

Organization for Security and Co-operation in Europe  
**Mission in Kosovo**

**REVIEW OF**  
*illegal re-occupation*  
**CASES IN KOSOVO**



## TABLE OF CONTENTS

1. INTRODUCTION .....	3
2. INTERNATIONAL AND KOSOVO LEGAL FRAMEWORK.....	5
3. CONCERNS IDENTIFIED IN EFFECTIVELY ADDRESSING ILLEGAL RE-OCCUPATION CASES.....	6
3.1 Background.....	6
3.2 Issues related to the Kosovo Property Agency .....	7
3.2.1 Filing of reports to the Kosovo Police.....	7
3.2.2 Case follow-up.....	8
3.3 Issues related to Prosecutors' Offices.....	9
3.3.1 Cases still pending with the prosecutors' offices .....	9
3.3.2 Time to file an indictment.....	10
3.3.3 Content of indictments .....	11
3.3.4 Charges brought.....	11
3.3.5 Penalties sought .....	12
3.4 Issues related to the courts.....	12
3.4.1 Unreasonable delays .....	12
3.4.2 Sentencing.....	13
3.4.3 Restitution.....	14
3.4.4 Execution of Sentences.....	15
4. CONCLUSION .....	16
5. RECOMMENDATIONS.....	17

## **LIST OF ABBREVIATIONS**

**CPC** Criminal Procedure Code

**ECHR** Convention for the Protection of Human Rights and Fundamental Freedoms

**ECtHR** European Court of Human Rights

**KP** Kosovo Police

**KPA** Kosovo Property Agency

**OSCE** Organization for Security and Co-operation in Europe Mission in Kosovo

**UDHR** Universal Declaration of Human Rights

## **LIST OF CHARTS**

**Chart 1:** Average time in months to dispose of illegal re-occupation cases per Basic Court region (as of October 2014)

**Chart 2:** Number of illegal re-occupation judgements by month (as of October 2014)

**Chart 3:** Regional distribution of cases referred by the KPA to the prosecutors' offices (as of October 2014)

**Chart 4:** Handling of cases received by the prosecutors' offices (as of October 2014)

**Chart 5:** Number of months to file indictments (as of October 2014)

**Chart 6:** Status of cases with the Basic Courts (as of October 2014)

**Chart 7:** Months taken to dispose of cases by the Basic Courts vs unresolved cases per judge in each Basic Court (as of October 2014)

**Chart 8:** Sentences imposed after guilty verdicts (as of October 2014)

**Chart 9:** Fines paid per Basic Court (as of October 2014)

## EXECUTIVE SUMMARY

This report reviews the response of Kosovo institutions to cases of illegal re-occupation of properties under the administration of the Kosovo Property Agency (KPA) and assesses how illegal re-occupation cases are more broadly handled by the system.<sup>1</sup> An illegal re-occupation occurs when an individual or a group of individuals, who have been evicted from a property pursuant to a lawful eviction order, subsequently re-occupies it. Re-occupation of property where an eviction order has been passed is a criminal offence defined by the Criminal Code of Kosovo, and carries a sentence of up to three years imprisonment. The illegal re-occupation of properties is a Kosovo-wide phenomenon affecting both privately held properties and those under the administration of the KPA. The cases of re-occupied properties under administration of KPA over which the KPA has filed a criminal report with prosecution are largely inter-ethnic in nature, involving a Kosovo Serb property owner and a Kosovo Albanian occupier. The effective adjudication of these cases will contribute not only to establishing legal certainty but will also assist in reconciliation efforts between Kosovo Albanians and Kosovo Serbs.

In order to assess the institutions' response to cases of illegal re-occupation the OSCE examined all such cases involving property under the administration of the KPA between 2008 and 2013. Limiting the scope of the study to only those properties administered by the KPA allowed for an easy identification of properties subject to re-occupation. A drawback to this decision was that it left out the subset of illegal re-occupations of properties in sole possession and under the administration of private owners, which are equally important cases. Since all the cases deal with re-occupation, an initial eviction by KPA with the assistance of Kosovo Police (KP) was conducted in all of these cases. The OSCE examined the progress of each case from the initial identification of an illegal re-occupation through to the execution of a final judgment. The assessment indicates serious concerns regarding the enforcement of evictions by the Kosovo institutions. These cases are not legally complex: the cases generally involve one defendant; the amount of evidence is moderate; the level of complexity of legal issues involved is low; and there are no pending ownership disputes.

However, despite their relative simplicity, due to slow reaction at the prosecution and judicial level, the cases take on average two years and three months to process from the time the cases were submitted by the KPA to the prosecutors' offices to a final judgement being rendered by a Basic Court. In addition, a number of other deficiencies in the authorities' response to illegal re-occupation cases were observed which prevent the effective resolution of these cases. These include the fact that: the KPA does not inform the KP about an illegal re-occupation, thus leaving the illegal occupiers in place through the whole case process; the prosecution does not highlight the inter-ethnic nature of the cases or seek stiff penalties; and the courts fail to order re-evictions; the courts are also prone to issuing short, suspended sentences that fail to act as a deterrent; and the courts do not issue restitution orders to compensate the property owners.

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<sup>1</sup> The procedures for handling illegal re-occupation cases and the underlying facts of the illegal re-occupation are the same irrespective of whether the KPA administers the property or the property is held and administered privately. Thus, review of the cases involving KPA-administered cases can shed light on how cases involving property not administered by the KPA are also likely handled.

Better co-ordination among relevant executive institutions and a closer focus on the seriousness of these cases by the courts would likely lead to significantly improved enforcement of illegal re-occupation cases and a reduction of such cases in the future. The report concludes with recommendations highlighting, amongst others, the necessity for: the offences to be adequately qualified by the prosecution; and for the courts to adjudicate in a timely manner, to issue sentences based on the individual circumstances of the case, and to always order in the enacting clause that illegal occupants should vacate the occupied property, rather than issuing suspended sentences as a general rule.

## 1. INTRODUCTION

The implementation of eviction orders and property administration across Kosovo remains a challenge. The 2013 Kosovo Progress Report of the European Commission found that the outstanding number of evictions stands at about 820, of which about 350 pertain to northern Kosovo.<sup>2</sup> Many unresolved property compensation claims are before the courts and eviction orders in resolved cases are often not respected, with evicted persons returning and re-occupying properties. Between 2008 and 2013, the Kosovo Property Agency (KPA) referred 326 such cases of re-occupation to the prosecution concerning properties under its administration,<sup>3</sup> and the number of illegal re-occupations across Kosovo is likely significantly higher when those properties not under KPA-administration are factored in.<sup>4</sup>

The effective resolution of cases of illegal re-occupation is of critical importance to the rights and integration of Kosovo Serb communities in Kosovo. Over 95 percent of the KPA cases that were referred to the prosecution offices involved property owned by members of the Kosovo Serb community that were illegally re-occupied by members of the Kosovo Albanian community. There is a history of property-related violence in Kosovo, which continues to this day. For example, there were approximately 120 property-related offences reported to Kosovo Police (KP) throughout Kosovo in 2013. Thus, the effective resolution of these illegal re-occupation cases is also of critical importance to security and the rule of law in Kosovo.

