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PREPARATORY PROCEEDINGS IN CONTESTED CIVIL CASES

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Preparatory proceedings in contested civil cases

The Organization for Security and Co-operation in Europe (OSCE) is concerned that the failure of courts in Kosovo to conduct proper preparatory proceedings in contested civil cases may violate the legal framework in Kosovo and international human rights standards. The OSCE has observed that although obliged by the legal framework in Kosovo, in contested civil proceedings, courts frequently do not send a copy of the claim to the respondent for reply prior to holding the first session. In other cases, courts do not properly use preparatory proceedings to ascertain all the requirements necessary for holding the session. At times, courts hold preparatory sessions even when the conditions to hold these sessions are not met. These failures by courts to actively manage contested civil proceedings may negatively impact the protection of rights implicit in the right to a fair trial, including the right to an adversarial trial and the right to trial within a reasonable time. Furthermore, properly conducting preparatory proceedings contributes to more efficient trial management, less waste of the already overburdened resources of the Kosovo judiciary and the avoidance of undue delays.[1]

The applied law on contested procedure[2] sets forth clear guidelines for the steps that courts must take after receipt of the claim. First, the court sends the charges jointly with the official documents to the respondent[3] for a reply within fifteen (15) days when it was submitted to the court.[4] The respondent then has 15 days from the time that the charges and all official documents are submitted to respond in writing.[5] The court is also obliged to inform the respondent with regard to delivering summons and complaints about the deadline for response to the claim, and the consequences if the deadline is not met.[6] In the answer to the claim, the respondent should state "any

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1 The Council of Europe's Committee of Ministers has stated that "[n]ormally, the proceedings should consist of not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment. The court should ensure that all steps necessary for the second hearing are taken in good time and, in principle, no adjournment should be allowed except when new facts appear or in other exceptional and important circumstances." Principle 1, Council of Europe Committee of Ministers Recommendation No. R(84)5, *On the Principles of Civil Procedure Designed to Improve the Functioning of Justice*, adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies.

2 Law No. 03/L-006 on Contested Procedure, Kosovo Official Gazette, 20 September 2008 (2008 law on contested procedure), which courts in Kosovo began applying on 6 October 2008. See also Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982 of 12 February 1982, with amendments from 1998 (1982 law on contested procedure). Many provisions in the 2008 law on contested procedure remain substantially similar to those in the 1982 law on contested procedure.

3 The English translation of the 2008 law on contested procedure incorrectly translates the Albanian term "i padituri" as "accused" rather than as "respondent".

4 Article 394, 2008 law on contested procedure. The court simultaneously "initiates preparations for the main hearing" as soon as it receives the charges (Article 386). See Articles 386-393 for other steps that the court must take in preparation for the main hearing.

5 Article 395(1), 2008 law on contested procedure.

6 Article 395(2), 2008 law on contested procedure. When the court sends the claim to the respondent, it is obliged to inform him or her of the content to be submitted in answer to the charges, as well as of the procedural consequences of the failure to submit a reply to the claim. See also Article 123(4) of the 2008 law on contested procedure: "[t]he court through the summons informs the parties and other participants on the legal consequences from failing to take part in the procedure." Further, if "litigants, intercessors, legal representatives or authorized representatives continuously misuse the court orders, fail to offer information under the mandate in this or any other law in force, or fails to

procedural inconvenience," his or her response to the claim (acceptance or denial), and the requisite personal data.[7] In the answer the respondent, if he or she contests the claim, should further "state all facts and present all evidence that his/her claims can be proven."[8]

No matter what other procedural disposition the court accords to the claim after its submission, it must always send the claim to the respondent prior to the latter's appearance at any type of hearing. However, the OSCE is concerned that courts in Kosovo may sometimes fail to adequately safeguard the parties' right to an adversarial trial when the opportunity to view the claim in contested civil proceedings is not provided prior to the first court session. The case below serves as an example:

