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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KOSOVO

OPINION

ON CERTAIN PROVISIONS OF THE DRAFT CRIMINAL PROCEDURE CODE, NAMELY TRIAL IN ABSENTIA (ART. 306) AND SUSPENSION OF OFFICIALS FROM OFFICE (ART. 177)

Adopted by the Venice Commission on 19 June 2020
by a written procedure replacing the 123rd plenary session

On the basis of comments by

Mr António Henriques GASPAR (Member, Portugal)
Mr Martin KUIJER (Substitute Member, The Netherlands)
Mr Cesare PINELLI (Substitute Member, Italy)

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I. Introduction

1. By letter of 13 February 2020 Prime Minister Kurti of the Republic of Kosovo requested an opinion of the Venice Commission on specific draft amendments to the Criminal Procedure Code (CPC). In particular, the request is to assess whether the proposed amendments concerning trial in absentia (Article 306) and suspension of officials from office (Article 177) are compatible with the provisions of the Constitution and the European Convention on Human Rights.

2. Mr Gaspar (Portugal), Mr Kuijer (The Netherlands) and Mr Pinelli (Italy) acted as rapporteurs for this opinion.

3. The rapporteurs regret that a visit to Pristina had not been possible due to the COVID-19 crisis resulting in heavy travel restrictions and closed borders.[1] Instead, the rapporteurs, assisted by Ms Silvia Grundmann, Head of Division at the Secretariat held separate video conferences in May 2020 with the Kosovo Bar Association, civil society organisations including academics, and with members of the international community. Further video-conferences took place from third to fifth June 2020 with the Speaker of the Assembly, as well as with members of the judiciary and the prosecution. Regrettably virtual meetings arranged for with the Acting Prime Ministers' Office, the then Minister of Justice and the then Minister of European Affairs, as well as with majority and opposition in Parliament could not be held due to the change of government on 3 June 2020. The Venice Commission is grateful to the authorities and to the Council of Europe Office in Pristina for the support given in organising the virtual meetings.

4. This opinion was prepared in reliance on the English translation of the draft law, notably its Articles 306 and 177 provided by the authorities of Kosovo (CDL-REF(2020)023). The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings held. It was adopted on 19 June 2020 by a written procedure which replaced the 123rd session of the Venice Commission, due to the COVID-19 disease.

II. Background

6. In preparation of the virtual meetings, the authorities informed the delegation about the preparation work and the consultation process: The drafting of the draft Criminal Procedure Code of the Republic of Kosovo (hereafter: draft CPC) was initiated as part of the reform in the criminal legislation in the Republic of Kosovo as a need was felt to amend and supplement the current CPC provisions which were considered as lacking and inadequate with regards to their implementation. The draft CPC was drafted following intensive work directed by the Ministry of Justice and by a working group composed of national and international experts and with the support of the U.S. Embassy and the EU office in Pristina.

7. The finalisation of the draft CPC was subsequently followed by a consultation process, performed electronically in accordance with current legislation, within a reduced deadline for public consultations of eight days from 21 to 30 November 2018. The comments received were

[1] In this context, see guidance given by the Council of Europe's Secretary General through a toolkit for member states for dealing with the present sanitary crisis in a way that respects the fundamental values of democracy, rule of law and human rights, of 7 April 2020, https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40. See also Compilation of Venice Commission opinions and reports on States of Emergency, CDL-PI (2020) 003 of 16 April 2020 and Venice Commission Report States of Emergency, Respect for Democracy, Human Rights and the Rule of Law – Reflections, CDL-PI (2020) 005rev of 26 May 2020.

examined by the Legal Department of the Ministry of Justice, the Minister's Cabinet and by U.S. Embassy representatives. Revisions were made with the help of smaller and bigger working groups and EU and CoE experts. The version of the draft CPC submitted to the Venice Commission is the final draft that was developed after completion of the consultation and drafting process described above.

8. As to the scope of this opinion, it should be noted that assessing the constitutionality of a domestic law is a matter for the Constitutional Court of the Republic of Kosovo.[2] The Venice Commission is thus not competent to authoritatively interpret the Constitution of the Republic of Kosovo. The relevant provisions of the Constitution[3], however, are very similar to the requirements of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

9. As to the applicability of international law, regardless of the generally necessary ratification of international agreements, the human rights and fundamental freedoms as enshrined in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights are directly applicable under the Constitution.[4]

10. The opinion will therefore focus on the ECHR and its interpretation by the Strasbourg Court as well as on other international standards, notably the International Covenant on Civil and Political Rights (ICCPR).

