



**Organization for Security and Co-operation in Europe  
MISSION IN KOSOVO**

# **Review of Criminal Cases relating to Failure to File Declarations of Assets by Senior Public Officials**

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## EXECUTIVE SUMMARY

This report reviews the response of Kosovo institutions to the failures of Senior Public Officials to file timely declarations of their assets pursuant to the Law on Declaration of Assets.<sup>1</sup> The Law on Declaration of Assets obligates Senior Public Officials to file within 30 days of taking up a new post, and annually thereafter. By requiring the open disclosure of assets these declarations are a key tool in ensuring transparency and fighting corruption, allowing assets and wealth to be tracked. The proper enforcement of failures to file these declarations is, therefore, of critical importance in combatting corruption in Kosovo.

Since January 2013, a failure to file declarations of assets has been treated as a criminal offence. The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) reviewed such cases brought between 2013 and 2014, analyzing their disposition through October 2015. The OSCE's assessment indicates that, in practice, inconsistencies exist in the handling of these cases by the relevant institutions: the Anti-corruption Agency, the prosecution and the courts. These inconsistencies result in divergent outcomes even where the underlying circumstances of the cases are nearly identical, with negative implications for guarantees of legal certainty and equality before the law as provided in the Kosovo legal framework. They also undermine the enforcement of this critical anti-corruption tool by overburdening the justice sector with cases that reasonably should not have been brought.

This report identified several concerns, as follows: an interpretation of the law that results in a number of cases being brought without adequate evidence that Senior Public Officials were informed by Contact Officers of their obligation to file declarations of assets; the failure to provide guidance and training to Contact Officers, designated persons within each institution of government responsible for notifying Senior Public Officials of their obligations to file declarations; inconsistencies within and between prosecution offices on how to address the cases; a failure to use alternatives to criminal prosecution; indictments, judicial decisions and judgments that do not contain adequate reasoning, including with regards to the issue of whether Senior Public Officials were properly notified of their obligation to file; and low-levels of defence counsel representation.

Despite the challenges observed in the enforcement and adjudication of these cases, the report notes that positive developments in relation to these concerns have occurred. In February 2014, the Anti-corruption Agency began training Contact Officers on their roles and responsibilities and, in March 2015, published a manual for them. The manual instructs Contact Officers to notify each Senior Public Official of their responsibility to file and to keep records of this notification for future use; an important step given the need to establish that Senior Public Officials were notified in order to create criminal liability for failure to file. In addition, efforts have been made by the Office of the Chief Prosecutor to harmonize prosecutorial practice in these cases and to encourage the greater use of alternatives to criminal prosecution. However, further efforts to harmonize practice and ensure consistent application of the law are needed. The report concludes with recommendations to further assist relevant actors in their efforts to harmonize practice.

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<sup>1</sup> Law No 04/L-50 on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of All Public Officials, 14 September 2011, as amended and supplemented by Law No 04/L-228 on Amending and Supplementing the Law No. 04/L-50 on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of All Public Officials (Law on Declaration of Assets), 7 April 2014.

## 1. INTRODUCTION

This report presents the findings and recommendations from the OSCE's monitoring of criminal cases brought between 2013 and 2014 against "Senior Public Officials" for their failure to file declarations of assets pursuant to the Law on Declaration of Assets, analyzing their disposition through October 2015. Before the entry into force of the new Criminal Code of Kosovo<sup>2</sup> (Criminal Code) in January 2013, the failure to report assets or the filing of false or inaccurate reports constituted minor offences. Since January 2013, however, failures to report assets or the filing of false or inaccurate reports have constituted criminal offences under Article 437 of the Criminal Code.

The report is based on an analysis of 52 cases related to declaration of assets raised between 2013 and 2014, communication with Anti-corruption Agency officials in March 2015 to understand its view on how declaration of assets cases should be handled; communication with prosecutors and judges involved in declaration of assets cases to follow-up on specific cases; statements made in June 2015 at a workshop for prosecutors organized with the Office of the Chief Prosecutor to discuss differing practices in declaration of assets cases within and among the various prosecution offices in Kosovo; and the review of the dispositions of the 162 criminal reports filed by the Anti-Corruption Agency between 2013 and 2014.

The OSCE reviewed 63 cases from 162 criminal reports filed by the Anti-corruption Agency with the prosecution from January 2013 to December 2014, of which 52 were determined to be related to failures to file declarations of assets, with the remaining 11 relating to mistakes made in the filing of these declarations. Of the 52 cases, which are the focus of this report, decisions on motions to dismiss indictments or judgments have been rendered in 24 cases with the remaining cases either still with the prosecution or with the courts pending initiation of proceedings as at the end of October 2015. In assessing the handling of the 52 cases, the OSCE not only looked at statistical data on their disposition but also analyzed seven criminal reports, 21 indictments, four decisions on motion to dismiss indictments and 20 judgments, and directly monitored hearings in 15 cases before the courts.

The 162 criminal reports filed by the Anti-corruption Agency with the prosecution were related to either the failure to file declarations of assets or to inaccuracies made in filed declarations, according to data provided by the prosecution to the OSCE. The data received from the prosecution does not disaggregate the 162 criminal reports according to the failure to file declarations of assets under Article 437(1) of the Criminal Code and inaccuracies made in filed declarations under Article 437(2) of the same. Thus the breakdown of cases between the two is unknown on the basis of the data available to the OSCE. It should be noted that cases pertaining to inaccuracies in declarations, falling under Article 437(2), were beyond the scope of this report.