Cases of illegal re-occupation of properties are not legally complex as they: generally involve one defendant; the amount of evidence is moderate; the level of complexity of legal issues involved is low; and there are no pending ownership disputes. In light of these reasons, prosecution offices should file the indictments even earlier than they did during the period covered by the report.

The purpose of the report is to determine whether Kosovo's institutions are providing an effective resolution of illegal re-occupation cases. In line with the OSCE's mandate to promote and protect the property rights of Kosovo

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<sup>2</sup> See European Commission *2013 Kosovo Progress Report* available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2013/package/brochures/kosovo\\_2013.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/kosovo_2013.pdf)

<sup>3</sup> Out of 326 cases, 65 cases are from the Mitrovicë/Mitrovica region. The cases the KPA has thus far dealt with pertain to properties south of the Ibër/Ibar River only.

<sup>4</sup> Illegal reoccupation cases involving property not administered by the KPA cannot be readily identified. The KPA does not maintain data on illegal reoccupation cases involving property that it does not administer.

communities, and security and the rule of law in Kosovo, this report provides an analysis of the Kosovo institutions' response to these cases using a subset of the illegally re-occupation on properties administered by the KPA.

When KPA evicts the initial illegal occupant of a property, the owner of the property has the right to choose between KPA administration of his/her property or repossession. If the latter is chosen, the KPA will no longer monitor the property, for example to ensure that it is not re-occupied, nor will it take any action if it is. In this case, the owner must address the re-occupation issue to the relevant local institutions.

The findings of the report are based on a quantitative and qualitative analysis of information received by the KPA, as well as indictments, summary indictments and judgments collected from seven regional basic prosecution offices and seven basic courts in Kosovo.

To perform this assessment, the OSCE's justice monitors tracked the institutions' handling of each of the KPA cases. At the time of reporting, judgement had been entered in 137 cases. Of these cases, the courts were able to produce case files, including indictments, judgments and sentencing information for 117 cases.<sup>5</sup> These 117 cases were the subset that formed the basis of this report. The OSCE conducted an in-depth reading of the indictments and judgements issued in these cases in order to assess and compare the qualification of the offences and sentences awarded. In addition to the desk review of the documents, between October 2013 and October 2014, the OSCE monitored 93 hearings in 50 ongoing cases relating to illegal re-occupation of property, observing in-court judicial and prosecutorial practice relating to illegal re-occupation cases.

Limiting the scope of the study to only those properties administered by the KPA allowed for an easy identification of properties subject to re-occupation. A drawback to this decision was that it left out the subset of illegal re-occupations of properties in sole possession and under the administration of private owners. However, the procedures for handling illegal reoccupation cases by the prosecution and the courts and the underlying facts of the illegal reoccupation are the same irrespective of whether the KPA administers the property or the property is held and administered privately. Thus, review of the cases involving KPA-administered cases can shed light on how cases involving property not administered by the KPA are also likely handled by the system.<sup>6</sup>

The report is divided into five parts. Part 2 presents an overview of the international and Kosovo legal frameworks. Part 3 outlines issues identified in effectively addressing re-occupation cases. Part 4 presents the report's conclusions and, finally, Part 5 sets out recommendations for relevant stakeholders.

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<sup>5</sup> In the remaining cases, neither the court clerks, nor the judges were able to locate the case files. However, in those cases the fact that the case is completed and the date of judgement or acquittal was recorded in the registry book.

<sup>6</sup> See *supra* note 1.

## 2. INTERNATIONAL AND KOSOVO LEGAL FRAMEWORK

### 2.1 International Legal Framework

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols, as well as the Universal Declaration of Human Rights,<sup>7</sup> are directly applicable in Kosovo.<sup>8</sup> Of particular relevance is Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 1) which provides that everyone is entitled to the peaceful enjoyment of possessions and that no one should be illegally deprived of his or her property.

The European Court of Human Rights (ECtHR) has held that any interference with property must be: 1) lawful; 2) in the public interest, in other words, in pursuance of a legitimate aim; and 3) proportionate.<sup>9</sup> According to the ECtHR, a violation of Article 1 of Protocol 1 occurs when an applicant is “denied access to and control, use and enjoyment of his properties as well as any compensation for the interference with his property rights”.<sup>10</sup> All cases assessed for the purpose of this report fall short of the ECtHR’s requirements on permissible interference with the right to peaceful enjoyment of property.

### 2.2 Kosovo Legal Framework

Re-occupation of immovable property constitutes a criminal offense sanctioned by Article 332 of the Criminal Code of Kosovo.<sup>11</sup> Article 332, paragraph 3 states that “[t]he perpetrator shall be punished by imprisonment of one (1) to three (3) years when he or she has been previously convicted for unlawful occupation of real property or has been evicted from such property by order of the court or order or decision of any public entity or institution established under the applicable laws[...].” This paragraph is applicable to cases when a property has been re-occupied.

Two other criminal offences which are very often used in relation to cases of re-occupation of property are, firstly, “removing or damaging official stamps or marks”<sup>12</sup>, punishable by fine or imprisonment of up to three years, and; secondly, “infringing inviolability of residences and premises”<sup>13</sup>, punishable by imprisonment of up to three years. The first offence is often used because once an occupied property is vacated by the KPA it is always sealed to prevent occupiers from entering it and removing that seal is a criminal offence in itself; the second offence is a general offence preventing any intruder from entering someone’s private property. None of these two above-mentioned offences require the establishment of “intent” of the perpetrator to occupy the property for a longer period of time.

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<sup>7</sup> See Article 17(2) of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly on 10 December 1948, which states that “no one shall be arbitrarily deprived of his property”. See also article 1 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

<sup>8</sup> See Article 22 of the Kosovo constitution, 15 June 2008.

<sup>9</sup> *Albergas and Arlauskas v. Lithuania*, para. 58, ECtHR, Judgment of 27 May 2014.

<sup>10</sup> *Orphanides v. Turkey*, para 35, ECtHR, Judgment of 20 January 2009, became final on 6 July 2009.

<sup>11</sup> Kosovo Criminal Code No. 04/L-082 1 January 2013.

<sup>12</sup> *Ibid*, Article 414.

<sup>13</sup> *Ibid*, Article 200.