A. Trial in absentia (Art. 306 CPC proposal)

11. Trial in absentia remains a matter of controversy in Kosovo due to alleged war crimes and the difficult relationship between Serbian and Kosovan authorities which is hampering cooperation in general and in particular in criminal law cases. Being absent from domestic law for a long time, in July 2019, the Criminal Procedure Code of Kosovo was amended regarding trials in absentia, in relation to criminal offences against international humanitarian law and international criminal law, committed between January 1990 and June 1999. These amendments cover war crimes committed in Kosovo during the armed conflict. The proposed Article 306 CPC aims to introduce the possibility of a trial in absentia for *all* criminal offenses contained in the Criminal Code. During the virtual meetings of the delegations several interlocutors underlined the need for such a general provision in order to close the current impunity gap for the sake of justice, peace and reconciliation.

12. The concept of trial in absentia is known to domestic as well as to international criminal procedures, subject to certain safeguards. The practice of international tribunals has changed over time. While the International Military Tribunals of Nuremberg and Tokyo recognized the in-absentia trial, the gravity of crimes that are investigated in the context of genocide, crimes against humanity and war crimes, led the majority of international judicial bodies to adopt provisions that explicitly require the physical presence of the accused. This applies to the International Criminal Tribunal for the former Yugoslavia (ICTY), to the International Criminal Tribunal Rwanda (ICTR),

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[2] See Article 113 of the Constitution of the Republic of Kosovo.
[3] *Inter alia* Articles 30-33.
[4] Article 22 Constitution: Direct Applicability of International Agreements and Instruments
Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:
(1) Universal Declaration of Human Rights;
(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(3) International Covenant on Civil and Political Rights and its Protocols; …

and the Rome Statute of the International Criminal Court (ICC).[5] Yet trial in absentia is permissible in the case that the accused continually disrupts the trial, or during the hearing in which charges are confirmed. However, the Special Tribunal for Lebanon (STL), recently reintroduced the concept of in-absentia trials as a means to preclude suspects of international crimes to avoid justice.

1. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other international standards

13. While the right of the accused to be physically present at the trial has been acknowledged as a general principle under Art. 6 ECHR by the European Court of Human Rights (ECtHR) in its case law, trials in absentia are admissible in exceptional cases provided they meet certain conditions to strike a fair balance between the right of the accused and the need to administer justice. The physical presence of the accused as a precondition of a fair trial is equally enshrined in the International Covenant on Civil and Political Rights (ICCPR).[6]

14. Furthermore, the Council of Europe's Committee of Ministers Resolution (75)11 of 21 May 1975 on the criteria governing proceedings held in the absence of the accused provides: "The Committee of Ministers, ... I. Recommends that the governments of the member states apply the following minimum rules: ... 8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled. ...".

15. Equally, the relevant part of the Second Additional Protocol to the European Convention on Extradition of 17 March 1978 (ETS No. 98) states:

16. Chapter III Article 3 "The Convention shall be supplemented by the following provisions: "Judgments in absentia 1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited…."

17. The EU law provides for detailed provisions contained in the European Union's Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, governing the European Arrest Warrant, reiterated in Directive (EU) of the European Parliament and of the Council 216/343 of 9 March 2016 thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. Due information of the accused and safeguarding defence rights are of crucial importance in these provisions. The delegation learned in its virtual

[5] ICTY Articles 20 and 21 (4) (d); ICTR, Articles 19 and 20 (4) (d); ICC, Article 63, see also UNMIK Regulation No. 2001/1 Section 1.

[6] Article 14 (3) (d) ICCPR: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

meetings that the draft Article 306 has been modelled after these provisions. The Constitution of the Republic of Kosovo contains these principles in its Article 30 ("Right of the accused").[7]

2. Analysis

18. In view of the standards described above, Venice Commission observes that the draft amendment for Art. 306 - Trial in Absentia acknowledges the general principle that the accused shall be present at the trial and that absence is the exception. The draft proposal reads