OSCE monitoring indicates inconsistencies in practice across the three relevant institutions involved in criminal cases related to the declaration of assets – the Anti-corruption Agency, the prosecution and the courts – and many instances where the relevant substantive and procedural law has been improperly applied. Such inconsistencies have negative implications for guarantees of legal certainty and equality before the law as guaranteed in the Kosovo legal framework.

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<sup>2</sup> Code No. 04/L-02, Criminal Code of Kosovo, 1 January 2013.

The report concludes with a series of recommendations aimed at rectifying the concerns uncovered in the OSCE's monitoring and assessment with the aim of improving the ability of relevant institutions to respect the human rights of persons involved in criminal cases concerning declarations of assets.

## 2. INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORKS

### 2.1 International legal framework

As discussed above, this report analyses the implementation of the Law on Declaration of Assets by relevant Kosovo institutions and finds differing approaches being taken by and within them. As established by the European Court of Human Rights and Fundamental Freedoms, consistent and predictable application of the law is a critical component of the rule of law, and the rights to equality before the law and a fair trial.<sup>3</sup> These international standards are guaranteed in the Kosovo legal framework. The Kosovo legal framework guarantees equality before the law, including that Kosovo is “governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions” and that the exercise of public authority “shall be based upon principles of equality of all individuals before the law.”<sup>4</sup> Similarly, the Kosovo legal framework also guarantees “equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.”<sup>5</sup> As will be shown below, inconsistencies in the application of the law undermine these guarantees to individuals and the effective enforcement of cases concerning failure to file declarations of assets.

### 2.2 Domestic legal framework

The Law on Declaration of Assets establishes, *inter alia*, the persons required to file a declaration, the procedure for notifying those who must file, when filings are required, and how declarations should be made. Each of these issues is material to the question of whether a person has committed a criminal offence under Article 437(1) of the Criminal Code.

The Law on Declaration of Assets establishes that all of the “Senior Public Officials” listed in the law must file a declaration.<sup>6</sup> Each institution of government must, under the law, appoint a Contact Officer who acts as a co-ordinator of activities with the Anti-corruption Agency.<sup>7</sup> The Contact Officer, who should be from the Personnel Office, is responsible for notifying the Anti-corruption Agency on which officials in the institution are responsible for filing declarations, *notifying Senior Public Officials in the institution about their obligations to file*, and recording gifts received by those officials in the performance of their duties.<sup>8</sup> Senior Public Officials are required to file a declaration within 30 days of taking up their official function and to thereafter

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<sup>3</sup> See European Court of Human Rights (ECtHR), *Popov v. Moldova*, ECtHR Judgment of 6 December 2005 (“The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of [parties]. One of the fundamental aspects of the rule of law is the principle of legal certainty.”); *Ištván and Ištvánová v. Slovakia*, ECtHR Judgment of 12 June 2012 (legal certainty requires consistency in judicial decision-making in order to provide “guidance and predictable outcomes”).

<sup>4</sup> Kosovo constitution, Article 3, 15 June 2008.

<sup>5</sup> *Ibid*, Article 31(1).

<sup>6</sup> See Article 3, Law on Declaration of Assets, *Supra* note 1.

<sup>7</sup> *Ibid*, Article 3(1.5).

<sup>8</sup> *Ibid*, Article 4.

file annually between 1 March and 31 March.<sup>9</sup> Declarations must be submitted to the Anti-corruption Agency in person by the Senior Public Official or by other persons authorized by the Senior Public Official.<sup>10</sup> Finally, Article 17(1) of the Law on Declaration of Assets states that the “[Anti-corruption] Agency shall submit a criminal report at the competent prosecution office against the senior public official violating the obligations provided for by the Law, which comprise a criminal act according to the Criminal Code.”

Article 437(1) of the Criminal Code provides that: “Any person, obligated by law to file a declaration of property, income, gifts, other material benefits or financial obligations, who fails to do so, shall be punished by a fine or by imprisonment of up to three (3) years. The offence in paragraph 1 of this Article is deemed committed when the deadline for filing the declaration has passed and no report has been filed.”<sup>11</sup>

Read on its own, Article 437(1) appears to establish a strict liability standard whereby the mere failure to file a declaration of assets results in a criminal violation. However, this must be read in the context of the Criminal Code as a whole, which attaches criminal liability only where the act or omission has been committed intentionally or negligently. An act is taken intentionally either when a person is aware of the act and desires its commission or when the person is aware that an unlawful consequence can occur as a result of the act and accedes to its occurrence.<sup>12</sup> Criminal liability for negligent conduct, on the other hand, only attaches when the law expressly provides, which it does not under Article 437(1).<sup>13</sup> Moreover, a person is not criminally liable if, at the time of commission, the person, for justifiable reasons, did not know or could not have known that an act was prohibited.<sup>14</sup> A person is also not criminally liable if, at the time of commission, the person mistakenly believed that circumstances existed which, had they in fact existed, would have rendered the act permissible.<sup>15</sup> Thus, for criminal liability to be established additional facts need to be shown, for example that the relevant official *knew* of the requirement to file a declaration of assets and that he/she *intentionally* failed to file the declaration (in other words did not fail to file negligently or by mistake).