> On 9 February 2010, one of the district courts in Kosovo conducted a reconciliation session in a dissolution of marriage case.[9] Both parties were regularly summoned and both attended the reconciliation session. The reconciliation session was immediately followed by the main hearing (including evidentiary procedure) and issuance of a judgment, all in the same session. A copy of the claim was not delivered to the respondent until the start of the reconciliation session, and no information was provided regarding the right, or procedure, to submit an answer to the claim.[10]

The right to an adversarial trial flows directly from the right to a fair trial guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR). It means "in principle the opportunity for the parties to a criminal or civil trial to have knowledge of, and comment on all evidence adduced or observations filed [. . .] with a view to influencing the court's decision".[11] That the material may be on file at the court, accessible to the party does not constitute an adequate safeguard of the right to an adversarial trial.[12] Rather, it is up to the court to inform the applicant of the material on file and of his or her right to comment.[13] Parties must be provided with sufficient information to enable them to participate properly in the proceedings.[14]

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attend respective sessions, with the aim of delaying the proceeding of a case, the court may issue monetary fines or apply other measures provided for by this law." Article 10(3), *id*.

[7] Article 396(1), 2008 law on contested procedure. See Article 99(2), *id*.: "Submission must be comprehensible and must contain everything necessary for it to be acted upon. In particular, it should contain the following: the name of the court, the first name and the family name (the name of the legal person) the permanent or temporary residence (headquarters of the legal person) of the parties, their legal representatives and authorized representatives, if the parties have them, the disputed facility, the content of the statement, and the signature of the claimant."

[8] Article 396(2), 2008 law on contested procedure.

[9] See Articles 76-83 of Law No. 2004/32, Family Law of Kosovo, as promulgated by UNMIK Regulation 2006/7 of 16 February 2006 (Family Law). As per Article 349 of the Family Law, the law on contested procedure applies to marital litigation or court disputes among family members, unless the Family Law itself provides otherwise.

[10] Several court officials informed OSCE monitors that in some regions it is not the practice of the court in dissolution of marriage cases to send the claim to the opposing party prior to the reconciliation session, nor to attach it to the summons for the same.

[11] *Vermeulen v. Belgium*, European Court of Human Rights (ECtHR) Judgment, 22 January 1996, paragraph 33.

[12] *Göç v. Turkey*, ECtHR Judgment, 11 July 2002, paragraph 57.

[13] *Id*.

[14] *H.A.L. v. Finland*, ECtHR Judgment, 7 July 2004, paragraph 51.

Once the respondent has submitted an answer, the burden is once again on the court to take further action. If the answer is "incomprehensible and incomplete"[15], or if it decides that the answer "is not sufficient or that it is unclear"[16], the court may request the party to make corrections.[17] If, after receipt of the answer, the court decides that "there is contentious issue [of fact], and that there are no obstacles to give a just ruling", then it can bring an order that it accepts the claims with no court session.[18] The court convenes the preparatory session after it has received an answer to the claim.[19] If the respondent does not provide an answer and the court does not wish to compel one, then the court convenes the preparatory session after the deadline for submission of the answer has passed.[20] The court should schedule the preparatory session after consultation with the parties, if possible.[21] As a rule, the session should be held within 30 days of the court's receipt of the answer.[22]

The preparatory session is obligatory, except in cases that the court deems non-contentious after receiving the answer from the respondent, or in cases where the court decides one is not needed because the case is "not complicated."[23] Furthermore, if the respondent fails to submit an answer to the claim within the time period prescribed by law, the court may issue a form of default judgment called a "judgment based on non-compliance".[24] If the respondent does not respond to the claim, and the conditions for issuing a judgment are not fulfilled, the court should convene the preparatory session after the deadline for response to the claim has passed.[25] In cases when the claim is sent to the respondent along with the invitation for the preparatory session (rather than before the scheduling of the preparatory session) and the respondent does not attend the preparatory session, the court may, under certain circumstances, issue another type of default judgment called a "judgment due to absence"[26]. Courts should always clearly inform parties of the potential legal consequences that may result from the failure to reply to the claim.[27]

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15 Article 102(1), 2008 law on contested procedure.