1. *The accused shall be present at:*
   1.1. the initial hearing; and
   1.2. the main trial.
2. *The accused waives the right to be present at the main trial in the following circumstances:when the accused was present at the initial hearing and was informed of the trial date by the single trial judge or presiding trial judge pursuant to Articles 283 and 285 of this Code, or during another court hearing, and the accused was told of the requirement to be present for the trial and that the trial could proceed if the accused voluntarily fails to appear for trial; or*
   2.2. was present at the trial, but then failed to appear at subsequent trial sessions, and was informed pursuant to subparagraph 2.1 of this Article.
3. *In the event the accused fails to appear in either circumstance in subparagraph 2.1 or 2.2 of this Article, the single trial judge or presiding trial judge shall determine if the accused is voluntarily absent after the hearing described in paragraph 5 of this Article and the accused shall be represented by a defense counsel.*
4. *If the accused waives the right to be present, the trial shall commence and proceed to completion during the accused's absence.*
5. *In deciding whether to hold a trial in the absence of the accused, the single trial judge or presiding trial judge shall hold a hearing to determine why the accused is absent and assess any explanation or evidence regarding whether the accused has voluntarily decided to be absent from the trial. During this hearing the single trial judge or presiding trial judge shall determine if the trial could soon take place with the accused's presence, against the undue inconvenience or prejudice caused by a slight delay or a rescheduling of the trial. In making this determination the single trial judge or presiding trial judge shall consider:*
   5.1. if reasonable efforts have been made to locate the accused;
   5.2. the difficulty of rescheduling the trial, particularly in trials involving multiple accused;
   5.3. the burden on the state prosecutor in having to undertake two trials involving evidence common to co-accused; and
   5.4. if a delay will place the prosecution witnesses in substantial jeopardy or inconvenience.
6. *In the event of a trial held as provided in paragraph 2 of this Article, the court shall make reasonable efforts to inform the defendant regarding the judgement. However, if the court is not able to inform the defendant due to his or her absence, the defense counsel*

[7] Art. 30 Constitution: "Everyone charged with a criminal offense shall enjoy the following minimum rights: (1) to be promptly informed, in a language that she/he understands, of the nature and cause of the accusation against him/her; (2) to be promptly informed of her/his rights according to law; (3) to have adequate time, facilities and remedies for the preparation of his/her defence; (4) to have free assistance of an interpreter if she/he cannot understand or speak the language used in court; (5) to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel; (6) to not be forced to testify against oneself or admit one's guilt."

shall have the right to appeal the judgment on behalf of the defendant pursuant to Article 386 of this Code. The provisions of Article 383 of this Code regarding the deadline shall apply mutatis mutandis.

7. *In cases of offenses in Article 104 of the Criminal Code, a trial in absentia may be conducted without meeting the criteria of ensuring the presence of the accused as set forth in this Article, if the single trial judge or presiding trial judge is satisfied that reasonable efforts have been made to notify the accused of the trial and ensure the presence of the accused. In this case, the accused shall be represented by a defense counsel throughout the criminal proceedings, until the judgment becomes final.*
8. *A person tried under paragraph 7 of this Article is entitled to have an automatic retrial upon request.*

a) Art. 306 No. 1 and 2 CPC

19. The Venice Commission is aware that States enjoy a considerable discretion in how to organise their domestic legal systems in this field as "the Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6." [8]

20. Under these provisions the trial can proceed only when the accused had been present at least once and later on fails to appear, as the accused is deemed to have waived his rights. It should be noted that any waiver has to be made out of someone's own free will, which implies that the person concerned is fully aware of the (extent of the) rights he or she waives, and the waiver must be made "in an unequivocal manner"[9]. This last condition does not necessarily mean that the waiver always has to be made explicitly. The accused's conduct may also imply such a waiver, for example if he or she seeks to evade the trial.[10] If an accused waives his or her right to be present, the accused must still be permitted legal representation.[11] The Venice Commission observes that Nr. 1 and Nr. 2 of draft Art. 306 spell out these requirements in detail including the accused being represented by defence counsel.

21. However, paragraph 2.2 does not seem entirely clear. The provision speaks of a situation in which an accused was 'informed pursuant to subparagraph 2.1 of this Article'. Presumably, this refers to being informed of the new trial date. The Venice Commission recommends that this should be mentioned explicitly.

b) Art. 306 No. 5 CPC

22. A crucial point of Article 306 is that, after defining the circumstances in which the accused waives the right to be present, namely when the accused was present at the initial hearing or at the trial, and then failed to appear at subsequent trial sessions, it requires from the judge to "determine whether the accused has voluntarily decided to be absent from the trial".

23. This is a demanding requirement for admitting trial in absentia. Contrary to the doctrine of *semel praesens semper praesens* (to be present once is to be present always) that is applied by some jurisdictions including the Italian, and allows trials to continue in case the accused disappears during the proceedings, the Draft Code requires a demonstration of the accused's will to be absent from the trial.