If found guilty of a criminal offence under Article 437(1) the impact of such a finding of guilt may extend beyond the criminal sanctions provided in the Criminal Code to affect the continued employment of Senior Public Officials. As an example, under the Law on the Civil Service, if a civil servant is found guilty of a criminal offence “with elements that comprise violations of civil service principles and rules” the civil service employer must initiate procedures for dismissal.<sup>16</sup> Similarly, under the Law on Local Self-Government “a member of the [municipal assembly] shall cease to be a member . . . (d) if [the] member is convicted of a criminal offence by a final court decision.”<sup>17</sup> Municipal mayors will be removed from office upon a conviction of a criminal offence with an order for imprisonment for six months or more.<sup>18</sup>

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<sup>9</sup> *Ibid*, Articles 7 and 8.

<sup>10</sup> *Ibid*, Article 6(3).

<sup>11</sup> See Article 437(2), Criminal Code, which governs situations where declarations are filed in a timely manner but omit information required by the law or contain false information, providing for fines and imprisonment of between six months and five years, *Supra* note 2.

<sup>12</sup> *Ibid*, Article 21.

<sup>13</sup> *Ibid*, Articles 17 and 25(2).

<sup>14</sup> *Ibid*, Article 26.

<sup>15</sup> *Ibid*, Article 25.

<sup>16</sup> See Article 63, Law No. 03/L-149 on the Civil Service, 13 May 2010.

<sup>17</sup> See Article 37, Law No. 03/L-040 on Local Self Government, 20 February 2008.

<sup>18</sup> *Ibid*, Article 63.

### **3. CONCERNS IN RESPONSES TO FAILURES IN FILING TIMELY DECLARATIONS OF ASSETS**

#### **3.1 General observations regarding the interpretation of the law by responsible authorities**

OSCE monitoring and assessment of declaration of assets cases from 2013 and 2014,<sup>19</sup> indicate a possible misinterpretation of Article 437(1) which has resulted in more criminal cases for declaration of assets being brought and processed than would otherwise appear warranted by the underlying facts. This misinterpretation appears to stem from a failure of those involved in these cases to read Article 437(1) within the context of the broader Kosovo legal framework.

##### *3.1.1 The mental and material element requirements in the context of the Criminal Code and Law on Declaration of Assets*

As discussed above, the Criminal Code requires that the failure to file a declaration of assets be intentional, which occurs either when the Senior Public Official is aware of the act and desires its commission or when the Senior Public Official is aware that an unlawful consequence can occur as a result of the act and accedes to its occurrence. The presence or absence of the Senior Public Official's knowledge is, therefore, a critical component to proving commission of the crime.

The OSCE's review of the Anti-corruption Agency's criminal reports, indictments filed by prosecutors, and judicial decisions on motions to dismiss indictment and judgments does not indicate that a consistent interpretation from the facts presented as to when and whether or not the public official knowledge of their responsibility to declare their assets. In some instances, the notification by the Contact Officer was the basis for the relevant authorities to infer that the public official was aware of his or her responsibility. In four out of seven criminal reports, seven out of 21 indictments, and three out of 20 judgments reviewed by the OSCE made reference to the role of the Contact Officer in informing the Senior Public Official, with no consistent practice observed within and between regions. In other instances, the authorities inferred that Senior Public Official's was aware of the requirement to file by fact that the Anti-corruption Agency publicly published general information on the requirement for Senior Public Officials to file a declaration. In three out of seven criminal reports, six out of 21 indictments, and one out of four decisions on motions to dismiss indictments made reference to the Anti-corruption Agency's media campaigns as a basis for knowledge, with no consistent practice observed within and between the seven prosecution and basic court regions in Kosovo. Still in other cases reviewed by the OSCE, no analysis whatsoever appears to have been made into whether the Senior Public Official had the requisite knowledge for criminal liability to be attached; seven out of 21 indictments, three out of four motions to dismiss indictments, and 17 out of 20 judgments mentioned neither the media campaigns nor the role of the Contact Officer, with no consistent practice observed within and between regions.

As discussed above, Article 437(1) must be interpreted in the context of both the broader Criminal Code and the Law on Declaration of Assets. The Law on Declaration of Assets requires that a Contact Officer be established by the relevant institution whose responsibilities include, amongst others, to notify Senior Public Officials of their responsibility to file. This law, therefore, implies that a Senior Public Official should not be held liable under the Law on Declaration of Assets for failing to file a declaration if the Senior Public Official has not been notified by a Contact Officer.

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<sup>19</sup> Based on the 162 dispositions reviewed, close analysis on 52 cases and interviews with relevant authorities.

Article 2(3) of the Criminal Code, provides that “[i]n case of ambiguity, the definition of a criminal offence shall be interpreted in favor of the person against whom the criminal proceedings are ongoing.”<sup>20</sup> The Criminal Code generally applies a much broader standard for knowledge as an element of the criminal offence.<sup>21</sup> In this case, therefore, the narrower and more favorable standard in the Law on Declaration of Assets – requiring notification by a Contact Officer – likely prevails.<sup>22</sup>

This interpretation is strongly supported by practical considerations, in particular for those required to file for the first time after taking up a new role as a Senior Public Official. It can reasonably be argued that a personalized notice, informing the official that the aforementioned role is subject to the Law on Declaration of Assets, is the main – if not the only – way to guarantee that a new Senior Public Official is properly notified.<sup>23</sup> Hence, a possible conclusion is that the material elements of the crime are not fulfilled when such notification is lacking. Additionally, in the absence of other evidence, it could also be argued that criminal intent should not be inferred simply because the Anti-corruption Agency issued a general media announcement on the obligations of Senior Public Officials to file a declaration.

