



Organization for Security and Co-operation in Europe

MONITORING DEPARTMENT

Legal System Monitoring Section

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Reactions to Kosovo's declaration of independence severely impact the justice system in Mitrovicë/Mitrovica and negatively affect courts in other regions, resulting in human rights violations

I. The situation in Mitrovicë/Mitrovica

A. Background

Kosovo's 17 February 2008 declaration of independence brought turmoil to the Mitrovicë/Mitrovica region. The situation severely impacts the functioning of the region's courts, leading to serious human rights violations. These relate to the right of access to justice, the right to a trial within a reasonable time, the right to liberty, and the right to a tribunal established by law.

The reactions of some Kosovo Serbs in the Mitrovicë/Mitrovica region against Kosovo's declaration of independence primarily affected four courts: the Mitrovicë/Mitrovica District Court and Municipal Court, the Leposavić/Leposaviq Municipal Court, and the Zubin Potok Municipal Court. It also impacted the three Minor Offences Courts in the Mitrovicë/Mitrovica region, and the offices of the district and municipal prosecutors.

With respect to the institutions based in the Mitrovicë/Mitrovica court complex,¹ none have functioned since 20 February 2008. Starting from 21 February 2008, a group of 50 to 200 protestors, among them employees from the pre-1999 justice system, gathered outside the court complex on weekday mornings for up to three hours demanding entry to the building to return it to the Serbian court system. International police secured the court building, not allowing anyone access until the protestors forcibly entered the premises on 14 March 2008. On 17 March 2008, in an operation supported by KFOR, UNMIK police entered the building and arrested the occupants. Serious civil unrest followed.

To date, neither the court nor the prosecution offices have been able to resume their work.² Due to continuing political tensions, it is questionable if they will be able to do so in the near future.³

With respect to other northern municipalities, on 22 February 2008 the Serbian Ministry of Justice annexed the Leposavić/Leposaviq and Zubin Potok Municipal and Minor Offences Courts. The staff of these UNMIK courts transferred to the Serbian justice system and joined the staff of the parallel courts. The Serbian Ministry of Justice's plan for addressing the UNMIK court caseload is unclear.

¹ Mitrovicë/Mitrovica District Court, Municipal Court, and Minor Offences Court.

² Criminal trials continued only at Vushtrri/Vučitrn and Skenderaj/Srbica Municipal Courts. However, prosecutors face significant difficulties as they cannot access their prosecution files and evidence, but must rely on the court files.

³ On 25 March 2008, the Mitrovicë/ Mitrovica District Court President submitted a letter to Kosovo government officials, the Kosovo Judicial Council, the Special Representative of the Secretary General, the KFOR commander, the UNMIK police commissioner, and the head of Department of Justice, asking for sufficient security to allow the courts to resume their functions in the complex in the north.

B. Human rights concerns

1) Right of access to justice. The European Court of Human Rights has held that “everyone [has] the right to have any claim relating to his civil rights and obligations brought before a court or tribunal,”⁴ and that “hindrance, even of a temporary character, may contravene the Convention.”⁵

Since 20 February 2008, no one (judges, prosecutors, court employees, or parties) has been able to physically access the Mitrovicë/Mitrovica courts. Thus, residents of Mitrovicë/Mitrovica do not have access to judicial remedies in criminal cases (for instance, they cannot file appeals against rulings or verdicts) and in civil cases (they cannot file any claim or application). Moreover, legally, it is unclear whether deadlines in civil and criminal proceedings continue to run for the parties while the courts are not operational.

2) Right to a trial within a reasonable time. According to the European Convention on Human Rights, everyone has a right to a trial within a reasonable time.⁶ The court has found in a case that “public unrest” in the region where the trial was held was a valid justification for delays in the proceedings,⁷ but only insofar as public authorities took steps to transfer the caseload to another territorial jurisdiction. In fact, public authorities have a duty to organize their legal systems to enable the courts to comply with the “reasonable time” requirement.⁸

Since the district and municipal court judges and prosecutors have been unable to enter their offices since 20 February 2008, no criminal trials have been held in the entire region and no civil trials have been held in the Mitrovicë/Mitrovica Municipal Court. The suspension of court activities in Mitrovicë/Mitrovica inevitably leads to delays in civil and criminal proceedings with consequent violations of the right to a trial within a reasonable time.⁹ This is especially troubling in cases that need special urgency, such as applications for protection orders in domestic violence cases or criminal cases against suspects who are in detention on remand.¹⁰

⁴ European Court of Human Rights, *Golder v. United Kingdom*, 21 February 1975, paragraph 36.