[8] ECtHR [GC] 1 March 2006, *Sejdovic v. Italy* (no. 56581/00), para. 83.
[9] ECtHR [GC] 1 March 2006, *Sejdovic v. Italy* (no. 56581/00), para. 86.
[10] ECtHR 26 January 2017, *Lena Atanasova v. Bulgaria* (no. 52009/07), para. 52.
[11] ECtHR 22 September 1994, *Pelladoah v. the Netherlands* (no. 16737/90), para. 40 f.

24. Such requirement complies entirely with the ECtHR's caselaw, especially with the ruling that "Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial.[12] However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.[13] Furthermore, it must not run counter to any important public interest.[14] The Court has also had occasion to point out that, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. [15]

25. Nr. 5 combines several aspects, namely an assessment whether the accused has voluntarily decided to be absent with aspects of due diligence of the authorities having made "reasonable efforts" (5.1) to locate the accused and aspects of efficiency of justice listed in 5.2 to 5.4.

26. After having conceived a system in which the judicial hearing is aimed at ascertaining "whether the accused has voluntarily decided to be absent from the trial" (paras. 1-5, first period), article 306 gives that hearing a quite different function. During this hearing, so para. 5 goes on, "the single trial judge or presiding trial judge shall determine if the trial could soon take place with the accused's presence, whether the accused has voluntarily decided to be absent from the trial against the undue inconvenience or prejudice caused by a slight delay or a rescheduling of the trial. In making this determination the single trial judge or presiding trial judge shall consider not only "if reasonable efforts have been made to locate the accused" (5.1), but also "the difficulty of rescheduling the trial, particularly in trials involving multiple accused" (5.2), "the burden on the state prosecutor in having to undertake two trials involving evidence common to co-accused" (5.3.), and "if a delay will place the prosecution witnesses in substantial jeopardy or inconvenience." (5.4.).

27. A fairly objective issue such as that of the delay or rescheduling of the trial (5.2.-5.4.) is thus mixed to that of how to provide the accused with the opportunity of deciding whether to waive or to exert his right of defense (5.1.). It is as if the judicial hearing aimed at ascertaining the defendant's will were also called to balance his own "minimum rights" as affirmed from Article 6, para. 3, of the ECHR with the need of ensuring efficiency to the trial. However, an inquiry on the latter point not only presupposes a completely different kind of scrutiny, but gives also the opportunity of leaving aside the defendant's rights in the name of the trial's efficiency.

28. Such possibility might encroach on the ECtHR's claim that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or at a retrial – ranks as one of the essential requirements of Article 6, and in particular that the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, is a "flagrant denial of justice" rendering the proceedings "manifestly contrary to the provisions of Article 6 or the principles embodied therein."[16] The Court has also held that the reopening of the time allowed for appealing against a conviction in absentia, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the

[12] ECtHR 30 Nov. 2000 *Kwiatkowska v. Italy* (dec.), (no. 52868/99).
[13] ECtHR 23 Nov. 1993 *Poitrimol v. France* (no.14032/88), paras. 31, 35.
[14] ECtHR 21 Feb. 1990 *Håkansson and Sturesson v. Sweden* (no. 11855/85), para. 66; ECtHR [GC] 1 March 2006 *Sejdovic v. Italy* (no. 56581/00), para. 86.
[15] ECtHR 9 Sept. 2003 *Anthony Jones v. the United Kingdom* (dec.) (no. 30900/02).
[16] ECtHR 24 March 2005 *Stoichkov v. Bulgaria* (no. 9809/02) paras. 54-58; ECtHR 12 Feb. 2015 *Sanader v. Croatia* (no. 66408/12) para. 71.

proceedings as a whole could be said to have been fair.[17] These rulings clearly demonstrate that, in the Court's view, the defendant's rights under Article 6 could not take second place to the needs of efficiency.

29. The Venice Commission observes that these provisions raise serious doubts as to their internal coherence and applicability. The Commission therefore recommends to rewrite Nr.5 in such a manner that the assessment of the free will of the accused to be absent from trial and the question whether reasonable efforts have been made, are separated from the aspects of efficiency of justice listed in 5.2 to 5.4.