Notably, the OSCE has observed practice in line with this interpretation in two of the 52 cases it reviewed. In one case in the Mitrovicë/Mitrovica basic court relating to a Senior Public Official in Mitrovicë/Mitrovica South municipality the defendant was acquitted after a trial because the prosecution was unable to present any evidence that the defendant was notified of their responsibility to file a declaration of assets by a Contact Officer. Similarly, in another case, before the prosecution office in Prishtinë/Priština, the prosecutor dismissed a criminal report against a municipal assembly member in the Leposavić/Leposaviq municipality for a lack of evidence of notification by a Contact Officer.

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<sup>20</sup> See Article 2(3), Criminal Code, *Supra* note 2.

<sup>21</sup> *Ibid*, Article 22 (“Knowledge...as an element of a criminal offense may be inferred from factual circumstances”).

<sup>22</sup> Although it should be for the jurisprudence, and ultimately the Supreme Court of Kosovo, to address and clarify queries related to issues revolving around the material elements of a particular criminal offence from one side and those related to the mental element from the other – above all when they might appear overlapping – what matters for the purposes of this report is that, irrespective of the theory of crime, the procedural conclusions would be the same: Senior Public Officials who were not properly notified of their duties to file declaration of assets should be spared from criminal responsibility, above all when the conditions for them to be properly informed were lacking due to structural weaknesses within the institutional framework of Kosovo.

<sup>23</sup> The Law on Declaration of Assets does not apply to the general public but rather to a small subset of society. A person only becomes subject to the law upon taking up a role as a Senior Public Official. For a number of reasons, a general public announcement is likely insufficient to put new Senior Public Officials on notice that their particular role is classified as one for which a declaration of assets is required. For example, the list of Senior Public Official roles in the Law on Declaration of Assets includes some generic terms for positions (for example, “managers of agencies”, “directors of all departments, heads of public finances and procurement throughout all public institutions”). These may not accurately correspond to the precise title of the official’s position. In addition, there is a discrepancy between the Albanian, Serbian and English language versions of the Law on Declaration of Assets regarding who within a municipal assembly is required to file, which adds confusion over whether a municipal assembly member is required. In the Serbian version of the Law on Declaration of Assets Article 1.1.8 defines those who must file at the municipal level as including “Savetnike Opštinskih Asambleja”. This literally translates as “advisors” not municipal assembly members. Moreover, the English version of the law (which is not an official version) does not mention advisors or assembly members.

### 3.1.2 *The filing requirement in the context of the Criminal Code and Law on Declaration of Assets*

At the end of October 2015, the OSCE noted that in the criminal reports, dismissals, cases or indictments it reviewed, neither the Anti-corruption Agency nor the prosecution has addressed the implications on criminal liability of instances where a Senior Public Official has provided a declaration to a person – considered to be an authorized person – who in turn fails to file the declaration with the Anti-corruption Agency. This situation appears to have occurred in at least one municipality, Leposavić/Leposaviq, affecting all municipal assembly members therein, after which criminal reports and indictments were still raised.<sup>24</sup>

However, under the Criminal Code, criminal liability does not attach where there has been a mistake of fact or law and the Law on Declaration of Assets permits a Senior Public Official to file a declaration of assets through an authorized person, or to a person considered to be an authorized person. Thus, criminal liability likely should not attach where a Senior Public Official provides a declaration of assets to an authorized person under the assumption that in doing so the person will ensure compliance with the Law on Declaration of Assets when such person subsequently fails to appropriately file the declaration.<sup>25</sup>

## **3.2 Issues related to the Anti-corruption Agency**

### 3.2.1 *Examination of whether officials were notified through a Contact Officer*

In three of the seven criminal reports reviewed, all from 2014 and relating to municipal assembly members in the Zubin Potok and Leposavić/Leposaviq municipalities, the Anti-corruption Agency did not provide information in its criminal reports regarding whether or not the Senior Public Official was notified through a Contact Officer. In contrast, in the other four criminal reports reviewed, all from 2013 and relating to municipal assembly members from Gjilan/Gnjilane, a member of the Kosovo Judicial Council and a member of the Assembly of Kosovo, the Anti-corruption Agency made reference to the role of the Contact Officer.

In March 2015, the Anti-corruption Agency published a manual for Contact Officers which specifically informs Contact Officers of their duty to notify each Senior Public Official of their responsibility to file and to keep records of this notification in case it is needed in the future. However, an interview with Anti-corruption Agency officials at the end of March 2015 indicates that, at that time, the Anti-corruption Agency continued to believe that notification via a media campaign could be a sufficient basis on which to raise a criminal report.

As a result, it is not possible to determine whether a consistent policy has been applied between January 2013 and October 2015 within the Anti-corruption Agency as to the necessity for notification from a Contact Officer as a prerequisite for raising a criminal report. To the extent that the recently-published guidance establishes a new policy in this regard, the OSCE welcomes this development and encourages the Anti-corruption Agency to ensure that it is consistently applied, only raising a criminal report once it has been established that the Contact Officer

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<sup>24</sup> See Section 3.5, *Infra*. In these cases, three criminal reports were dismissed after the prosecution found that the relevant officials had yet to take the oath of office to become Senior Public Officials as defined by the Law on Declaration of Assets.