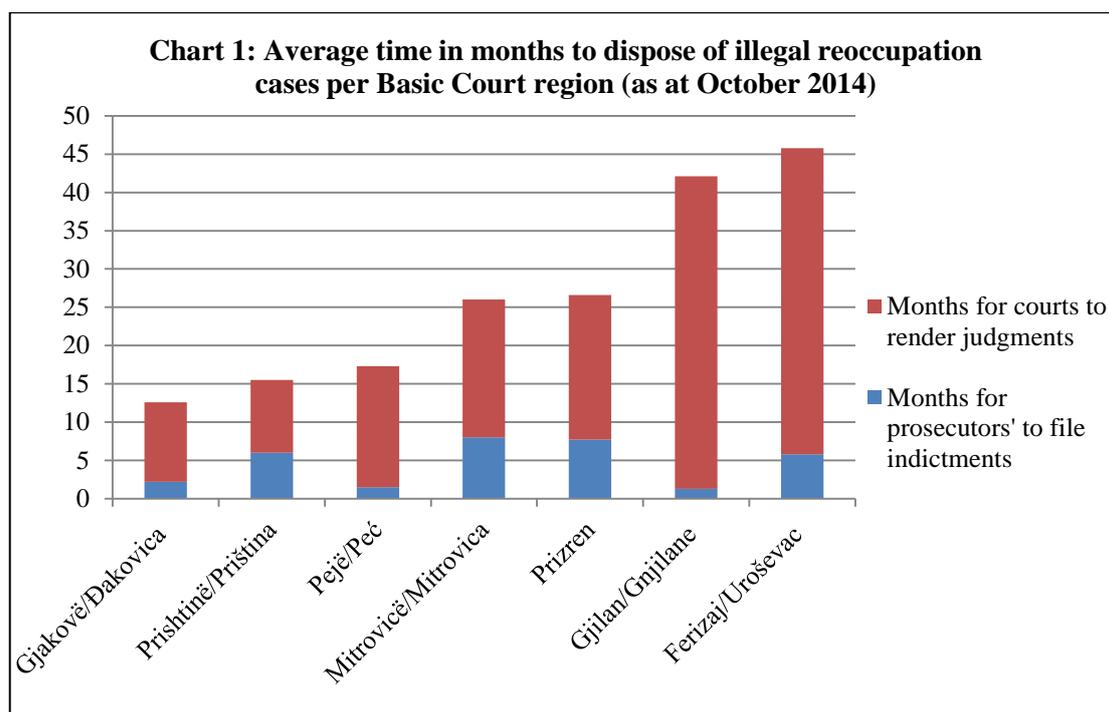
### 3. CONCERNS IDENTIFIED IN EFFECTIVELY ADDRESSING ILLEGAL RE-OCCUPATION CASES

#### 3.1 Background

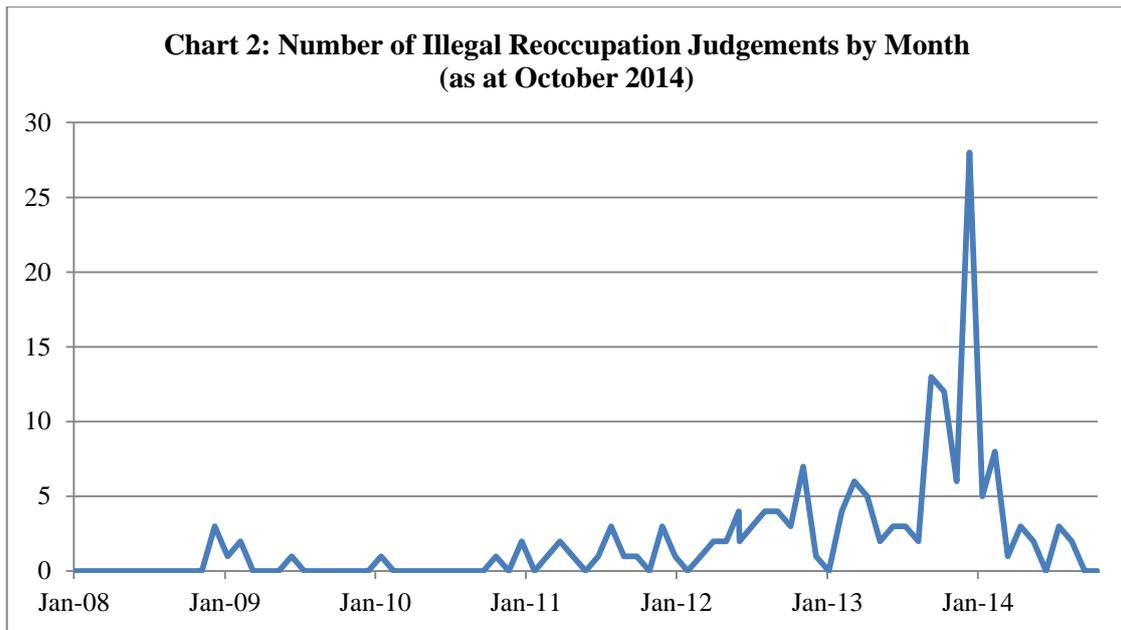
Between 2008 and 2013, the Kosovo Property Agency (KPA) referred a total of 326 cases of illegal re-occupation of properties under its administration to the prosecution. The OSCE received this list of cases from the KPA and tracked the cases through various stages of criminal procedure with the prosecution offices and courts. Over 95 percent of these involved property owned by members of the Kosovo Serb community that was being illegally re-occupied by members of the Kosovo Albanian community.

In all of the cases, the KPA, in line with its mandate, carried out an initial eviction with the assistance of the KP. The evictions were unsuccessful in that the properties were subsequently re-occupied. The KPA, in its capacity as an administrator of the properties in question, then resorted to the criminal justice system to address the re-occupation.

By October 2014, final judgements had been issued in just 42 percent (137 cases) of these cases. On average it took two years and three months for cases to be issued with a final judgement from the time the KP submitted the case to the prosecutor's office, although (as detailed in Chart 1 below) this varies greatly by region:



As can be seen in Chart 2 below, in December 2013 it appeared that some progress had been achieved to speed up the resolution of these matters, with an unusually large number of judgements being rendered in illegal re-occupation cases. However, these gains proved merely temporary.



The OSCE has found significant deficiencies in the processing and enforcement of illegal re-occupation cases which jeopardizes the realisation of the right to peaceful enjoyment of possessions under Article 1 of Protocol 1. The specific findings are detailed below.

### **3.2 Issues related to the Kosovo Property Agency (KPA)**

#### *3.2.1 Filing of reports to the Kosovo Police*

The KPA is mandated to resolve ownership claims over private immovable property and claims to rights of use over private immovable property when the owner is not able to exercise those rights,<sup>14</sup> and, in the performance of its duties, may place properties under its administration.<sup>15</sup> The OSCE’s monitoring indicates that in cases of illegal re-occupation, the KPA files a criminal report of illegal re-occupation directly to the respective prosecution office only, and not to the KP.<sup>16</sup> In no case did the KPA file a report with the KP or seek to have the original eviction notice enforced again. This contrasts with the process used to enforce the original eviction order, during which process the KPA works closely with the KP to ensure that the eviction is carried out.

The most effective means by which a suspect can be removed immediately from the property is if the KPA files a report for re-eviction with the KP which can then

<sup>14</sup> See Sec. 2, UNMIK Regulation 2006/10.

<sup>15</sup> See Section 3 of UNMIK Regulation 2006/50 which outlines the responsibilities of the KPA. See also, Section 16.5 of the same Regulation which states that “[a]ny person who, without lawful excuse, enters a property by breaking a seal shall be subject to removal from the property by the law enforcement authorities.” (Subsequently replaced by Law No. 03/L-079 Amending UNMIK Regulation 2006/50 On the Resolution of Claims Relating to Private Immovable Property, Including the Resolution of Agricultural and Commercial Property, 13 June 2008). See also Article 69 of the Kosovo Code No. 04/L-12 on Criminal Procedure (CPC), 1 January 2013, which gives autonomy to the police to investigate criminal acts.