30. Furthermore, the term "reasonable efforts" is not specified and therefore open to interpretation to the individual judge. The Commission recommends to provide in an explanatory memorandum a set of criteria illustrating by way of example what can constitute "reasonable efforts", mitigating the risk of different application of the new provision.

c) Art. 306 No. 6 CPC

31. Nr. 6 allows the defence counsel to appeal the in-absentia judgment on behalf of the defendant. It seems that the provision allows the attorney to instigate appellate proceedings without the knowledge and consent of the accused. The Venice Commission recommends to qualify this provision in such a way that the defence council has to demonstrate that he has taken the best interest of the accused into account when launching the appeal without the consent and/ or the knowledge of the defendant tried in absentia.

d) Art. 306 No. 7 CPC

32. In principle, an accused in criminal proceedings must be able to be present during the court proceedings. Indeed, the duty to guarantee the right of a criminal defendant to be present in the courtroom ranks as one of the essential requirements of Article 6 ECHR.[18] A trial in absentia may only be allowed in certain exceptional circumstances, notably if the authorities have acted diligently but have not been able to notify the relevant person of the hearing.[19]

33. From the outset, Nr. 7 aims to meet the above requirements. Nevertheless, the draft provision raises concerns as it is closely linked to Article 104 of the Criminal Code of 14 January 2019 which reads:

> *Non-applicability of statutory limitation for crimes against international law and aggravated murder:*
>
> 1. *No statutory limitation shall apply to the offenses of genocide, war crimes, crimes against humanity, or other criminal offenses to which the statutory limitation cannot be applied under international law.*
> 2. *No statutory limitation shall apply to the offense of aggravated murder.*

34. Consequently, a trial in absentia may be conducted for very severe crimes carrying heavy sentences without meeting the general requirement as spelled out in Nr. 1 that ensures the presence of the accused. It is therefore necessary to assess whether the procedural safeguards provided for in Nr. 7 and 8 are in line with the above described standards.

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[17] See ECtHR 9 Sept. 2003 *Anthony Jones v. the United Kingdom* (dec.) (no. 30900/02).
[18] ECtHR [GC] 1 March 2006, *Sejdovic v. Italy* (no. 56581/00), para. 84; ECtHR [GC] 18 Oct. 2006 *Hermi v. Italy* (no. 18114/02), paras. 58f., both referring to ECtHR 24 March 2005, *Stoichkov v. Bulgaria* (no. 9808/02), para. 56.
[19] ECtHR 22 Feb. 1985, *Colozza v. Italy* (no. 9024/80).

35. As to the right to take part in the trial, the ECtHR has repeatedly asserted that "Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present.[20]

36. On the other hand, the Strasbourg Court is also convinced that "The Convention leaves the Contracting States wide discretion as regards the choice of the means put in place to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial.[21]

37. It is true that, under Article 306, para. 7, if the judge "is satisfied" of the "reasonable efforts" made to notify the accused and ensure his presence, "the accused shall be represented by a defence counsel throughout the criminal proceedings, until the judgment becomes final." However, the provision does not specify whether the defence counsel has to be appointed by the accused or it can be nominated by the state, as occurs in various Council of Europe's Member States.

38. The Venice Commission therefore recommends to strengthen the currently weak safeguards by spelling out what is meant by "reasonable efforts" by way of example to be provided in an explanatory memorandum.[22]. Furthermore, it should be specified in the law whether defence counsel has in the first place to be appointed by the accused and only if the accused does not do so may be appointed by the court, subject to observing certain minimum qualifications in the choice of the defence counsel, i. e. a minimum experience in criminal law.

e) Art. 306 No. 8 CPC

39. No. 8 provides for a right to re-trial in the situation described in paragraph 7 of draft Article 306 CPC. In its virtual meeting with the Bar Association the delegation became aware of different versions of this provision or probably a difference due to translation. In its video conference with prosecution, including members of the working group that had contributed to the drafting of this provision it was explained that the aim is to ensure that the defendant has the right to a retrial without the judge having discretion. This rationale is fully understandable in view of the fact that the defendant had never been present in court.

40. The Venice Commission therefore recommends to make clear that the right of the defendant to have a retrial is not subject to any other condition than the one that he had never been present at the first trial and that the retrial has to be a complete one on facts and law.

[20] ECtHR 22 Feb. 1985 *Colozza v. Italy* (no. 9024/80) para. 27; ECtHR 12 oct. 1992 *T. v. Italy* (no. 14104/88), para. 26; ECtHR 28 Aug. 1991 *F.C.B. v. Italy* (no. 12151/86) para. 33; ECtHR 25 March 1998 *Belziuk v. Poland* (no. 45/1997/829/1035), para. 37; ECtHR [GC] 1 March 2006 *Sejdovic v. Italy* (no. 56581/00), para. 81.
[21] ECtHR 14 June 2001 *Medenica v. Switzerland* (no. 20491/92), para. 55; ECtHR 18 May 2004 *Somogyi v. Italy* (no. 67972/01), para. 67; ECtHR 12 Feb. 2015 *Sanader v. Croatia* (no. 66408/12) para. 69.
[22] See para 30 above.