⁵ European Court of Human Rights, *Palaoro v. Austria*, 16718/90, judgment, 23 October 1995, paragraph 41.

⁶ Article 6(1), European Convention on Human Rights.

⁷ See European Court of Human Rights, *Foti v. Italy*, 7604/76, 7719/76, 7781/77 and 7913/77, judgment, 10 December 1982, paragraph 61.

⁸ See, e.g., European Court of Human Rights, *Eckle v. Germany*, 8130/78, Judgment, 15 July 1982, paragraph 92. In *Milasi v. Italy*, the Court moreover held that “a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation” (European Court of Human Rights, *Milasi v. Italy*, 10527/83, judgment, 25 June 1987, paragraph 18).

⁹ These delays also affect Minor Offences Courts. Of particular concern, persons whose driving license or passport were temporarily confiscated to ensure payment of a fine cannot obtain these documents. Even if they wanted to pay the fine, they could not do so, since they have no access to the court. Minor offences judges do not have access to their court, and thus could not return these documents to the rightful owners. In fact, some people who came from abroad to celebrate Kosovo’s declaration of independence, and whose passports were confiscated, are unable to return to their countries of residence.

¹⁰ Domestic law establishes that courts should act with special urgency when the suspect is held in detention (see Article 463(4), Criminal Procedure Code).

3) Right to liberty. Kosovo law establishes deadlines for pre-trial detention, which must be initially validated¹¹ and then periodically reviewed by a competent court.¹² 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.¹³ Otherwise, detention becomes unlawful,¹⁴ and the person must be released pending trial.¹⁵

From 20 until 27 February 2008, the Mitrovicë/Mitrovica Municipal and District Courts could not hear any detention-related matter. The OSCE has information that during that time at least two suspects were released from detention centres because the detention order against them expired.¹⁶

The OSCE welcomes that, as of 27 February 2008, the Mitrovicë/Mitrovica District and Municipal Courts have conducted detention hearings¹⁷ using the Vushtrri/Vučitrn Municipal Court facilities.¹⁸ However, the OSCE notes that this interim solution may not be sufficient to avoid violating the rights of detained persons.¹⁹ In fact, public authorities must ensure that detention on remand of a person shall last no longer than necessary.²⁰ In furtherance of this obligation, authorities must take positive steps to re-organize their systems in a way that proceedings (including investigations) are conducted without undue delay.²¹ Of concern, the OSCE has already monitored at least one case where the Mitrovicë/Mitrovica District Court extended detention on remand against a defendant *inter alia* because the prosecutor, due to the current situation, could not continue investigations against the suspect.²²

4) Right to a tribunal established by law. Courts other than UNMIK courts in Kosovo are illegal.²³ Establishing Serbian courts in some northern municipalities

¹¹ Article 212(4), Criminal Procedure Code.

¹² Article 284 and following, Criminal Procedure Code.

¹³ European Court of Human Rights, *Dobrev v. Bulgaria*, 55389/00, judgement, of 10 August 2006, paragraph 79.

¹⁴ See Article 5(1)(c), European Convention on Human Rights.

¹⁵ See Article 5(3), European Convention on Human Rights.

¹⁶ OSCE interview with a defense counsel, 20 March 2008. The two detainees, suspected of kidnapping (Article 159(1), Criminal Code) were released on 22 February 2008.

¹⁷ This includes both hearings within 72 hours of the initial arrest and hearings to decide on the extension of detention orders.

¹⁸ The OSCE Legal System Monitoring Section is also aware that, in order to avoid the release of people currently held in detention on remand, some Mitrovicë/Mitrovica judges conducted hearings in the Lipjan/Lipljane detention centre.

¹⁹ This solution moreover poses questions of access of Kosovo Serbs (including defence counsel) to this court, as they may not be able or willing to travel freely to that court.

²⁰ The European Court of Human Rights has held that “Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty” (European Court of Human Rights, *Labita v. Italy*, 26772/95, judgment, 6 April 2000, paragraph 152).

²¹ *Ibid.*, paragraph 2.

²² On 12 March 2008, the Mitrovicë/Mitrovica District Court extended detention on remand against a defendant suspected of grave cases of theft in nature of robbery or robbery (Article 256(1), Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation 2003/25 of 6 July 2003), and robbery (Article 255(1), Criminal Code). Among the grounds for extending the detention, the court considered the fact that several witnesses could not be heard, since “as of 17 February 2008 the work in the District Prosecutor cannot be performed regularly.”