<sup>16</sup> This was confirmed during several interviews which OSCE monitors conducted with KPA representatives in the period between September 2013 and February 2014.

proceed to execute the initial eviction order, remove and/or provisionally arrest and detain the perpetrator.<sup>17</sup> Because this is not done, the person illegally occupying the property may remain in the property, continuing to commit the crime of illegal re-occupation of property, until the resolution of the case, which can take a number of years in some courts.

The filing of a report with the KP does not preclude the KPA also referring the case to the prosecution. Since illegal re-occupation is a crime, proceedings should also be commenced in order to prosecute the illegal re-occupier and to recompense the injured party.<sup>18</sup> Notifying both institutions about an illegal re-occupation would likely ensure the most effective initial handling of the case.

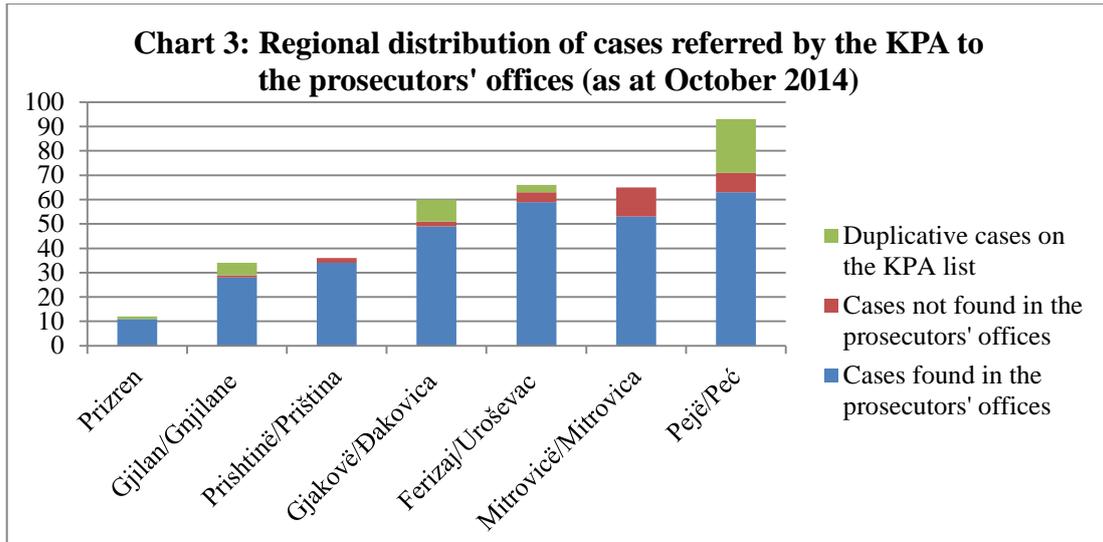
### 3.2.2 Case follow-up

The manner in which records of illegal re-occupations are being kept by the KPA and are being followed up with the enforcement institutions also raises a concern. The list provided to the OSCE by the KPA contained 366 case referrals. However, upon further investigation by the OSCE, 40 records on the KPA's list were double counted. Thus, some cases that were actually closed were considered still pending by the KPA. In addition, some 29 cases on the KPA's list of cases referred to the prosecutors could not be found either in the prosecutors or the courts. Chart 3, below, details the number of cases referred by the KPA by region.

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<sup>17</sup> Article 8.2 of The Law on Police provides the KP with a general power to assist central and local government institutions in the carrying out of their duties, such as in securing an eviction: "Upon the request of central or local governmental institutions, the Police is authorized to provide assistance to them in the performance of their public duties when there is a reason to believe that the safety of the person or persons performing the public duties could be at risk because of possible resistance to their actions." In addition, the KP has more general authority to enter premises to stop the commission of an ongoing crime, such as an illegal re-occupation. See Article 11.1 of the Law on Police ("Police Officer has power to impose reasonable control on people and property within his/her jurisdiction and power to issue and enforce lawful orders and instructions for members of society in general to achieve legitimate police objectives.") And the KP may also provisionally arrest and detain a person, such as an illegal re-occupier, caught in the act of committing a criminal offense. See Article 162 of CPC, ("If a person is caught in the act of committing a criminal offence prosecuted ex officio or is being pursued, the police or any other person shall be authorized to arrest him or her provisionally even without a court order"). *Supra* note 15.

<sup>18</sup> See Article 6(2) of the CPC, which states: "[c]riminal proceedings shall only be initiated upon the decision of a state prosecutor that reasonable suspicion exists that a criminal offence has been committed." See also Article 6(3) which states that "[a] state prosecutor may initiate a criminal proceeding in accordance with Paragraph 2 of this Article upon receiving information from the police, from another public institution, private institution, member of the public, media, from information obtained from another criminal proceeding, upon the filing of complaint or motion of an injured party." *Supra* note 15.

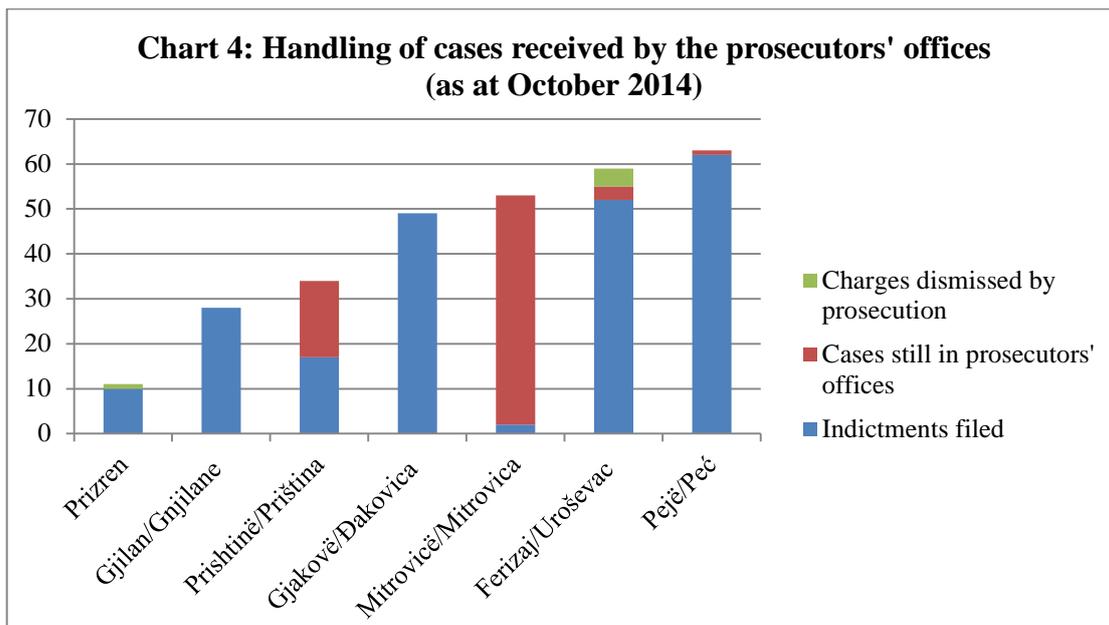


Confusion over the actual number of cases of re-occupation relating to KPA-administered property and the status of these cases impedes the effective enforcement of these actions. Better record keeping and more proactive communication between the KPA and the prosecution offices on case status is necessary for clarity on the scale of the issue of illegal reoccupation.