B. Suspension of official person from duty (Article 177 CPC proposal)

41. Being aware that at present, there is no general legal provision allowing for suspension of public officials suspected of criminal offences, the Venice Commission fully acknowledges the need to effectively fight crime and corruption, as these have stalled the development of the country over many years. The Venice Commission notes with appreciation the progress made as part of the ERA process.[23]

42. It seizes this opportunity to recall the specific benchmarks detailed in its Rule of Law Checklist which are available to states to measure their measures taken in their fight against corruption.[24] It is in this spirit that the following comments aim at strengthening the draft provision also in view of a stringent and coherent application.

1. International standards

43. Suspension of an official from office is an effective measure to avoid the committal of an offence, if this offence can only be committed by a public official in office. According to Article 30 (6) of the UN Convention Against Corruption (UNCAC): "Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence". Article 23 (1) of the Council of Europe Criminal Law Convention on Corruption (ETS 173) provides that "Each Party shall adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention (…)". International standards support the introduction of the measure for that specific reason.

2. Analysis

44. In view of the standards described above the Venice Commission underlines that the suspension of a non-convicted official from office is a severe measure. On the one hand, the implications for the reputation of the official will be significant, and may be permanent (the return of a suspended official to office will not be easy, even if the accused official has been officially acquitted). In that sense, the imposition of the measure is related to the presumption of innocence[25] and the right to privacy. On the other hand, the implications of imposing the measure may also be of a more material (i.e. pecuniary) nature, for example due to the fact that the official may not receive his or her salary in full or only in part during the suspension from office. In that sense, the imposition of the measure is related to the right to property. The draft law reads

> ***Article 177 Suspension of Official Person from Duty***
> 1. *The court shall suspend the defendant, who is an official person from his or her duty, if:*
> 1.1. *there is a grounded suspicion that the defendant has committed a criminal offense; and*
> 1.2. *one of the following conditions is met:*

[23] Kosovo – EU High Level Dialogue on Key Priorities – European Reform Agenda (ERA), November 2016 Pristina, see under Good Governance and the Rule of Law.
[24] See European Commission for Democracy through Law (Venice Commission), The Rule of Law Checklist 2016 CDL-AD(2016)007 adopted at its 106th Plenary Session (Venice 11 – 12 March), II. F. 1. Corruption and conflict of interest.
[25] See Venice Commission Rule of Law Checklist, footnote 24, II. E. 2. Presumption of innocence.

1.2.1. There are grounds to believe that, if remaining on his or her duty, an official person will destroy, hide, change or forge evidence of a criminal offense or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices; or

1.2.2. The seriousness of the criminal offense, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that if remaining on his or her duty an official person will repeat the criminal offense, complete an attempted criminal offense or commit a criminal offense which he or she has threatened to commit.

2. The court shall decide on the measures under this Article with a reasoned decision. The ruling must contain the reasoning that stipulates that the conditions from paragraph 1 of this Article have been met and that the measure is necessary.

3. The court determines in the ruling that during the suspension, the official person will not have access to the official premises of his or her office, he or she will not have the right to undertake official duty and will refrain from contacting employees in his or her office.

4. The ruling shall be delivered to the defendant and his or her direct supervisor.

5. The court shall order detention on remand if the defendant does not comply with the ruling. The defendant shall always be informed in advance of the consequences of non-compliance.

6. If the direct supervisor of the defendant does not take action in the execution of the ruling on the suspension, the court shall punish him by a fine as provided for in Article 446 of this Code.

7. Unless otherwise provided in this Article, the provisions of this Code regarding detention on remand shall apply mutatis mutandis to the ordering, duration, extension and termination of the measure under this Article.

8. For the duration of the measure under this Article before the indictment is filed, the pretrial judge decides ex officio or upon the request of the state prosecutor.

45. During its virtual meetings the delegation learned about criticism expressed by civil society about the wide scope of the provision encompassing all criminal offences and not only those referred to in Chapter XXXIII Official Corruption and Criminal Offences against Official Duty of the criminal code. Furthermore, concerns were expressed as to the question of mental competence and criminal offences committed by negligence, § 17 Criminal Code, not taken into account by the draft.

46. In this context the Venice Commission observes that para 1.1 requires an assessment whether there is grounded suspicion for a criminal offence. Consequently, the standards of the criminal code and notably the concrete definition of the suspected crime serve as a benchmark whether the concrete facts provide for sufficient ground of the crime at stake, including the questions of mental competence or of negligence as part of the respective criminal offence.