<sup>25</sup> The one exception to this would be if it could be shown that a person instructed the authorized representative not to file in an attempt to create a shield against criminal liability.

directly notified the relevant Senior Public Official of his/her responsibility to file.<sup>26</sup> Moreover, the OSCE would suggest that the Anticorruption Agency specifically formalizes a system whereby Senior Public Officials are required to sign a written notification of their obligation to file as part of their onboarding package from the Personnel Office. This would greatly relieve the prosecution of the burden of examining what the Contact Officer did or did not do in each case and would serve as an initial screening from the Anti-corruption Agency as to which cases truly give rise to a reasonable suspicion of criminal conduct.

### 3.2.2 *Automatic filing of criminal reports upon a failure to file a declaration*

According to Anti-corruption Agency officials, it is the practice within the Anti-corruption Agency to file a criminal report whenever a Senior Public Official fails to file a declaration of assets in a timely manner. In April 2014, the Law on Declaration of Assets was amended to embed the criminalization of the failure to file declarations of assets, which came into effect in the Criminal Code in January 2013.<sup>27</sup> The prior version of the law gave the Anti-corruption Agency the power to levy administrative sanctions on Senior Public Officials who failed to file declarations of assets. Through the April 2014 amendments, the Anti-corruption Agency was instead given the responsibility to “submit a criminal report at the competent prosecution office against the senior public official violating the obligations provided for by the Law, which comprise a criminal act according to the Criminal Code.”<sup>28</sup>

In an interview with officials of the Anti-corruption Agency, the officials indicated their belief that this provision requires the Anti-corruption Agency to file a criminal report in each case in which a Senior Public Official fails to file a declaration of assets. The officials further expressed their frustration that this amendment eliminated the Anti-corruption Agency’s ability to use administrative sanctions to push Senior Public Officials to remedy their failure to file.

This, however, appears to be too narrow an interpretation of the Law on Declaration of Assets as amended. The Law could reasonably be interpreted to provide that the Anti-corruption Agency should only submit criminal reports where it first determines that there is a reasonable suspicion that a criminal act has been committed, in both its material and mental elements (in other words, that the Senior Public Official intentionally failed to file a declaration). That would give the Anti-corruption Agency scope to communicate with Senior Public Officials who failed to file as well as the opportunity to file a declaration, with the consequence that if they do not do so the Anti-corruption Agency could file a criminal report. Nonetheless, the Ministry of Justice may wish to review the implementation of the April 2014 amendment to the Law on Declaration of Assets to determine whether it is meeting the goals for which it was passed, in line with the *Guidelines on Ex-Post Evaluation of Legislation* made mandatory on all government agencies and ministries by government decision in July 2015.<sup>29</sup>

### 3.2.3 *Effective establishment and Training of Contact Officers*

The OSCE notes that in February 2014 the Anti-corruption Agency began training Contact Officers on their roles and responsibilities and in March 2015 issued the detailed manual

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<sup>26</sup> See Section 3.2.2, *Infra*.

<sup>27</sup> *Supra* note 1.

<sup>28</sup> See Article 17(1), Law on Declaration of Assets, *Supra* note 1.

<sup>29</sup> See Decision No. 03/38, 15 July 2015. The Guidelines on Ex-post Evaluation of Legislation are available at [http://www.kryeministri-ks.net/repository/docs/2\\_Guidelines\\_on\\_Ex-post\\_evaluation.pdf](http://www.kryeministri-ks.net/repository/docs/2_Guidelines_on_Ex-post_evaluation.pdf).

discussed above. These are highly positive developments for which the Anti-corruption Agency should be commended. However, it is important to note that such support was not being provided in a systematic way prior to February 2014. In three of the seven criminal reports from before February 2014 that the OSCE reviewed make no reference to the role of the Contact Officer in notifying the relevant Senior Public Official.<sup>30</sup> Thus, it is questionable whether the Contact Officers were fully operational across Kosovo prior to this date and, indeed, OSCE monitoring indicates at least three municipalities did not have Contact Officers effectively established by February 2014.<sup>31</sup>

### **3.3 Issues related to the Prosecution**

#### *3.3.1 Divergent actions upon receiving a criminal report*

Of the 162 criminal reports filed by the Anti-corruption Agency and received by the prosecution between 2013 and 2014, 117 had been disposed of by the end of June 2015, with the remaining 45 still pending with the prosecution. The 117 criminal reports were disposed of by the prosecution as follows: five criminal reports (4%) were dismissed without further steps being taken; 16 (14%) were dismissed after an investigation; an indictment was filed after an investigation in 59 (50%) cases; direct indictments were filed in 32 (27%) cases; and a request for a punitive order was made in five (4%) cases.<sup>32</sup>

While the OSCE has not analyzed whether or not the disposition in each case was justified, these divergent outcomes appear to be indicative of a lack of uniformity in prosecutorial practice given that declaration of assets cases do not typically have widely varying fact patterns. Rather, it appears that prosecutors across Kosovo handle declaration of assets cases differently in accordance with their own interpretation of the law and caseloads, giving rise to fundamentally different outcomes despite a marked similarity in the cases. This raises a concern with regard to the principle of legal certainty and right to equality before the law guaranteed in the Kosovo legal framework.