16 Article 397, 2008 law on contested procedure.

17 Article 397, referring to Article 102, 2008 law on contested procedure.

18 Article 398, 2008 law on contested procedure.

19 Article 400(1), 2008 law on contested procedure.

20 Article 400(2), 2008 law on contested procedure.

21 Article 400(3), 2008 law on contested procedure.

22 Article 400(4), 2008 law on contested procedure. Similarly, the main hearing should be held within 30 days of the end of the preparatory session. Article 420(2), 2008 law on contested procedure.

23 Article 401, 2008 law on contested procedure.

24 "Default judgment" is defined as "[a] judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim." *Black's Law Dictionary*, 8th edition (United States, Thomson West, 2004), page 449. The court may issue a judgment based on non-compliance if: (a) the claim and summons to reply to the claim have been appropriately served to the defendant; (b) if the claim is founded on evidence provided in the claim; and (c) if the facts that support the claim are not in contradiction with the evidence from the claimant or widely known evidence. See Article 150(1)(a)-(c), 2008 law on contested procedure.

25 Article 400(2), 2008 law on contested procedure.

26 Article 151(1), 2008 law on contested procedure permits the issuance of such decision "with proposal from the plaintiff or in accordance with the official task [. . .] if these conditions are met: (a) if the accused was invited regularly to the session; (b) if the accused never contested the request for charges through a preliminary pre-note if the charged party didn't oppose it; (c) if the depth of the request for charges is based on facts shown in the charge; (d) if the facts on which the charges are based are not contradictory to the existing proofs presented by the plaintiff or other facts known worldwide; (e) if there are no circumstantial notes from which it can be determined that the charged party was stopped due to justified reasons no tot [sic] attend the session."

27 As per *supra* at note 5.

The preparatory session as foreseen by the 2008 law on contested procedure is an important tool which, if used correctly by courts in Kosovo, could increase judicial efficiency and result in less workload for the already overburdened judicial resources in Kosovo.[28] Preparatory sessions should be used to help avoid unnecessary delays during the development of the proceedings.[29] The primary function of the preparatory session is to discuss "propositions given by the parties involved and about the facts that their propositions are based upon."[30] Holding the preparatory session permits courts to determine "what will be discussed, [and] which facts will be considered in the main hearing session."[31]

However, the OSCE has observed that courts frequently do not properly use preparatory proceedings to ascertain all the requirements necessary for holding the main hearing. This practice may contribute to undue delays in the final adjudication of cases, which may be in violation of parties' rights to trial within a reasonable time.[32] The case below serves as an example.

> In the retrial of a property-related case, a preliminary hearing was held on 16 March 2009 in a municipal court in the Prizren region. At the preliminary hearing, the claim was read, to which the authorized representative of the respondent objected. The authorized representative of the respondent requested the court to increase the value of the dispute. The authorized representative of the plaintiff replied that the respondent's objection was based on the 2008 law on contested procedure, while the case began pursuant to the previous law on contested procedure. He argued therefore that the procedure should be carried out according to the law in force when the procedure

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[28] Courts should further note that the parties can resolve their case with the court settlement any time during the trial. The court during the entire procedure, especially in the preparatory session, tries to come to a settlement if it is fair and if the nature of the case allows it. The court can propose to the parties how to reach the settlement to help out in the process, considering their wishes, the nature of the case, their relationship, and other circumstances (Articles 412-413, 2008 law on contested procedure). The OSCE has previously reported on the negative human rights implications of the insufficient allocation of judges to courts in Kosovo. See *Monthly Report – June 2009: Insufficient Number of Judges in Kosovo*, at http://www.osce.org/documents/mik/2009/09/39346_en.pdf. Retrieved on 1 June 2010.

