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Failure to respect the principle of legality violates domestic law and international human rights standards

The OSCE Mission in Kosovo (OSCE) is concerned that courts in Kosovo have failed to respect the principle of legality by prosecuting persons for crimes that did not constitute offences at the time when they were allegedly committed, or by imposing sanctions above the maximum prescribed by the law.

The principle of legality (“*nullum crimen, nulla poena sine lege*”) is a fundamental legal principle that aims to protect individuals against the arbitrary imposition of sanctions by the State. This principle is widely recognized, both by human rights conventions¹ and domestic law.²

The first part of the principle, *nullum crimen sine lege*, prohibits the punishment of a person for an act which did not constitute a criminal offence at the time when it was committed. Thus, a criminal provision can not be retrospectively applied. The second part, *nulla poena sine lege*, protects a perpetrator from receiving a punishment more severe than that foreseen by the law.

However, the OSCE has monitored cases where Kosovo courts violated both aspects of the principle of legality.

On 7 November 2006, in a case before a District Court , the court confirmed an indictment against a defendant for the crime of trafficking in human beings, pursuant to Article 139(3) Provisional Criminal Code of Kosovo (PCCK), a serious offence resulting in punishment of 7 to 20 years of imprisonment. However, the alleged acts constituting trafficking occurred in 1999, two years before trafficking was classified as a distinct criminal offence in the Kosovo legal system,³ and five years before the enactment of the legal provision on which the indictment is based.⁴

In two trials⁵ before a Municipal Court, both held on 16 August 2007, the court convicted two defendants for the crime of illegal border crossing,⁶ and sentenced each to a fine of 900 Euro.⁷ The law establishes a penalty of 250 Euro for the offence.

¹ See Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR), and Article 7(1) of the European Convention on Human Rights (ECHR). See also European Court of Human Rights (ECtHR), *Kokkinakis v. Greece*, judgment, 25 May 1993, para. 52.

² See Article 1 of the Provisional Criminal Code of Kosovo (PCCK), promulgated by UNMIK Regulation No. 2003/25 On the Provisional Criminal Code of Kosovo, 6 July 2003.

³ See Section 2 of UNMIK Regulation 2001/4 On the prohibition of trafficking in persons in Kosovo, 12 January 2001.

⁴ The PCCK only entered into force on 6 April 2004.

⁵ The proceedings were conducted according to Art. 476 ff. of the Provisional Criminal Procedure Code of Kosovo (PCPCK).

⁶ Art. 114(1), PCCK.

⁷ Of note, the execution of the sentence was suspended according to Art. 43 of the PCCK.

In the first example, the court applied a criminal provision retrospectively. In the second one, it imposed a sentence harsher than the law allows.⁸ In both cases, the court, violated domestic law and international human rights standards which codify the principle of legality.

Therefore, the OSCE recommends that:

- Prosecutors should not bring criminal cases against persons and judges should not convict defendants for acts which did not constitute crimes at the time the alleged acts occurred.
- Judges should impose punishments permissible under the law.
- When a court sentences a defendant for a crime or punishment not foreseen by law, his or her lawyer should appeal the verdicts as a violation of Articles 1 and 2 of the PCCK.

Delays in the execution of final court judgments violate domestic law and the right to a fair trial

The OSCE is concerned that some courts fail to act immediately upon parties' proposals to execute final court judgments, thus infringing on the right to a fair trial.

The effective implementation of court decisions is implicit in the guarantee of the right to a fair trial according to Article 6 of the European Convention on Human Rights (ECHR). In addition, the European Court of Human Rights (ECtHR) held that the right of access to the court "would be illusory if a [...] domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."⁹ Furthermore, under Article 6 of the ECHR, everyone is entitled to a trial within reasonable time. This time period includes enforcement of proceedings.

According to applicable domestic law, the Law on Executive Procedure (LEP), the court is obliged in execution proceedings to proceed instantly upon the proposal of the creditor.¹⁰

Despite these provisions, the OSCE has monitored cases in which the court did not act instantly on the creditor's proposal, thus violating domestic law and affecting the right of the party to a fair trial. The following cases serve as examples:

In a case before a Municipal Court, the court decided in a judgment dated 13 September 2001 to require the defendant to vacate the disputed property and transfer possession to the plaintiff within 15 days. The District Court confirmed this judgment on 4 December 2001. However, after the plaintiff requested the

⁸ Of note, in both cases defence counsel failed appeal the decisions on the grounds of violation of art. 1 and 2 of the PCCK.

⁹ See *Hornsby v. Greece*, ECtHR, judgment, 19 March 1997, para. 40.

¹⁰ Article 2(1) and 10(1), Law on Executive Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia, 21 April 1978 No. 20/78.

eviction of the defendants from the premises on 21 December 2001,¹¹ the execution clerk only partly executed the judgement on 21 June 2002, and only evicted the defendants from a portion of the property. Consequently, on 29 July 2003, the plaintiff filed another request to evict the defendants from the entire premises.¹² However, the court failed to take any action until the plaintiff on 24 April 2007 filed yet another request for execution. At present, the execution procedure is still pending and the judgment is only partly executed.¹³

In another case before a Municipal Court, in a judgment dated 9 February 2005 the court required the defendant to pay damages as compensation. The District Court confirmed the judgment on 12 July 2006, and on 12 October 2006 the plaintiff requested execution of the judgment by the Municipal Court. However, it was not until six months later, on 2 March 2007, that the court issued the decision on the execution to list and sell movable property from the defendant's apartment. On 3 July 2007, the court scheduled the execution for 18 July 2007. However, the execution did not occur on this date.

In both examples, the courts failed to immediately process the creditor's proposals to execute judgments. In the first case, the execution procedure has been pending for more than six years and in the second one for almost one year. This delay is primarily due to the courts' failure to act. By not enforcing court decisions in a timely manner, courts not only violate the LEP, but also the right to a fair trial.¹⁴

Consequently, the OSCE recommends that:

- Executive judges should immediately process a creditor's proposal for an execution, as required by the LEP.
- Attorneys should request that courts execute decisions of their clients in a timely manner.
- The Kosovo Judicial Institute should train judges on the Law on Executive Procedure

¹¹ The court accepted the request for execution on 18 January 2002.

¹² The court accepted the request for execution on 30 July 2003.

¹³ On 11 June 2007, the court obliged the plaintiff to supplement his request for execution. After the plaintiff's submission on 18 June 2007, the court overruled the request. The plaintiff filed an appeal against this decision on 10 August 2007, which is still pending. The non-execution of this judgment, and the resulting inability of the plaintiff to peacefully enjoy his property, may also constitute a violation of Article 1 of Protocol 1 of the ECHR. See *Loizidou v. Turkey*, ECtHR, judgment, 18 December 1996, paras. 58-64 (finding that a State has a positive obligation to ensure that the owner of real property has access to it so that it can be enjoyed). See also *Cyprus v. Turkey*, ECtHR, judgment, 10 May 2001, paras. 178-189.

¹⁴ Of note, in both cases the plaintiffs were represented by attorneys who failed to adequately request that the courts expeditiously processed their clients' requests for execution.