47. The Venice Commission notes that the measure is not only applicable to public officials suspected of having committed a public office offence. It is applicable to *all* criminal offences. It appears from Nr. 1.2.1 that the rationale is to avoid obstruction of justice as a result of the fact that the accused is an official who may use his or her powers to hinder the course of the investigation. During its virtual meetings, the delegation learned of concrete cases of public officials having tried to destroy evidence and influence witnesses while already being detained.

48. The Venice Commission notes that Article 5 paragraph 2 of the UN Convention Against Corruption (2003) stipulates that “Each State Party shall endeavour to establish and promote

effective practices aimed at the prevention of corruption". Thus, the introduction of admittedly a broad measure would not run counter to international standards. Furthermore, Nr. 1.2.2 seems to suggest an additional rationale: the seriousness of the criminal offence the official is suspected of having committed warrants the (temporary) suspension of the official. Maintaining the official in office during the course of the criminal investigation would cause harm to the public trust in the bona fide functioning of the authorities.

49. As to the potentially wide scope of the draft provision, referring to crimes in general, the Venice Commission acknowledges the intent of the legislator to effectively combat corruption as well as to prevent tampering with evidence and the wide discretion of the legislator subject to providing certain safeguards. Such safeguards are provided in 1.2.2 when explicitly requiring that the Court has to establish the seriousness of the alleged criminal offence.

50. The Venice Commission observes that "Court" responsible for decision is not defined, nor is it clear how the Court gets involved. In its virtual meetings, notably with judiciary and prosecution including members of working groups having been involved in the development of the new draft legislation, the delegation learned that the prosecutor would initiate the respective proceedings after having filed an indictment. It was explained to the delegation that following the indictment, the prosecutor, based on the criteria listed would request suspension of an official person, identifying the competent court and demonstrating grounded suspicion.

51. While this interpretation is entirely plausible, it is not stipulated in the draft law. Furthermore, the Venice Commission observes that an exception is made in Nr. 8 of the draft, were the pretrial judge may or must become active, apparently without any prior request from the prosecutor.

52. The Commission recommends that the procedure is clearly stipulated in the draft provision by describing the responsibility of the prosecutor. Furthermore, the exception made for the pretrial judge is not clear, especially as it is the prosecution that is involved at the investigative stage that lays before the indictment. The Commission therefore recommends a harmonised approach, the prosecutor being competent for submitting all requests for suspension of officials before and after the indictment as well as during a trial.

53. As to the competent court, the delegation learned that this would be the Court in the respective region competent for the alleged crime. This bears the risk that a court, and potentially the same single judge or the same chamber, would first decide on the suspension and later on in an actual trial on the alleged offence itself. Consequently, such a procedure would be open to challenges invoking the presumption of being innocent before the final decision has been taken.

54. In order to avoid such potential constellations, a specialised single judge or chamber could be named for suspension of official persons at each court or at a higher level to be responsible for all cases under draft Art. 177 in the country.

55. The current place of draft Art. 177 gives the impression that it is meant as a coercive measure, as it is placed among coercive measures of the Criminal Procedure Code, such as Art. 174 Order for Arrest, Art. 175 Promise of Defendant not to leave the current place of residence, Art. 176 Prohibition of Approaching a Specific Place or Person.

56. The drafting of Art. 177 however suggests that the provision should be administrative in nature and of a preventive character, namely to hamper tampering with evidence or allow for committing further similar crimes.

57. In its virtual meetings, notably with judiciary and prosecution, this interpretation of the administrative nature of the provision was confirmed to the delegation. Furthermore, the delegation learned that placing a provision allowing for removal of officials in the criminal procedure law is a novelty and that such issues would be typically dealt with in the context of

administrative law, such as provisions for civil servants. There was however no doubt among interlocutors that the meaning of the draft law relates to official persons as defined in Art. 113 of the Criminal Code of 14 January 2019.

58. The Venice Commission acknowledges the need for a broader scope encompassing all official persons. It thus recommends to make this intention of the legislator clear by inserting an explicit reference to Art. 113 of the Criminal Code of 14 January 2019 containing a definition of official persons. Furthermore, it should be considered to either remove draft Art. 177 from the Criminal Procedure Code and place it into the context of administrative legal provisions or to move draft Art. 177 to the end of the Criminal Procedure Code, clearly indicating its non-coercive but administrative function. This would have two advantages. Its implementation would be facilitated as the high standards of criminal law would not apply for assessing the grounded suspicion and it would be less incriminating to the potential suspect, thus respecting the presumption of innocence enshrined in Art. 6(2) of the ECHR.

