



MISSION IN KOSOVO

Organization for Security and Co-operation in Europe

**THE DEPARTMENT OF HUMAN RIGHTS,
DECENTRALIZATION, AND COMMUNITIES**

Legal System Monitoring Section

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Non-informed guilty pleas violate domestic law

The OSCE Mission in Kosovo (OSCE) is concerned that defendants have been convicted on the basis of guilty pleas although judges did not inform them in advance of the consequences of such a plea.

The Provisional Criminal Procedure Code of Kosovo (Criminal Procedure Code)¹ allows a defendant to plead guilty to criminal charges,² in return for a more lenient sentence.³ In such cases, the main trial does not take place, and the proceedings move directly to the closing statements of the parties.⁴

Given the serious consequences of a guilty plea, the law provides guarantees for the accused who decides to plead guilty. In particular, the judge has a duty to ensure that: (1) “The defendant understands the nature and consequences of the guilty plea [and] (2) [t]he guilty plea is voluntarily made by the defendant after sufficient consultation with defence counsel, if the defendant has the defence counsel.”⁵

Despite these legal requirements, the OSCE has monitored cases where the Kosovo courts accepted a guilty plea by a defendant who was not informed of the consequences of such a plea.

In a case before a municipal court, on 18 October 2007 a defendant pleaded guilty to one charge of damage to movable property,⁶ for allegedly unintentionally breaking the window of a car parked on the street. The judge failed to inform the defendant, who did not have legal representation, of the consequences of pleading guilty. The court then sentenced the defendant to a fine of 150 Euro.⁷

A second case before a municipal court involved summary proceedings for the alleged crime of unauthorised border or boundary crossing.⁸ There, at the start of the trial on 16 February 2007, the judge asked the two defendants if they had

¹ Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003.

² Articles 359(2) and 315(1), Criminal Procedure Code.

³ See Articles 64(1) and 70(3) of the Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (Criminal Code).

⁴ Article 359(5), Criminal Procedure Code.

⁵ The judge also must determine whether: (a) the act charged is a criminal offence; (b) the guilty plea is supported by the facts of the case; (c) no circumstances exist that exclude criminal responsibility; (d) the period of statutory limitation has not expired; and (e) there is a well grounded suspicion that the defendant has committed the criminal offence (see Article 315, read with Article 316, Criminal Procedure Code). See also Article 17 of the Criminal Procedure Code, imposing a duty on the court to inform defendants of their rights.

⁶ Article 260(1), Criminal Code.

⁷ Of greater concern, the acts alleged in the indictment do not even constitute a criminal offence. A person is guilty of the crime of damage to movable property only if the person acted intentionally (see Article 11(3) and 260(1), Criminal Code). Convicting a defendant for acts which do not constitute criminal offences, as the OSCE has already highlighted recently (see OSCE Mission in Kosovo, Department of Human Rights, Decentralization and Communities, monthly report of the Legal System Monitoring Section, September 2007) is a violation of the principle *nullum crimen sine lege* (see Article 1(2), Criminal Code, Article 15(1) of the International Covenant on Civil and Political Rights, and Article 7(1) of the European Convention on Human Rights).

⁸ Article 114, Criminal Code.

committed the acts described in the summary indictment. After they answered in the affirmative, the judge entered a plea of guilty on their behalf. Only then did the judge inform the defendants of the consequences of their statements and allow them to consult with defence counsel. The court ultimately sentenced the defendants to 15 days of imprisonment.

In the cases described above, the courts convicted the defendants based on guilty pleas although they had not been informed in advance of the consequences of pleading guilty and had not consulted with defence counsel. An uninformed guilty plea is null and void.⁹ Consequently, a judgment based on such a plea is invalid, and should be appealed on the grounds of Article 403(2) of the Criminal Procedure Code.

In light of the above, the OSCE recommends:

- Before requesting defendants to enter a plea, judges should always inform defendants of the consequences of pleading guilty.
- Judges should encourage defendants to consult defence counsel before pleading guilty.
- Lawyers should appeal verdicts based on procedurally invalid guilty pleas.

Failure by courts to properly summon parties or witnesses may lead to unjustifiable delays in civil trial proceedings

The OSCE is concerned that delays resulting from repeated postponements of civil trial proceedings may hinder the proper administration of justice and violate the rights of parties to a trial within a reasonable time.¹⁰

The right to be tried within a reasonable time is implied in the guarantee of the right to a fair trial (Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention)), which also applies to civil proceedings.¹¹ In determining what constitutes “a reasonable time” for the purposes of Article 6 of the Convention, regard must be paid to the circumstances of each case. This includes the complexity of the factual or legal issues raised by the case, the conduct of the plaintiff and of the state.¹² In this context, the European Court of Human Rights ruled that states must organize their legal systems so as to allow the courts to comply with the requirements of Article 6 of the Convention.¹³

Applicable civil procedure law in Kosovo stipulates that summonses normally must be served by mail, but they can also be delivered by a designated member of the court

⁹ See Article 315(4) and 359(4), Criminal Procedure Code. A guilty plea is also invalid if any of the requirements of Articles 315 and 316 of the Criminal Procedure Code (see footnote 5) are not satisfied.