### 3.3 Issues related to Prosecutors' Offices

#### 3.3.1 Cases still pending with the prosecutors' offices

As at October 2014, there were 71 cases referred by the KPA to the prosecutors' offices between 2008 and 2013 that were still pending in the prosecutors' offices, with neither an indictment filed nor the charges dismissed by the prosecutors. Chart 4, below, details the handling of the cases received from the KPA broken down by region.

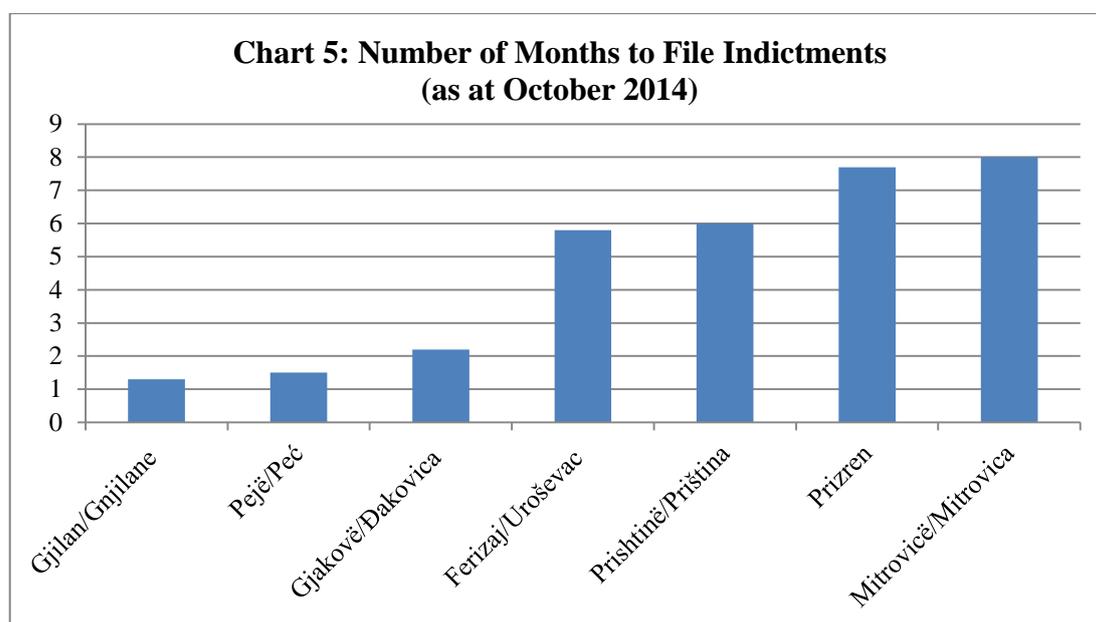


The handling of cases by the prosecutors' offices in Prishtinë/Priština and Mitrovicë/Mitrovica raises particular questions. Out of 36 cases filed by the KPA to the Prishtinë/Priština prosecutor's office, 17 cases are still pending. According to the prosecutors in that office, in all 17 cases, the perpetrator's identity could not be established. Given the fact that the KPA had initially issued an eviction order against the occupiers, it is unclear why the prosecutors cannot establish the identities of the perpetrators. The high number of cases designated as having the occupier "unknown" therefore indicates a failure in the investigation process.

In the Mitrovicë/Mitrovica region the situation is more complex than in other regions. Between 2008 and 2013, the KPA confirmed that it had forwarded 65 cases to the prosecutor's office.<sup>19</sup> The prosecution office states that it has received 53 cases, but only in two of these has an indictment been filed.<sup>20</sup> Furthermore, due to a lack of office space and difficult work conditions, the KPA was requested by the Mitrovicë/Mitrovica prosecutors' office not to submit any other cases until further notice. Given the overwhelming inter-ethnic and conflict-related nature of these cases, as well as their relatively simple character, these cases appear to be of the type that should be processed by the prosecution office in Mitrovicë/Mitrovica regardless of the underlying working conditions.

### 3.3.2 Time to file an indictment

Kosovo-wide, the average time to file an indictment from the moment a criminal report is filed with any prosecutors' office is five months, although (as detailed in the Chart 5, below) this varies greatly from region to region.



Cases of illegal re-occupation of properties are not legally complex as: they usually concern one defendant only; the volume of evidence is moderate; the level of complexity of legal issues involved is low; and there are no pending ownership disputes. Because of these reasons, prosecution offices should file the indictments

<sup>19</sup> KPA provided list of pending cases before courts in Kosovo, February 2014.

<sup>20</sup> At the time of publication the reasons for why only two indictments were filed were unknown.

even sooner than they did during the period covered by this report. The prosecutors' offices in Gjilan/Gnjilane, Pejë/Peć, and Gjakovë/Đakovica, with turnaround times of approximately two months or less, show that this is possible. Indeed, as can be seen in Chart 3, two of those offices, Pejë/Peć and Gjakovë/Đakovica, have high numbers of these cases compared to some of the regions with slower response times, such as Prizren and Prishtinë/Priština.

### 3.3.3 Content of indictments

Between 2008 and the end of 2012, prosecution offices filed summary indictments in 220 cases, as they were entitled to under the prior Provisional Criminal Procedure Code.<sup>21</sup> From 1 January 2013, regular indictments were filed since it is no longer possible to file summary indictments under the new Criminal Procedure Code. However, the regular indictments filed in 2013 were still largely summary in fashion. For example, prosecutors failed to adequately describe the inter-ethnic nature of the case and they generally considered the KPA, not the actual property owner, to be the injured party since the property is administered by the KPA. The actual owner of the property was generally not mentioned in the summary indictment/indictment, and was also not listed as someone who should be summoned to the main trial.<sup>22</sup>

### 3.3.4 Charges brought

In the 117 completed cases reviewed in-depth by the OSCE, prosecutors regularly failed to file the right charges in light of the facts. For example, in 94 of those cases only the charge of "removing or damaging official stamps or marks"<sup>23</sup> was brought even though from the facts of the case it is clear that the defendant removed the official stamp in order to re-enter the property. By not charging the defendants for "illegal occupation of immovable property,"<sup>24</sup> in addition to the removing of an official stamp, the eviction of the defendant is not ordered in the judgment.<sup>25</sup> Moreover, by charging the defendant for one criminal offence instead of two, the gravity of the case is not made evident and a higher aggregate sentence is not imposed.<sup>26</sup>

The cases brought in the Gjakovë/Đakovica Basic Court represent an exception: out of 32 final judgments reviewed, in all but one case defendants were charged for both of the aforementioned offences.