59. Furthermore, the Commission observes that the cross-reference in no. 7 is very unspecific. It states that "the provisions of this Code regarding detention on remand shall apply mutatis mutandis". Detention on remand is mentioned over 200 times in the Code and it is coercive *per se*. Most likely, the legislator intended to refer to Articles 184 to 192. However, via Article 184(4) various other provisions of the Code are declared applicable as well and they do not all seem to be relevant with regard to the measure envisaged by draft Article 177. For example: Article 168 on medical examinations, Article 169(3) on providing meals during detention and Article 170(3) and (4) on methods of police interrogation.

60. No reference is made to Article 172 no. 2 of the draft code which provides for a general proportionality test, namely "to ensure that it does not apply a more severe measure if a less severe measure would suffice".

61. The Commission recommends strengthening the safeguards of draft Art. 177 by introducing a general proportionality test into the provision. Furthermore, the provision would benefit from including a right to appeal.[26]

62. The Commission observes that the draft provision does not contain regulations for the payment of salary during the period of suspension and the rights of the suspended official in the event of an acquittal. While such regulations might be part of other specific laws, i. e. for civil servants, the Commission recommends that they are stipulated in the draft provision for all public officials to ensure a stringent and coherent approach and a harmonised application.

III. Conclusion

63. The Venice Commission is well aware of the difficult situation the Kosovan legislator is faced with trying to find a solution in a highly sensitive area. The Venice Commission fully acknowledges the aim of the legislator to strike a fair balance between the protection of individual rights in line with the Strasbourg Court's case law and other international standards and the need to guarantee a proper functioning of the justice system, including in the fight against corruption. The Commission notes that the draft provisions are largely in line with the European Convention on Human Rights and Fundamental Freedoms as interpreted by the Strasbourg Court and other international standards. Both provisions lack however in precision which results in intended safeguards not being incorporated in such a manner that the draft amendments are unambiguous and easy to implement. Therefore, the Venice Commission invites the legislator to re-examine

[26] See Venice Commission Rule of Law Checklist, footnote 24, II. E. 2. c. Other aspects of the right to a fair trial.

the two draft amendments and in doing so, take into consideration the following recommendations:

64. As to **trial in absentia (Art. 306 CPC proposal)**

- Precise no. 2.2 referring to a situation in which an accused was 'informed pursuant to subparagraph 2.1 of this Article' in such a manner that the accused needs to be informed of the new trial date.
- Redraft para 5 to avoid a mix between the necessary procedural safeguards for the individual and the need for the efficiency of justice.
- In an explanatory memorandum specify criteria to enable the judge to determine whether "reasonable efforts" have been made for no. 5 and 7 of the draft provision.
- Specify that the defence counsel has in the first place to be appointed by the accused and may only be appointed by the court if the accused does not do so, subject to observing certain minimum qualifications in the choice of the defence counsel, i. e. a minimum experience in criminal law.
- As to no. 8 stipulate that the right of the defendant to have a retrial is not subject to any other condition than the one that he had never been present at the trial and that the retrial has to be a complete one on facts and law.

65. As to **suspension of official person from duty (Article 177 CPC proposal)**

- Insert an explicit reference to Art. 113 of the Criminal Code of 14 January 2019 containing a definition of official persons.
- Clearly stipulate in the draft provision the responsibility of the prosecutor, employing a harmonised approach, the prosecutor being competent for submitting all requests for suspension of officials before and after the indictment as well as during a trial.
- Provide for a specialised single judge or chamber to take the decision for suspension of a person either at each court or at a higher level to be responsible for all cases under draft Art. 177 in the country.
- Consider either removing draft Art. 177 from the Criminal Procedure Code and placing it into the context of administrative legal provisions or moving the draft provision to the end of the Criminal Procedure Code, clearly indicating its non-coercive but administrative function.
- Consider introducing a right to appeal.
- Consider introducing provisions regulating the payment of salary during the period of suspension and the rights of the suspended official in the event of an acquittal directly in the draft provision for all public officials to ensure a stringent and coherent approach and a harmonised application.

66. Last the Venice Commission underlines that it would be advisable to request specific practical support in the framework of Council of Europe cooperation activities for drafting legislation as well as for its implementation, including through training of all relevant stakeholders.

67. The Venice Commission remains at the disposal of the authorities of the Republic of Kosovo for further assistance in this matter.