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Failure to secure the presence of the defendant at the trial violates domestic law and international human rights standards

The OSCE Mission in Kosovo (OSCE) is concerned about monitored cases where courts conducted criminal proceedings in the absence of the defendant, thus violating the rights to be present at trial and to a defence.

The right of the accused to be present at the trial is fundamental to the fairness of the proceedings. The International Covenant on Civil and Political Rights (ICCPR) prescribes that “[i]n the determination of any criminal charge against him, everyone shall be entitled [...] to be tried in his presence.”¹ Although the European Convention on Human Rights (ECHR)² does not expressly mention a person’s right to participate in his/her trial, the European Court of Human Rights (ECtHR) stressed that the existence of this right “is shown by the object and purpose of the Article [Art. 6] taken as a whole.”³

Attendance at the proceedings is also essential to the right to defend oneself.⁴ According to the ECtHR, Article 6 of the ECHR “guarantee[s] to ‘everyone charged with a criminal offence’ the right ‘to defend himself in person,’ ‘to examine or have examined witnesses’[...] and it is difficult to see how he could exercise these rights without being present.”⁵

These principles have also been incorporated into domestic law. According to the PCPCK,⁶ “[t]he defendant shall have the right to defend himself or herself in person or through legal assistance by a member of the bar of his or her own choice.”⁷

Despite these clear legal requirements, the OSCE observed cases where judicial authorities held criminal hearings in the absence of the defendant.

In a case before a Minor Offences Court, thirteen defendants were charged with disturbing public peace and order.⁸ At the trial sessions of 18, 19, 21 and 26 June 2007, the judge called the defendants to testify one at a time. The defendants, who

¹ Art. 14(3)(d), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.

² European Convention on Human Rights (ECHR), 4 November 1950.

³ *Brozicek v. Italy*, European Court of Human Rights (ECtHR), 11152/84, judgment, 19 December 1989, para. 45.

⁴ See Art. 6(3)(c), ECHR and Art. 14(3)(d), ICCPR.

⁵ *Colozza v. Italy*, ECtHR, 9024/80, judgment, 12 February 1985, para. 27.

⁶ Provisional Criminal Procedure Code of Kosovo (PCPCK), promulgated by UNMIK Regulation No. 2003/26, 6 July 2003.

⁷ Art. 12, PCPCK.

⁸ Art. 18(5) and Art. 19(1), Law on public peace and order, Official Gazette of the Socialist Autonomous Province of Kosovo, no. 13/81. Despite the domestic legal classification of the offence, this offence can be considered to be “criminal in nature” (see *Engel and others v. The Netherlands*, ECtHR, 5100/71, judgment, 8 June 1976, para.82) since it contains a prohibition applicable to all citizens and since it can lead to imprisonment of up to two months (in fact, one of the defendants was eventually sentenced to 30 days of imprisonment, and another one to 20 days). Therefore, a person tried for this offence should receive the guarantees of Art. 6 of the ECHR in minor offences proceedings (see the OSCE Review of the Criminal Justice System in Kosovo, December 2006, pages 20-22).

were not represented by defence counsel, were asked to leave the room afterwards. None of them therefore was present when several witnesses were heard. This was partly due to the fact that the judge's office, in which the trial took place, was so small that only four people, besides the judge, could fit at once.⁹

The failure of the minor offences judge to ensure the presence of the defendants violated their right to a fair trial, in that it prevented them from following the proceedings,¹⁰ presenting their defence, and cross-examining witnesses.

In another case involving several allegations of theft¹¹ before the Prizren Municipal Court, on 22 November 2006 two co-defendants were brought before the pre-trial judge for the detention hearing.¹² Approximately ten minutes after the hearing started, a third co-accused was brought in the courtroom. Instead of beginning the hearing again, the pre-trial judge continued with the proceedings.

In this second case, the absence of one of the accused from the initial part of the hearing prevented him from being informed of his rights¹³ and of the accusations against him.¹⁴ Moreover, his defence counsel could not hear the prosecutor's reasons for detention on remand,¹⁵ and was not therefore in a position to adequately defend his client.

Consequently, the OSCE recommends the following:

- Judges should use all available means to ensure the presence of the accused at all stages of the criminal proceedings. Such means should include: (a) holding hearings in courtrooms of appropriate size; (b) adjourning hearings if the defendant is not present; and (c) re-starting hearings if more defendants appear when the hearing has already started.
- Defence counsel, if present, should object to holding hearings in the absence of their client and request the judge to ensure the defendant's presence.
- Defence counsel should challenge decisions issued after trials where the defendant is not present, relying on the grounds provided for by Art. 403(1) no. 3, PCPCK.

⁹ Of note, contrary to the trial minutes, the defendants were not informed of their right to appoint a defence counsel. This also violates the ICCPR, according to which everyone has also the right "to defend himself in person or through legal assistance of his own choosing [and] to be informed, if he does not have legal assistance, of this right" (Art. 14(3)(d), ICCPR).

¹⁰ For the accused to be able to defend him/herself, he/she must have the right to "participate effectively" in the trial (see *Stanford v. United Kingdom*, ECtHR, 16757/90, judgment, 23 February 1994, para. 26).

¹¹ Art. 252, Provisional Criminal Code of Kosovo (PCCK), promulgated by UNMIK Regulation No. 2003/25 On the Provisional Criminal Code of Kosovo, 6 July 2003.

¹² Art. 282, PCPCK.

¹³ See Art. 282(2) and Art. 214(1), PCPCK.