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<sup>21</sup> See Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003, with subsequent amendments. On 6 November 2008, the Kosovo Assembly promulgated Law No. 03/L-002 on Supplementation and Amendment of the Provisional Criminal Code of Kosovo (hereinafter PCCK), Chapter XL: summary procedure, Articles 461 and 462. Summary indictment applied to summary proceedings, for which the principal punishment is a fine or imprisonment of up to three years.

<sup>22</sup> See Article 62, CPC, *Supra* note 15.

<sup>23</sup> Article 322, PCCK. Also, Article 414, CPC, *Supra* note 15.

<sup>24</sup> Article 259, PCCK. Also, Article 332, CPC, *Supra* note 15.

<sup>25</sup> The first offence is "consumed" as soon as the official stamp was removed, whereas the second offence is perpetrated in continuity, for as long as the immovable property is held in defendant's possession.

<sup>26</sup> Under the PCCK, the removal of the official stamps offence carried a higher maximum sentence than the illegal occupation offence. This is no longer the case under the CPC.

### 3.3.5 Penalties sought

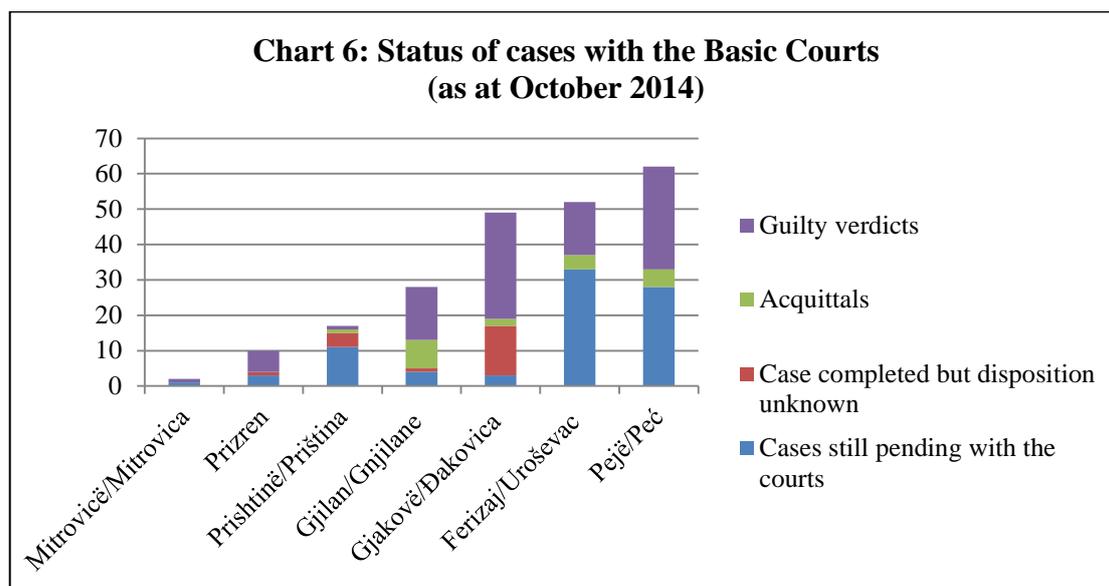
At sentencing, the OSCE observed that prosecutors regularly took a passive position, deferring entirely to the judge, making no suggestion of a particular sentence, but rather simply proposing that defendants be punished “according to the law”. When the prosecutors did seek specific penalties, these were generally in and around the legal minimum. In some cases, for example, prosecutors sought only a punitive order (in other words, a fine).

The above factors, taken together, seem to suggest that an effective criminal investigation and prosecution did not take place in many instances. In this regard, the ECtHR has held that “where the interference is of a criminal nature, [the] obligation will in addition require that the institutions conduct an effective criminal investigation and, if appropriate, prosecution”.<sup>27</sup>

## 3.4 Issues related to the courts

### 3.4.1 Unreasonable delays

Out of 220 indictments and summary indictments filed by the prosecutors’ offices, the Basic Courts have rendered judgments in 137 cases. Significant numbers of unresolved cases exist in certain courts. Chart 6, below, details the status of the cases filed with the Basic Courts as at October 2014.<sup>28</sup>



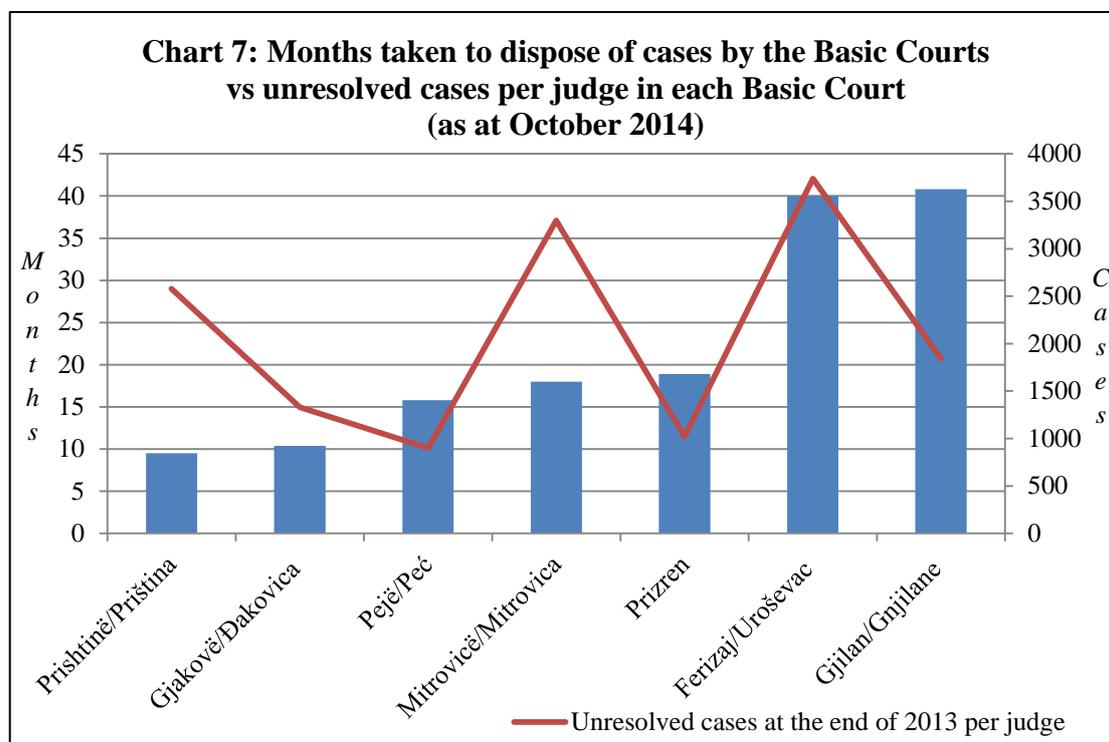
There are also significant delays in processing these cases through the courts. Average time to render a judgement is approximately 22 months, although this varies greatly between Basic Courts. Chart 7, below, details the average time to dispose of cases per Basic Court, compared to a measure of the backlog facing each Basic Court: the number of unresolved cases per judge.<sup>29</sup> As can be seen in

<sup>27</sup> *Blumberga v. Latvia*, ECHR Judgment of 14 October 2008.