[29] The Council of Europe's Committee of Ministers has emphasized that courts should take a pro-active approach to management of civil proceedings. It stated: "[t]he court should, at least during the preliminary hearing but if possible throughout the proceedings, play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment. In particular, it should have *proprio motu* ("on its own motion") powers to order the parties to provide such clarifications as are necessary; to order the parties to appear in person; to raise questions of law; to call for evidence, at least in those cases where there are interests other than those of the parties at stake; to control the taking of evidence; to exclude witnesses whose possible testimony would be irrelevant to the case; to limit the number of witnesses on a particular fact where such a number would be excessive. These powers should be exercised without going beyond the object of the proceedings." Principle 4, Council of Europe Committee of Ministers Recommendation No. R(84)5, *On the Principles of Civil Procedure Designed to Improve the Functioning of Justice*, *supra* at note 1.

[30] Article 405, 2008 law on contested procedure.

[31] Article 406(1), 2008 law on contested procedure.

[32] See Article 6(1), ECHR.

began.[33] At the end of the preparatory session, in scheduling the main hearing for 27 March 2009, the court stated: "[t]he parties are obliged to provide any potential evidence i.e. objection to the statement of claim at the main trial." However, objections to the statement of claim should be made by the end of the preparatory session, and should already be clear when the proceedings enter into the main trial session.[34] Furthermore, the court did not address in the preliminary session the respondent's request to clarify the value of the dispute, even though obliged to do so in the preliminary hearing by Article 36 of the 2008 law on contested procedure.[35]

In the preparatory session held in the case described above, the court did not use the session to request from the parties further information or clarification about their propositions, nor did it ascertain which facts the parties would use to prove their propositions at the main trial session. Instead, the timeliness of the proceedings was jeopardized as the issues that should have been resolved in the preliminary session would later have to be resolved in the main session. Considering that this preparatory session was held in the retrial of a case in which the original claim was filed on 16 May 2006, nearly three years earlier, the passive role of the court in conducting the proceedings in this case is particularly troubling.

Preparatory sessions are not merely a procedural formality, rather, they are a mechanism for the court to actively exercise control over the proceedings. Proper use of preparatory proceedings to evaluate the parties' claims and evidence can help to eliminate the need for later extraneous main hearing sessions held to ascertain these requirements. Extraneous sessions may lead to undue delays, in violation of international human rights standards. In providing the right to trial within a reasonable time, the ECHR "underlines the importance of rendering justice without delays which might jeopardise its effectiveness and credibility."[36] Excessive delays in individual proceedings also contribute to the already significant backlog of civil cases in Kosovo courts.

The OSCE has further noted that courts sometimes hold preparatory sessions even when the conditions to hold these sessions are not met. In the context of the under-resourced judiciary in Kosovo, where some courts are not able to hold hearings in courtrooms due to lack of space,[37] such practice constitutes a particularly unfortunate waste of judicial resources. The cases below serve as examples:

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[33] However, Article 532(1) of the 2008 law on contested procedure specifies that "[i]f the court process star[t]ed at the first degree court prior this law is enacted, then the procedure will continue according this law's provisions."

[34] See Articles 256 and 403, 2008 law on contested procedure.

[35] Article 36, 2008 law on contested procedure, states: "If the claimant did not specify the value of the disputed facility in the claim filed to the court, or the amount is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing [...] promptly and appropriately determine or verify accurately the value claimed by the claimant."

[36] *H. v. France*, ECtHR Judgment, 24 October 1989, paragraph 58.

[37] The OSCE has previously noted the prevalence of this practice, and expressed concern regarding its impact on the right to a public trial. See pages 25-26 the OSCE's March 2004 report, *The Administration of Justice in Municipal Courts*, at http://www.osce.org/documents/mik/2004/03/2499_en.pdf. Retrieved on 1 June 2010.

In a municipal court in the Pejë/Peć region, a plaintiff submitted a request to annul two decisions made by his employer in the context of a workplace dispute. A ruling for the initiation of an investigation had also been filed in regard to the same case. The court held the first preliminary session on 29 September 2008. At that time, the plaintiff submitted his evidence, and the respondent made his objections to the claim. The respondent also proposed to suspend the civil proceedings due to an ongoing criminal investigation against the plaintiff. The court in its ruling refused the respondent's proposal to suspend the civil proceedings and forwarded a request to the district public prosecutor's office to provide the case file, and also requested the case file from the Supreme Court. On 16 December 2008, the court held another preliminary session, only to inform the parties that the court had not received the prosecutorial file requested at the previous preliminary hearing, and postponed the next session (a main session) until 26 February 2009.