¹⁴ See Art. 214(1), no. 1 and Art. 282(5), PCPCK.

¹⁵ See Art. 282(5), PCPCK.

Incorrect determination of the value of the matter in controversy affects the rights to a tribunal established by law and to appeal

The OSCE has observed several civil proceedings in which courts failed to correctly determine the value of the matter in controversy. This affects the rights to a tribunal established by law and to appeal.

The ECHR guarantees the right to a fair trial before an “independent and impartial tribunal established by law.”¹⁶ In interpreting this right, the ECtHR held that a court should be properly composed “in accordance with law” and noted that a violation occurs when a tribunal does not function according to applicable procedural law.¹⁷ Furthermore, the ECtHR held that the right to a fair trial, of which the right to access to court forms an important part, also applies in appeal proceedings if domestic law provides for a right to appeal.¹⁸

According to the Law on Contested Procedure (LCP),¹⁹ the composition of the trial panel as well as the right to appeal before the Supreme Court depends on the value of the claim. An appeal before the Supreme Court is only allowed in certain property disputes if the value of the dispute indicated in the claim exceeds 818,07 EUR.²⁰ Similarly, a single judge adjudicates disputes on property claims if the value does not exceed 818,07 EUR. If the value exceeds this amount, the court is composed of one judge and two lay judges.²¹

The determination of the value of the matter in controversy is described in detail in Articles 35 to 40 of the LCP. Generally, if the claim asks for an amount of money, this amount will be relevant in determining the value of the matter in controversy without interest rates, trial costs, contracted penalties and other secondary claims. If the claim does not ask for an amount of money, the value of the matter in controversy indicated by the plaintiff in the statement of claims shall be taken as relevant. However, if “[t]he plaintiff has assessed the value of the dispute obviously too high or too low, thereby causing uncertainty about [...] the composition of the court or right to revision, the court shall quickly and in an appropriate manner check the accuracy of the quoted value at the

¹⁶ Art. 6(1), ECHR.

¹⁷ *Zand v. Austria*, ECtHR, 7360/76, Commission Report, 12 October 1978.

¹⁸ *Tolstoy Miloslavski v. the United Kingdom*, ECtHR, 18139/91, judgment, 23 June 1995, para. 59.

¹⁹ Law on Contested Procedure (LCP), Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 27/90, and 35/91.

²⁰ Art. 382, LCP; Section 2(i)(j), UNMIK Administrative Direction No. 2001/10 implementing UNMIK Regulation No. 1999/4 On the Currency Permitted to be Used in Kosovo, 21 June 2001; and Section 3, UNMIK Administrative Direction No. 2001/24 amending UNMIK Administrative Direction No. 1999/2 implementing UNMIK Regulation No. 1999/4 On the Currency Permitted to be Used in Kosovo, 21 December 2001.

²¹ Art. 42, 43, LCP; Section 2 (i) (a), UNMIK Administrative Direction No. 2001/10, 21 June 2001, and Section 3, UNMIK Administrative Direction No. 2001/24, 21 December 2001.

preliminary hearing at the latest, or if the preliminary hearing has not been held, at trial before entering into argumentation on the principal issue.”²²

Despite these clear provisions, the OSCE has observed a number of civil proceedings where parties and courts failed to correctly assess the value of the matter in controversy. The following cases serve as examples:

In contesting proceedings before the Municipal Court in Prizren dated 9 May 2007, the plaintiff requested to be recognized as the owner of a certain agricultural land comprising 64 areas and indicated the value of the matter in controversy as 25 EUR. Although the value of the property, and thus the value of the disputed matter, is obviously much higher than 25 EUR and most probably higher than 818,07 EUR, the court failed to check the accuracy of the quoted value in the preparatory hearing on 23 May 2007. All main sessions²³ were held by a single judge.

In contesting proceedings before the Mitrovicë/Mitrovica Municipal Court dated 26 December 2006, the plaintiff asked for confirmation of ownership of a property which he had bought for 8.000 EUR. The claim, however, stated that the value of the matter in controversy would be 250 EUR. The court failed to check the accuracy of the value in the first session. Only a single judge presided over the next session on 21 February 2007.²⁴

In a claim before the Viti/Vitina Municipal Court dated 17 September 2002, the plaintiff requested to be recognized as owner of half of a property which her husband had purchased for 40.000 DM. Despite this high value of the disputed matter, the court in its judgment dated 10 April 2004 incorrectly determined the value of the disputed matter to be 200 EUR, and approved the claim. The defendant’s appeal before the Gjilan/Gnjilane District Court was refused as ungrounded. On 18 October 2005, the Supreme Court rejected the defendant’s further appeal, because the value of the claim was only 200 EUR according to the first instance court judgment.

In all cases, the court failed to correctly determine the value of the matter in controversy. This not only violates domestic law, but also the right to a tribunal established by law as recognized under international human rights standards. In the first two cases, the failure of the court to check the accuracy of the plaintiff’s claim of the value affected the right of the defendant to a tribunal established by law. In the third case, the parties could not exercise their right to appeal to the Supreme Court foreseen by the LCP.

Consequently, the OSCE recommends that:

²² Art. 40, LCP.

²³ The sessions took place on 7 and 19 June 2007.

²⁴ Of note, the minutes of this session indicate the presence of lay judges. Similarly, the presence of lay judges was recorded in the minutes for the first session of 11 January 2007.

- Courts should check the accuracy of the value of the matter in controversy indicated by the plaintiff in the statements of claim and should determine the value according to the law.
- Lawyers should follow the law when indicating the value of the matter in controversy.