In June 2015, the Office of the Chief Prosecutor held a workshop, supported by the OSCE, to examine and attempt to harmonize practice amongst the various prosecution offices in Kosovo. These efforts are highly commendable. Attempts to create uniformity of practice across the Kosovo prosecution offices in these cases, while recognizing the need to treat each case on its own merits, is critical to ensure the effective implementation of rule of law standards incorporated in the Kosovo legal framework. To that end, the OSCE notes that under new powers created in the recently-amended Law on Chief Prosecutor may now issue guidelines and decisions for all chief prosecutors and prosecutors to harmonize prosecutorial practices.<sup>33</sup>

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<sup>30</sup> See Section 3.2.1, *Supra*.

<sup>31</sup> See Section 3.5, *Infra* (discussing municipalities in which it appeared that Contact Officers had not been established prior to the deadline for filing declarations of assets).

<sup>32</sup> As discussed above, the data received by the OSCE does not disaggregate between cases related to the failure to file declarations of assets under Criminal Code Article 437(1) and those related to inaccuracies made in filed declarations under Article 437(2). See Section 1, *Supra*. Therefore, this information relates to both case types.

<sup>33</sup> Law No. 05/L-034 on Amending and Supplementing the Law No. 03/L-225 on Chief Prosecutor, Article 11(1.5), 28 May 2015.

### 3.3.2 *Inappropriate use of direct indictments*

In five of the 52 cases reviewed by the OSCE, involving three municipal assembly members in Leposavić/Leposaviq, a member of the Assembly of Kosovo, and an administrator in Mitrovica/Mitrovicë North municipality, the prosecution immediately filed a direct indictment with the courts upon receiving a criminal report rather than initiating an investigation. In none of those cases, however, did a direct indictment appear to be supported, either because the indictments were not well-reasoned or because insufficient discussion of the knowledge element of the crime was provided.<sup>34</sup>

The Criminal Procedure Code<sup>35</sup> provides that a prosecutor, upon receiving a criminal report, has two options beyond immediately dismissing the criminal report: (1) to initiate an investigation if there is a reasonable suspicion of a criminal offence; or (2) to file a direct indictment under Article 241 of the Criminal Procedure Code if a well-grounded suspicion exists that the defendant committed the criminal offence or criminal offences, none of which are punishable by fine and/or imprisonment of more than three years.

As the criminal offence for failing to file a declaration of assets is punishable by imprisonment of up to three years, the prosecutor is entitled in such cases to file direct indictments where there is evidence giving rise to a well-grounded suspicion that the defendant committed the criminal offence. However, direct indictments need to present evidence to show the prosecutor's well-grounded suspicion, which should include reference to the knowledge requirement. An investigation is encouraged if criminal reports provided by the Anti-corruption Agency do not satisfactorily present information about the existence of a well-grounded suspicion – the required standard to file an indictment – of all material and mental elements of the crime for which the Senior Public Official should be charged. In this regard, the role of the Contact Officer in notifying the Senior Public Official should be one of the issues to be considered.

### 3.3.3 *Indictments lacking reasoning*

Irrespective of whether an investigation was conducted or not, just four of the 21 indictments reviewed by the OSCE appear to contain sufficient reasoning. The remaining 17 of the 21 indictments – relating to municipal assembly members in Leposavić/Leposaviq, Zubin Potok, Mitrovica/Mitrovicë North and Mitrovicë/Mitrovica South, a member of the Assembly of Kosovo, a member of the Kosovo Judicial Council and an administrator within the Kosovo Police – failed to provide more than the general information provided in the Anti-corruption Agency's criminal reports and/or failed to properly analyze the facts in the context of the law. Indictments reviewed by the OSCE did not, for example, contain information on whether a Contact Officer had been established and, if so, whether the Contact Officer had properly notified the relevant Senior Public Official. Rather, these indictments simply stated that there was sufficient evidence in the case files to conclude that the elements of the criminal offence were met, but did not provide legal nor factual reasoning in support of such conclusions. Moreover, even where defendants had raised exculpatory evidence during an investigation, for example, that they were not notified by or had tried to file through an authorized representative who did not forward the declaration to the Anti-corruption Agency, the indictments reviewed did not consider this evidence. Rather, evidence was listed in the indictments but not analyzed, and the arguments

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<sup>34</sup> Three of the indictments made reference to the role of the Contact Officer (one case) or the Anti-corruption Agency's media campaign (two cases) and none of these indictments appear to have been well-reasoned.

<sup>35</sup> See Article 101, Code No. 04.L-123 on Criminal Procedure (Criminal Procedure Code), 1 January 2013.

presented by the defendant were not addressed but simply dismissed as ungrounded. The indictments reviewed by the OSCE appear to contravene Article 241(1.7) of the Criminal Procedure Code which requires that all indictments contain “an explanation of the grounds for filing the indictment on the bases of the results of the investigation and the evidence which established the key facts”.