<sup>28</sup> See *Supra* note 5. In some cases the Basic Court was unable to produce a case file, but the fact that the case is completed and the date of judgement or acquittal was recorded in the court’s registry.

<sup>29</sup> “Unresolved cases at the end of 2013 per judge” is calculated by dividing the number of active cases pending resolution in a Basic Court at the end of 2013 by the number of judges assigned to

Chart 7, court efficiency in illegal re-occupation cases is not related to the general backlog in each court. Some courts with a relatively high backlog (e.g. Prishtinë/Priština) dispose of cases quickly, while others with a low backlog (e.g. Gjilan/Gnjilane) dispose of cases slowly.



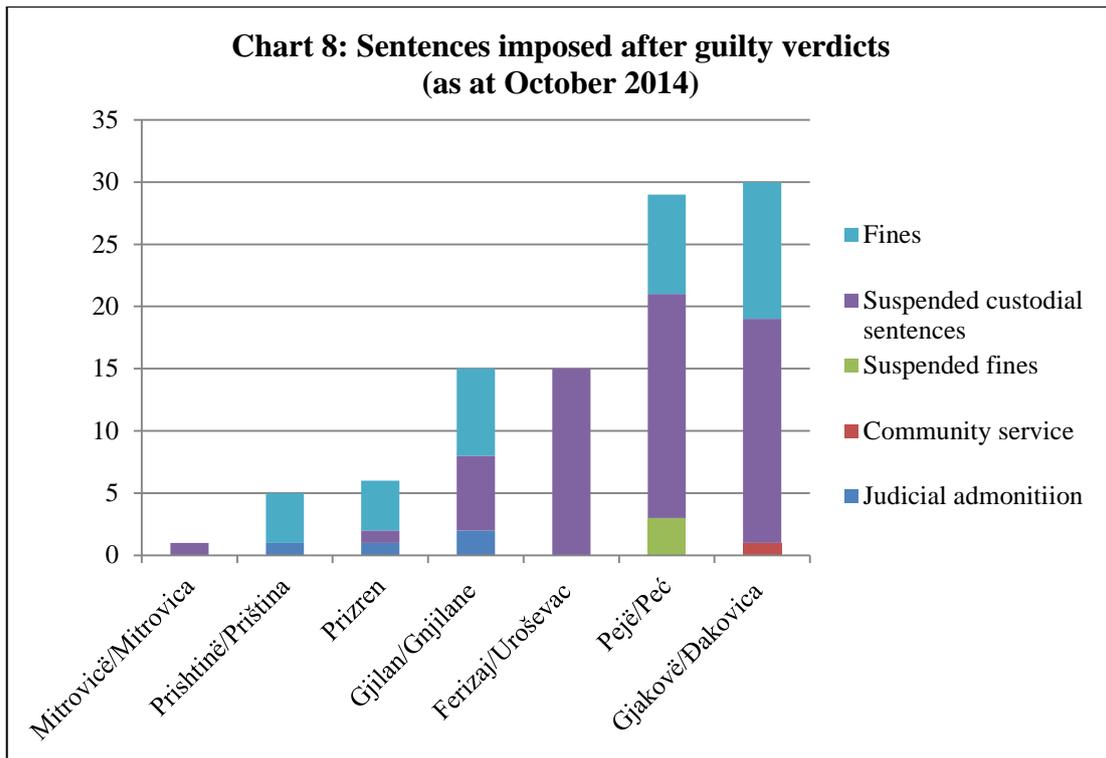
The specific features of illegal re-occupation cases – their relatively simple nature, the inter-ethnic element, and their impact on the property and housing rights of the Kosovo Serb community – indicate that the cases should be handled in an expeditious manner.<sup>30</sup> Yet these cases are not being treated with the requisite urgency in certain courts. That the Basic Courts in Prishtinë/Priština and Gjakovë/Đakovica can dispose of cases in approximately 10 months on average indicates that these cases can be processed relatively rapidly despite, in the case of Prishtinë/Priština, a comparatively heavy backlog of cases.

### 3.4.2 Sentencing

The issue of low sentencing is a major concern. Of the 117 cases reviewed in-depth by the OSCE following a judgment, 97 resulted in a guilty verdict. Chart 8, below, details the sentences handed out in those 97 cases.

that Basic Court. The data for that calculation was obtained from the KJC's *Annual Report 2013: Statistics of the Courts*, available at [http://kgjk-ks.org/repository/docs/RAPORTI-VJETOR-2013-Englisht\\_885030.pdf](http://kgjk-ks.org/repository/docs/RAPORTI-VJETOR-2013-Englisht_885030.pdf).

<sup>30</sup> See in general the CPC, *Supra* note 15, and for example: Article 159, for the length of investigation and filing of an indictment. See also Articles 242, 245, 285, and 314 detailing deadlines for the initial hearing, second hearing and for the main trial.



Not a single case resulted in a custodial sentence. Rather, of the 34 fines imposed, the highest observed by the OSCE was a €600 fine. In total 59 suspended custodial sentences were observed, with the stiffest being a suspended custodial sentence of one year imprisonment if the perpetrator committed another crime within two years. The passivity of prosecutors during the trial is a contributing factor to the issuance of low sentences. However, ultimately it is the duty of the courts to guarantee due process and to ensure that all factors, including all mitigating and aggravating circumstances, are taken into account in imposing a sentence that sufficiently reflects the severity of the crime. In addition, judges should always include in the enacting clause of a guilty judgment a specification that, in addition to a defendant being found guilty for illegally occupying a property, the property should also be vacated by the defendant, if the latter is still occupying it. Yet, in these cases, the eviction of the defendant was ordered in just seven instances, all in the Basic Court of Gjakovë/Đakovica, which indicates that properties may remain occupied even after a criminal trial has concluded.<sup>31</sup>

### 3.4.3 Restitution

The courts also do not issue restitution awards to recompense the property owner even though there is a right to this in the Criminal Procedure Code.<sup>32</sup> In the 97 judgments of guilt that the OSCE reviewed, no court has awarded compensation. Instead after conviction the courts typically instruct the KPA<sup>33</sup> (or the owner of the property, if present) to file an action for damages in the civil courts. This is highly

<sup>31</sup> Gjakovë/Đakovica Basic Court, Judgment P. Nr. 95/2012 of 21 August 2013, Judgment P. Nr. 241/12 of 28 June 2012, Judgment P. Nr. 236/12 of 14 November 2012, Judgment P. Nr. 19 November 2012, Judgment P. Nr. 231/12 of 28 June 2012, Judgment P. Nr. 19/12 of 17 May 2012, Judgment P. Nr. 311/12 of 7 August 2012.