²³ See OSCE Mission in Kosovo, *Parallel Structures in Kosovo*, October 2006.

contravenes UN Security Council Resolution 1244, UNMIK Regulation 1999/1,²⁴ and the Constitutional Framework.²⁵

Moreover, the entry into function of such tribunals raises doubts as to the compliance with the “tribunal established by law” requirement in the European Convention on Human Rights.²⁶ According to the Basic Principles on the Independence of the Judiciary, “everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures.”²⁷ The right to a hearing before a competent tribunal requires that the tribunal has been given that power by law. On the contrary, previously-legal UNMIK courts in Leposavić/Leposaviq and Zubin Potok which were annexed by the Serbian Ministry of Justice on 22 February 2008 are no longer operating according to the law applicable in Kosovo, and are therefore illegitimate.

Finally, the functioning of courts other than UNMIK courts creates legal uncertainty. If such courts issue criminal judgments, this may violate the principle of legality²⁸ (as the courts may punish offenders according to a law which is not applicable in Kosovo) and possible issue conflicting criminal judgments and/or violations of the *ne bis in idem* principle.²⁹ In addition, parallel courts can lead to duplicative litigation, forum shopping, and conflicting judgments in civil cases.

II. Situation of the justice system in other regions

The 17 February declaration of independence also affected some courts outside the Mitrovicë/Mitrovica region.

At the Prishtinë/Priština Municipal Court, the two Kosovo Serb judges did not attend work for a week after 17 February 2008. They resumed their duties as of 25 February 2008. The Gračanica/Gračanicë branch of the Prishtinë/Priština Municipal Court did not operate from 18 to 22 February 2008, and resumed its regular functions only on 25 February 2008. In the Lipjan/Lipljane Municipal Court, two Kosovo Serb lay judges did not work after 18 February 2008. Similarly, in the Gjilan/Gnjilane Municipal and District Courts, the two Kosovo Serb judges and the one Kosovo Serb prosecutor have not reported to work since 18 February 2008. The Štrpce/Shtërpçë branch of the Ferizaj/Uroševac Municipal Court has only been holding urgent trials since 18 February 2008.³⁰

²⁴ UNMIK Regulation 1999/1, *On the Authority of the Interim Administration in Kosovo*, 25 July 1999.

²⁵ See Art. 9(4) of UNMIK Regulation No. 2001/9, *On a Constitutional Framework for Provisional Self-Government in Kosovo*, 15 May 2001.

²⁶ Article 6(1) European Convention on Human Rights.

²⁷ Principle 5, Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, which stipulates that “tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

²⁸ Article 2, Criminal Code.

²⁹ See Article 4 of Protocol 7 of the European Convention on Human Rights, and Article 14(7) of the International Covenant on Civil and Political Rights.

³⁰ Of note, all the judges in this court are of Kosovo Albanian ethnicity.

The OSCE is concerned that the situation in Gjilan/Gnjilane and Štrpce/Shtërpçë may cause undue delays in court proceedings. For example, two property cases scheduled for 7 March 2008 and 10 March 2008 assigned to a Kosovo Serb judge at Gjilan/Gnjilane Municipal Court were postponed to an undetermined date, due to the judge's absence.³¹ Of special concern are cases including requests for temporary measures.³²

The OSCE is also aware that Kosovo Serb employees in some court liaison offices (including Gračanica/Graçanicë, Velika Hoča/Hoça e Madhe, Novobërdë/Novo Brdo, Vrbovc/Verbovac, and Shillovë/Šilovo) ceased working after 17 February 2008. Consequently, the offices ceased operating. This hinders access of Kosovo Serbs to justice, since the function of court liaison offices is to facilitate physical access to courts for non-Kosovo Albanian community members.

Conclusion:

In summary, the takeover or non-functioning of UNMIK courts in northern Mitrovicë/Mitrovica and other parts of Kosovo after the declaration of independence in Kosovo has had severe consequences for the Kosovo justice system. It has led to violations of human rights such as those related to the right to a tribunal established by law, a trial within reasonable time, liberty, and access to justice.

³¹ In two other cases before the Municipal Court in Gjilan/Gnjilane, assigned to the Kosovo Serb Judge, the President instead held the sessions because he had no other cases scheduled at that time.

³² For example, in an alimony case assigned to a Kosovo Serb judge at Gjilan/Gnjilane Municipal Court, the plaintiff requested temporary measures on 10 February 2008. To date, the court has not dealt with this case.