### 3.3.4 *Failure to use alternatives*

In none of the cases monitored or reviewed by the OSCE did the prosecutors use any of the alternatives foreseen in the Criminal Procedure Code. Several alternatives are foreseen under chapter XIV of the Criminal Procedure Code as a means to address cases before they reach the court. First, prosecutors may suspend prosecution of a criminal offence (with the consent of the injured party) if certain conditions are met and if the defendant undertakes to fulfill certain obligations to relieve or remove the harmful consequences of the criminal offence.<sup>36</sup> Second, prosecutors may abandon prosecution in some conditions when prosecution is not obligatory.<sup>37</sup> For instance, prosecution may be abandoned if the perpetrator of a criminal offence expresses genuine remorse over the criminal offence and has prevented harmful consequences or compensated for damage and the prosecutor determines that in view of the actual circumstances of the case a criminal sanction would not be justified. Third, the prosecutor may refer the case to mediation.<sup>38</sup> Fourth, the prosecutor may negotiate the terms of a written plea agreement.<sup>39</sup>

Declaration of assets cases appear to be ideal cases for the use of these alternatives to criminal proceedings, in particular where the evidence submitted by the Anti-corruption Agency is limited. Prosecutors could, for instance, instruct defendants to file declarations of assets within a certain timeframe, dismissing the criminal reports if they do so, but bringing indictments if they fail. Such an approach would be useful in establishing criminal intent for those who fail to file even after receiving an instruction from the prosecution, while immediately resolving the issue for those who do subsequently file. Moreover, the use of such alternatives would allow prosecutors to focus their efforts on cases where criminal intent clearly exists.

In this regard, the OSCE notes the highly commendable efforts of the Office of the Chief Prosecutor to increase the use of these alternatives across Kosovo; the Office held a series of trainings between August and September 2015, which were supported by the OSCE, for all prosecution offices on the use of such procedures. Thus, the primary reason that prosecutors have expressed to the OSCE for failing to use these alternatives – a lack of training – has been addressed.

## 3.4 **Issues related to the Courts**

### 3.4.1 *Failure to examine whether the defendants were notified about the obligation to declare through a Contact Officer*

From the 52 cases selected by the OSCE, the OSCE reviewed four decisions on motions to dismiss an indictment and 20 judgments covering a cross-section of Senior Public Officials including: municipal assembly members in Gjakovë/Đakovica, Gjilan/Gnjilane,

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<sup>36</sup> See Article 230, Criminal Procedure Code, *Supra* note 35.

<sup>37</sup> *Ibid*, Article 231.

<sup>38</sup> *Ibid*, Article 232.

<sup>39</sup> *Ibid*, Article 233.

Leposavić/Leposaviq, Mitrovicë/Mitrovica South, Mitrovica/Mitrovicë North and Skenderaj/Srbica; members of the Assembly of Kosovo; administrators in the Kosovo Police and Mitrovicë/Mitrovica South municipality; prosecutors from Gjakovë/Đakovica and Prishtinë/Priština; a judge from Gjilan/Gnjilane; and two deputy mayors from Gjilan/Gnjilane. With the exception of just four cases – involving a municipal assembly member in Gjilan/Gnjilane, a municipal assembly member in Leposavić/Leposaviq, an administrator in Mitrovicë/Mitrovica South municipality, and one of the deputy mayors from Gjilan/Gnjilane – the courts did not examine whether or not a Senior Public Official was properly notified through a Contact Officer. In these 20 decisions and judgments reviewed, the OSCE observed a failure to provide sufficient reasoning in support of findings in favor of the prosecution. This was true even where the defendants had raised the argument that they could not be held criminally liable because they were not properly notified of their obligation to file a declaration of assets. Even in those cases, the courts failed to properly address the defendants’ arguments.

As an example, in two judgments reviewed by the OSCE, the defendants pled guilty and the court accepted the guilty pleas stating that they were supported by the evidence contained in the case files even though in these cases no evidence existed regarding notification other than the Anti-corruption Agency’s public announcements. In these cases, the courts concluded that, in light of the evidence presented, the elements of the criminal offence were proven beyond reasonable doubt, but did not go on to provide reasoning to support such a conclusion.

Similarly, in two decisions issued at the indictment stage which were reviewed by the OSCE, the court rejected the defendants’ motions to dismiss even though there was nothing in the indictments beyond reference to the Anti-corruption Agency’s public announcements. In one of these decisions, the court concluded that there was sufficient evidence to support a well-grounded suspicion that the defendant committed the criminal offence but provided no reasoning whatsoever. The decision was upheld on appeal. In the other case, the court erroneously reversed the burden of proof; instead of examining whether the prosecutor had presented sufficient evidence in the indictment, it examined whether the defendant had done so in his motion to dismiss the indictment. In his motion, the defendant explained that he was not aware that the declaration had to be submitted to the Anti-corruption Agency, and therefore submitted it to the municipal officials in his municipality (and therefore to someone considered to be an “authorized person”). The court considered that he had not proven such a fact and confirmed the indictment.

Thus, in these cases, the courts not only failed to examine whether the defendants were notified about the obligation to declare through a Contact Officer but generally failed to reach conclusions that were adequately supported by reasoning. Yet, despite these deficiencies, the OSCE has been unable to find a single case in which the Court of Appeals has overturned a decision or judgment for lack of reasoning.

It is essential that courts clearly identify what the elements of a criminal offence are before analyzing the facts. A model can be found in one case against an official in Prizren observed by the OSCE. In this case the court dismissed the indictment upon a motion to dismiss by the defendant for lack of reasoning. During the investigation, the prosecutor had heard the defendant and included a summary of the defendant’s statement in the indictment. However, the indictment did not address the arguments of the defendant at all. Thus, the court dismissed the indictment stressing that the evidence listed in the indictment, which included the statement from the defendant, displayed a situation completely different from the one described by the prosecutor. The OSCE urges other courts to apply this type of rigorous reasoning to all declaration of assets cases, whether at the Basic Court or appellate stage.