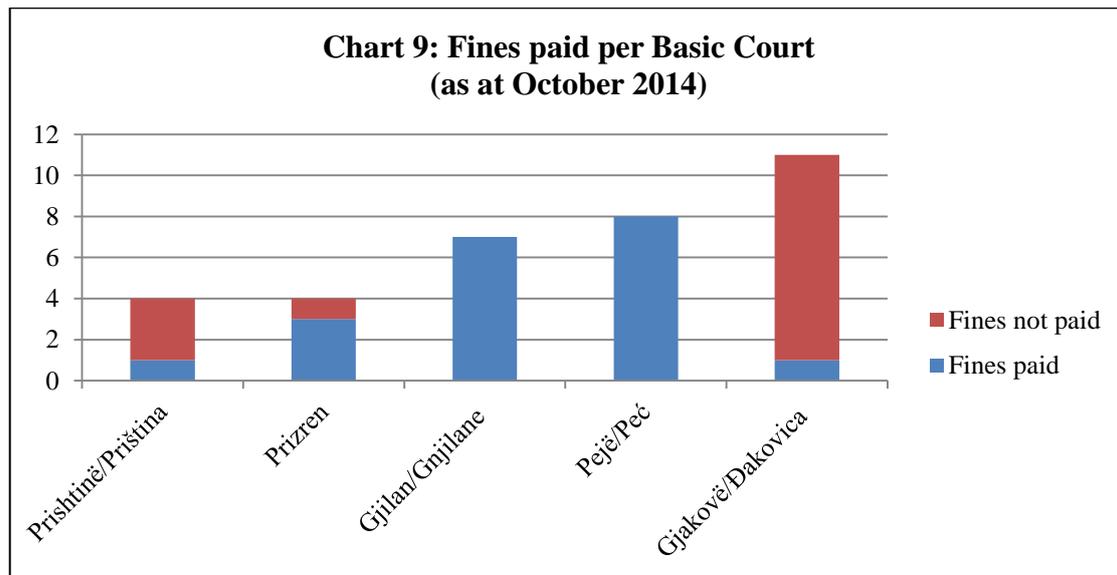
<sup>32</sup> Article 62, CPC, *Supra* note 15.

<sup>33</sup> The KPA provides legal representation in respect of all cases under its administration.

inefficient and a likely deterrent to the injured party, who must incur additional costs and time to pursue the claim in the civil courts. The criminal court should instruct the injured party about the right to file and be awarded property claims. Only if the evidence relating to the property claim is deemed insufficient should the court refer the party to initiate separate civil proceedings.<sup>34</sup> As mentioned, the ECtHR in this sense has found that there is a positive obligation on the institutions to ensure that “property rights are sufficiently protected by law, and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained”.<sup>35</sup> Not including the compensation claim goes against the spirit of these international standards, in particular considering that injured parties in these cases are likely to be IDPs and therefore have a smaller ability to seek justice in Kosovo courts.

#### 3.4.4 Execution of Sentences

Finally, deficiencies exist in the enactment of the sentences. Of the 34 fines imposed, 20 have been paid, although the rate of execution varies significantly by Basic Court. Chart 9, below, details the status of execution of fines in those Basic Courts where fines were imposed as at October 2014.



In only one case, in the Basic Court of Gjiilan/Gnjilane, was a custodial sentence imposed for failure to pay a fine.<sup>36</sup> Moreover, no system appears to be in place (whether in the courts or the prosecutors’ office) to track whether a perpetrator subject to a suspended sentence has committed another crime within the mandated period of the suspended sentence.

<sup>34</sup> Article 463, CPC, *Supra* note 15.

<sup>35</sup> *Blumberga v. Latvia*, ECtHR Judgment of 14 October 2008, paragraph 67.

<sup>36</sup> The imposed fine of €200 Euros was replaced with 13 days’ imprisonment due to an unpaid fine.

#### 4. CONCLUSION

The above assessment indicates that serious deficiencies exist in the enforcement, prosecution and adjudication of these actions, threatening the realisation of the right to peaceful enjoyment of property under Article 1 of Protocol 1 of the ECHR. In light of the nature of the offence and its potential to harm inter-ethnic relations, the cases need to be treated as important by all institutions concerned and measures should be taken to ensure that illegal re-occupiers are removed from the properties and appropriately punished within a reasonable time.

For example, the KPA should file a criminal report with the police where a property under its administration has been re-occupied in order to ensure enforcement of the initial eviction order. However, the assessment revealed that the KPA is not using the police to secure execution of the eviction order. The prosecution uniformly fails to raise the inter-ethnic nature of these cases and seek penalties which would deter future such conduct. Further, despite the inter-ethnic element and the straightforward nature of illegal re-occupation cases, certain prosecutors' offices and certain courts do not process them with sufficient urgency.

As a result of these inefficiencies, re-occupiers are able to occupy properties for the duration of an enforcement action – the average time for which is approximately two years and three months – and the penalties for this conduct are extremely benign. Out of 326 cases of re-occupation reported by the KPA between 2008 and 2013, just 20 fines have been paid and one person has served a custodial sentence for failure to pay a fine. No custodial sentences have been handed down, and no restitution orders to compensate the property owners have been issued.

However, despite the inherent short comings there are good practices. For instance, in Gjakovë/Đakovica, while there are problems in the failure to issue restitution orders and failure to execute sentences, the cases are pushed through the prosecutor's office and decisions are rendered by the Basic Court within a year of the case being submitted by the KPA to the prosecutor's office. Moreover, the prosecutors' office in Gjakovë/Đakovica is the only office observed by the OSCE with the practice of charging perpetrators with both the "removing or damaging official stamps or marks" and the "illegal occupation of immovable property" criminal offenses, and the judgments from the Basic Court of Gjakovë/Đakovica the only court where eviction was ordered in the judgment (although this was not a uniform practice).

## **5. RECOMMENDATIONS**

### **To Kosovo Property Agency**

- File timely criminal reports with Kosovo Police and the prosecution when made aware of illegal re-occupation.
- Instruct the prosecutors to seek financial compensation in addition to penalties and/or custodial sentences.
- Ensure that records of re-occupation are systematically kept and that cases are being regularly followed-up with Kosovo Police and the prosecutors' offices.

### **To public prosecutors**

- Submit cases of illegal property re-occupations to the courts expeditiously.
- Improve the quality of the indictments filed indicating, for example, the inter- ethnic nature of the case and the owner of the property.
- File indictments for a violation of provisions regulating the removal of official stamps as well as the re-occupation of properties.
- Be proactive in seeking convictions, penalties and, in certain cases, custodial sentences to act as a deterrent.
- Seek financial compensation for the property owner.
- Ensure that records of persons subject to suspended sentences are kept.

### **To the courts**

- Treat illegal re-occupation cases, at a minimum, in accordance with time limits set by law.
- Be mindful of the inter-ethnic nature of the case and the need for an effective deterrent of this conduct in sentencing.
- Issue an order for financial compensation to the property owner, unless clearly unwarranted because of the complexity of the matter.
- In the enacting clause of guilty judgments, always include a clause that states that the property shall be cleared of illegal occupants.



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