In a case held in a municipal court in the Prizren region, a claim for alimony for a child was submitted in November 2006. The first hearing in the case was held in December 2006, at which time it was determined that the claim was never sent to the respondent, who was absent. Hearings were held again in September 2007, twice in March 2009, in April 2009, and in February 2010. Each of these proceedings was adjourned due to the respondent's non-appearance. The court held each of these hearings without sending the claim to the respondent, nor having verified that the respondent had been duly summoned prior to scheduling the respective hearing sessions. Although there were indications that the respondent was residing abroad, the court never requested the use of the appropriate legal instruments[38] to locate him.

While the OSCE has previously noted Kosovo courts' difficulties in summoning parties,[39] courts should still always ascertain that the conditions for holding a session are met before holding a hearing. As set forth by the 2008 law on contested procedure "[t]he main hearing session cannot be postponed indefinitely", and "cannot be postponed for more than thirty days, except in cases determined by this law."[40] Courts should actively manage the proceedings by requesting the use of International Legal Assistance procedures where appropriate, and by appointing a temporary representative if all diligent efforts to locate the respondent fail. [41] A preparatory session is not an appropriate forum for determining whether parties have been duly summoned.[42]

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[38] See Ministry of Justice's Administrative Instruction No. 2009/1-09 on the procedure of international legal assistance in criminal and civil matters, 30 September 2009. Article 1, sets out the procedures involved in processing requests for international legal assistance in civil and criminal matters.

[39] See pages 14-15 of the OSCE's *First Review of the Civil Justice System* (June 2006), available at http://www.osce.org/documents/mik/2006/06/19407_en.pdf, last accessed 2 June 2010.

[40] Article 441(1) and 441(2), 2008 law on contested procedure.

[41] Article 79, 2008 law on contested procedure.

[42] The consequences of the scheduling or holding of a hearing to which parties are not duly summoned is not specifically foreseen by the 2008 law on contested procedure. Article 123(1), 2008 law on contested procedure provides that the court shall schedule a session "whenever is determined by the law or required by the procedure". The official English translation of Article 123(2) reads: "[t]he court invites to proceeding parties and other persons whose presence is deemed necessary." However, the original Albanian version is entirely different, providing that no appeal is allowed against the decision to schedule a session. See also Article 437(1), which provides that the

Conclusion and Recommendations

Active and effective management of contested civil proceedings is crucial to the rule of law. When courts in Kosovo fail to adequately safeguard parties' rights in their administration of these proceedings, the efficacy of the justice system as a whole is diminished. It is clear that the work of courts in Kosovo is hampered by significant logistical constraints. However, proper management of contested civil proceedings at the preparatory stage may help eliminate the waste of judicial resources that often occurs when courts play a passive role. Proper management of the preparatory stage will also more effectively guarantee parties' rights as provided by the ECHR, such as the right to an adversarial trial and the right to trial within a reasonable time.

To the courts:

- In contested civil proceedings, courts should always send a copy of the claim to the respondent within 15 days of its submission, along with clear information regarding the potential legal consequences of the failure to reply to the charges and of the failure to personally appear in court.
- Courts should use preparatory proceedings, as foreseen by the 2008 law on contested procedure, in order to ascertain the requirements necessary for holding the main hearing.
- Courts should only hold preparatory sessions when the conditions to hold these sessions are met.

To the Kosovo Judicial Institute (KJI):

- The KJI should continue to provide training on preparatory proceedings for current judges and candidates for judicial appointment. The training should highlight the important role that preparatory proceedings play in a comprehensive case management strategy.

To the Kosovo Judicial Council (KJC):

- The KJC should continue to train court staff on the proper use of preparatory proceedings in contested civil cases as a tool for improving judicial efficiency and ensuring effective case management.

court may postpone the scheduled session, "before it begins, if it decides that legal conditions are not fulfilled or if the specified evidences [sic] can not be present at the session."