, 4 February 2008.

⁷ In its latest report to the Security Council, the UN Secretary-General stressed that since “UNMIK can no longer perform as effectively as in the past the vast majority of its tasks” it should “allow for the European Union to take on an increasing role in the rule of law sector” (Report of the Secretary-

cooperation”, the two sides still have not concluded an agreement on the transfer of authority over ongoing proceedings.⁸ Moreover, EULEX judges cannot assume authority over criminal cases yet, as they have not been “selected and appointed by the competent authority”, as required by the law establishing the jurisdiction of EULEX judges and prosecutors.⁹

However, in preparation for future transfer, international judges received instructions to hear only those proceedings which could be terminated by October 2008. New or lengthy cases would be left to be handled by EULEX.¹⁰

As a result of these changes, the UNMIK Department of Justice has continued to decrease its staffing levels and this has negatively affected the ability of judges to process cases. According to the latest UNMIK Department of Justice Ongoing Case Transition Report,¹¹ the UNMIK Department of Justice is currently staffed with nine international prosecutors (including the Acting Director of the Department of Justice) and 11 international judges. However, three judges departed in August 2008 and three judges are assigned to the Special Chamber of the Supreme Court of Kosovo for Kosovo Trust Agency-Related Matters. Thus, as of September 2008, only five international judges will handle criminal cases assigned to the UNMIK Department of Justice. Approximately one year ago (July 2007), the UNMIK Department of Justice employed 13 international prosecutors and 16 international judges.

2. Human rights concerns

The OSCE is concerned that the failure to schedule cases led to avoidable delays in criminal trials handled by international judges, and may violate the right of defendants held in detention on remand. Employment reductions of judges, prosecutors, and support staff have also reduced the speed by which courts can process cases.

a. The right to a trial within a reasonable time

According to international standards, everyone has the right to a trial within a reasonable time.¹² Public authorities have a duty to organize their legal systems to enable the courts to comply with the “reasonable time” requirement.¹³ The European Court of Human Rights also held that “a temporary backlog of business does not involve liability [...] provided that [the relevant authorities] take, with the requisite promptness, remedial action to deal with an exceptional situation.”¹⁴

General on the United Nations Interim Administration Mission in Kosovo, S/2008/458, 15 July 2008, paragraph 3).

⁸ See Minutes from the Security Council 5944th Meeting, 25 July 2008 (S/PV 5944 and press release SC/9407), available at <http://www.un.org/Depts/dhl/resguide/scact2008.htm>

⁹ Law 03/L-053, *On the Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo*, 13 March 2008, Section 1.

¹⁰ OSCE interview with a UNMIK Department of Justice official on 21 July 2008.

¹¹ Department of Justice Ongoing Case Transition Report No. 15, 31 July 2008.

¹² See Article 6(1), European Convention on Human Rights; Article 14(3)(c), International Covenant on Civil and Political Rights.

¹³ See e.g. European Court of Human Rights, *Eckle v. Germany*, 8130/78, Judgment, 15 July 1982, paragraph 92.

¹⁴ European Court of Human Rights, *Milasi v. Italy*, 10527/83, Judgment, 25 June 1987, paragraph 18.

The following cases serve as examples of delays:

In a case before the Prishtinë/Priština District Court, involving eight defendants charged with fraud,¹⁵ misuse of economic authorisations,¹⁶ and entering into harmful contracts,¹⁷ an international judge issued a ruling confirming the indictment on 8 January 2008. The appellate panel rejected an appeal against this ruling on 14 April 2008. However, the trial has not been scheduled since April 2008, despite the one-month deadline established by the law.¹⁸

In another case before the Prishtinë/Priština District Court involving charges for money laundering¹⁹, on 8 November 2007 an international judge confirmed an indictment against three defendants. On 15 January 2008, the international prosecutor filed a response to an appeal against the confirmation of the indictment. On 14 April 2008, the appellate panel rejected the appeal. However, as of August 2008, the main trial has not been scheduled, despite the one-month deadline established by the law.²⁰

Thus, since April 2008 when the internal email limiting the scheduling of case was sent, international judges have failed to schedule hearings in several cases falling under their jurisdiction. This has resulted in delays in criminal proceedings, impacting the right to a trial within a reasonable time. This is particularly troubling in cases involving serious crimes, and defendants subject to restrictive measures such as house detention or detention on remand.

b. The right to liberty

Kosovo law establishes deadlines for pre-trial detention, which must be initially approved²¹ and then periodically reviewed by a competent court.²² According to the European Court of Human Rights, in order to justify the continued detention on remand of a suspect, public authorities must not only show that the grounds for it continue to exist but also apply “special diligence” in the conduct of the proceedings.²³ Otherwise, detention becomes unlawful²⁴ and the person must be

¹⁵ Article 261(1), Provisional Criminal Code, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (Provisional Criminal Code).