¹⁰ The OSCE has previously reported about the problems related to summoning witnesses in both civil and criminal proceedings. See OSCE Mission in Kosovo, Department of Human Rights, Decentralization and Communities, Monthly Report of the Legal System Monitoring Section, February 2005 and thematic report *The Administration of Justice in the Municipal Courts* (March 2004), page 15. Despite these reports, delays resulting from problems in summoning parties still persist in Kosovo.

¹¹ See *Moreira v. Portugal*, No. 11371/85, judgment, 26 October 1988, paragraph 46.

¹² *Pailot v. France*, No. 32217/96, judgment, 22 April 1998, paragraph 61.

¹³ *Muti v. Italy*, No. 14146/88, judgment, 23 March 1994, paragraph 15; *Sussmann v. Germany*, No. 20024/92, judgment, 16 September 1996, paragraphs 55 - 56.

staff (court messenger), through the competent municipality or directly in the court.¹⁴ If the person to be summoned is not at his or her address, the summons can be delivered to an adult member of the family or to other people, such as the housekeeper or neighbours.¹⁵ The receipt of the summons must be signed by both the recipient and the deliverer.¹⁶ Furthermore, if the plaintiff cannot determine the address of the defendant “[...] the court shall try to obtain the required information from the competent administrative body, or to obtain the necessary information in some other way”.¹⁷

The OSCE has monitored civil cases in which the summoning procedure was not efficient and led to delays in the proceedings. The following cases serve as examples:

In a case before a municipal court, the plaintiff filed a claim for damage compensation on 24 April 2002. The court postponed scheduled trial sessions seven times¹⁸ because there was no evidence in the case file regarding whether the parties had been properly summoned.¹⁹ The case is still ongoing.²⁰

In a claim dated 28 December 2005 before a municipal court, in which the plaintiff requested the eviction of the defendant from his store, the first trial session occurred on 2 May 2006. Subsequently, the court postponed three sessions on the following grounds: the failure to summon the proposed witness (3 August 2006); the failure to summon the defendant (on 24 November 2006);²¹ and the incorrect delivery of the summons for the witness to the cadastre office instead to the Directorate of Urbanism (23 January 2007).

Both examples demonstrate the lack of efficiency in summoning parties which resulted in delays in the proceedings. Although the first case does not involve

¹⁴ See Article 133 of the Law on Contested Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 4/77–1478, 36/80 – 1182, 69/82- 1596).

¹⁵ See Articles 141 and 142 of the Law on Contested Procedure. Article 142 of the Law on Contested Procedure explicitly specifies which documents must be delivered personally to the parties. Since summonses are omitted in this article, personal service is not required and summonses may be delivered to an adult member of the family or to other people, such as the housekeeper or neighbours, as stated in Article 141 of the Law on Contested Procedure. This article states that “if nobody happens to be in the apartment, the writ shall be served to the house keeper or to the neighbour, if they agree to accept it.” See also Articles 144 and 145 of the Law on Contested Procedure, which regulate other exceptional situations such as refusal of acceptance and change of address.

¹⁶ See Article 149 of the Law on Contested Procedure, which determines that “[i]f the recipient refuses to sign the proof of service, the deliverer shall note that [...] and write the date of delivery in letters, and by doing so, the service is considered made. [...] When, in accordance with the provision of this Code, the writ has been served to some other person instead the one to whom the writ should have been served, the deliverer shall mark the relation between the two persons on the proof of service.”

¹⁷ Article 148 of the Law on Contested Procedure.

¹⁸ The court postponed sessions on 2 July 2003, 21 October 2003, 19 November 2003, 17 December 2003, 26 March 2004, 28 June 2006, and 18 July 2007.

¹⁹ The summons receipt was returned with the notice that the party could not be found at the specified address, or the Post and Telecommunications of Kosovo did not return the receipt of the summons to the court before the scheduled session.

²⁰ The court also postponed trial sessions for reasons other than for failure to summon parties or witnesses. For example, the court rescheduled proceedings on 2 November 2004, 1 March 2005 and 23 March 2005 because the defendant did not appear (although properly summoned) and on 19 January 2006 because the expert did not submit a required report.

²¹ The summons was returned to the court, stating that the address of the respondent is unknown and insufficient, although the court had summoned the defendant at the same address for previous hearings.

complex legal or factual issues, it is still pending after more than five years in the court. Problems delivering summonses also caused unnecessary delay in the second case. These delays affected the right of the parties to a trial within a reasonable time as the relevant authorities failed to organise an effective system to summon parties.

Consequently, the OSCE recommends that:

- Courts should take the necessary steps to ensure that the relevant authorities follow the summoning procedures.
- Court presidents and the director of the Post and Telecommunications of Kosovo should ensure that court messengers and post office employees receive adequate training regarding the summoning procedure established by the Law on Contested Procedure.
- Courts should use all available means to locate the correct address of parties and witnesses if the plaintiff is not able to provide the correct address.²²

²² The OSCE has previously reported that under UNMIK Administrative Direction 2002/16 Implementing UNMIK Regulation 2000/13 On the Central Civil Registry, UNMIK judicial authorities can request the disclosure of personal data from the Civil Registry, and courts can use this information to locate people. See OSCE Mission in Kosovo, Department of Human Rights, Decentralization and Communities, thematic report *The Administration of Justice in the Municipal Courts* (March 2004), page 15.