¹⁶ *Id.*, Article 236(1)(2).

¹⁷ *Id.*, Article 237(2).

¹⁸ Article 319(2), Provisional Criminal Procedure Code, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 (Provisional Criminal Procedure Code). The presiding judge otherwise must inform the president of the court who will then, if necessary, take steps to schedule the main trial. In the Weekly Detention/Alternative Measures Report for the International Judicial Support Division dated 29 July 2008, this case was left to be handled by EULEX.

¹⁹ UNMIK Regulation 2004/2, *On the deterrence of money laundering and related criminal offences*, 5 February 2004, Section 10.

²⁰ Article 319(2), Provisional Criminal Procedure Code.

²¹ *Id.*, Article 212(4).

²² *Id.*, Article 284 and following.

²³ European Court of Human Rights, *Dobrev v. Bulgaria*, 55389/00, Judgement, 10 August 2006, paragraph 79.

²⁴ See Article 5(1)(c), European Convention on Human Rights.

released pending trial.²⁵ These guidelines apply not only to cases involving detention on remand, but also to those involving house detention.²⁶

The OSCE is aware that as of July 31 (the most recent information provided by the Department of Justice to the OSCE), 15 indictees were in detention on remand in connection to proceedings handled by international judges. The following cases serve as examples of prolonged detention of defendants without progress in their cases:

In a case before the Prishtinë/Priština District Court, involving a defendant accused of war crimes against the civilian population,²⁷ an international judge confirmed the indictment on 18 January 2008. Since then, there has been no further progress in the case. The main trial has not been scheduled, despite the one-month deadline foreseen in the law.²⁸ The defendant was initially detained on 16 August 2007, and has remained in house detention since 15 November 2007.

In another case before the Prishtinë/Priština District Court, a defendant has been in detention since 31 January 2008 on charges of abusing official position²⁹ and fraud in office.³⁰ The defendant is also indicted in a separate proceeding for misappropriation.³¹ The two indictments were confirmed on 13 February and 10 April 2008.³² However, since that time no progress has been made in the cases. The OSCE is also aware that in July 2008 the defendant began a hunger strike for 20 days, protesting against the undue delays in her case.

The failure of UNMIK Department of Justice judges to schedule hearings in cases involving detention on remand fails to show that “special diligence” is applied in these cases, and leads to the violation of the detainees’ right to liberty.

3. Recommendations

In light of the above, it is the position of the OSCE that:

- The Special Representative of the Secretary-General shall ensure that, as long as UNMIK retains executive competence over criminal cases, the UNMIK

²⁵ Id., Article 5(3).

²⁶ See Article 278(7), Provisional Criminal Procedure Code. Similarly, under the European Court of Human Rights case-law, house detention amounts to a deprivation of liberty and thus, any person placed under house arrest is entitled to the procedural guarantees enshrined in Article 5 of the European Convention of Human Rights (such as to be brought promptly before a judge to have his/her detention reviewed, and to have his case dealt with special diligence or be released pending trial). See *Vachev v. Bulgaria*, 42987/98, Judgment, of 08 July 2004, paragraph 64.

²⁷ See Article 142, Criminal Code of the Socialist Federal Republic of Yugoslavia, Official Gazette No. 44 of 8 October 1976.

²⁸ Article 319(2), Provisional Criminal Procedure Code. The presiding judge otherwise must inform the president of the court who will then, if necessary, take steps to schedule the main trial.

²⁹ Article 339, Provisional Criminal Code.

³⁰ Id., Article 341.

³¹ Id., Article 257.

³² The court issued a decision confirming the second indictment on 24 April 2008.

Department of Justice is adequately staffed with international judges, prosecutors, and support staff.

- The UNMIK Department of Justice must hear cases involving defendants in detention on remand as a matter of priority and ensure that criminal cases are not needlessly delayed.