### 3.4.2 *Failure to protect the rights of unrepresented defendants*

As mentioned above, 24 of the 52 cases reviewed by the OSCE had resulted in a decision on a motion to dismiss an indictment or a judgment by the end of October 2015. In 18 of those cases, defendants were not represented by counsel, whether privately appointed or appointed at public expense. Defendants were represented in just six of these cases.

Declaration of assets cases do not qualify for mandatory free criminal defence.<sup>40</sup> However, the Criminal Procedure Code permits defendants who cannot afford a lawyer to request the use of free criminal defence, which should be granted if the court determines that the interest of justice requires it.<sup>41</sup> OSCE monitoring, however, indicates that courts do not regularly inform unrepresented defendants of their right to make such a request.

In addition, OSCE monitoring indicates that the courts do not take additional care to ensure equality of arms in cases where defendants are unrepresented, neither helping guide unrepresented defendants, nor taking defendants' lack of legal knowledge/training into account during hearings. Rather, the OSCE has observed a number of instances where the courts dismissed with inadequate consideration unrepresented defendants' arguments, for example that they were not properly notified of their obligation to file a declaration.

On the other hand, OSCE monitoring indicates favorable outcomes for those defendants who do have representation in court. Of the six defendants represented by counsel at court, two pled guilty with the pleas accepted by the court, one defendant was able to have the indictment dismissed, and three were acquitted after a trial. This contrasts with the outcomes in cases in which defendants were not represented by counsel. The OSCE monitored 13 cases before the courts in which the defendant was not represented and which have resulted in a judgment. In those cases seven defendants pled guilty with the pleas accepted by the court, two defendants were found guilty after a trial, and four defendants were acquitted after a trial.

The contrast between the following two cases before the Mitrovicë/Mitrovica basic court may serve to highlight the importance of legal representation in these cases and of the court giving extra care to unrepresented defendants. In the first case, in which the defendant had a legal representative, a Senior Public Official in the Mitrovicë/Mitrovica South municipality argued at trial that he was not notified by the Contact Officer. The court in this case acquitted the defendant. In the second case however, in which the defendant did not have legal representation, a Senior Public Official in the Mitrovica/Mitrovicë North municipality pled guilty to the charges in the indictment, even though the evidence in the indictment related only to the fact that the Anti-corruption Agency issued a public announcement and the circumstances surrounding the failure to file indicated that no Contact Officer had been appointed at the time the Senior Public Official was required to file. In this case, in accepting the guilty plea, the court did not examine in any depth whether the defendant's guilty plea was based on a well-founded indictment. Nor did the court examine, as the court in the first case did, whether or not a Contact Officer existed and, if so, whether the Contact Officer properly notified the Senior Public Official. Thus, while the underlying facts in these two cases were very similar they resulted in fundamentally different outcomes, greatly favoring the represented defendant.

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<sup>40</sup> See Articles 57-58, Criminal Procedure Code, *Supra* note 35 (regarding cases of mandatory defence and when the conditions for mandatory defence are not met).

<sup>41</sup> *Ibid*, Article 58.

### 3.5 An indicative case study

The issues raised above can be seen in contrast by looking at an indicative study of cases brought against new municipal assembly members in three recently-established municipalities. In January 2014, four new municipalities were established in northern Kosovo – Zubin Potok, Mitrovica/Mitrovicë North, Leposavić/Leposaviq and Zvečan/Zveçan – as a result of progress made in implementing the April 2013 “*First agreement of principles governing the normalization of relations*”, reached in the framework of the European Union-facilitated dialogue between Belgrade and Prishtinë/Priština. In three of these municipalities – Zubin Potok, Mitrovica/Mitrovicë North and Leposavić/Leposaviq – a vast majority of municipal assembly members did not file declarations with the Anti-corruption Agency within the 30-day timeframe established by law, resulting in 38 criminal reports being raised (constituting a large subset of the overall 162 criminal reports raised by the Anti-Corruption Agency between 2013 and 2014). These cases are of note for this report because the underlying circumstances of the failures to file were largely the same, and yet dispositions and outcomes of the cases differ greatly between them and with other cases observed by the OSCE, thus highlighting the inconsistencies in practice that the OSCE has observed across Kosovo.

Information gathered by the OSCE relating to the establishment of these municipalities indicates that, at the deadline for the newly-appointed municipal assembly members to file declarations, these three municipalities had not formally appointed the relevant Contact Officers to inform members of their obligation to file. In at least two municipalities, Mitrovica/Mitrovicë North and Zubin Potok, no Contact Officers were appointed. In Leposavić/Leposaviq, municipal assembly members provided the declarations to persons whom they believed were co-ordinating the filing of the declarations, but the declarations were not forwarded to the Anti-corruption Agency.<sup>42</sup> As discussed above,<sup>43</sup> at this time, the Anti-corruption Agency had not begun systematic training of Contact Officers nor had it yet published its manual for Contact Officers. As a result, it does not appear that the Anti-corruption Agency conducted direct outreach to the individual municipal assembly members.

Instead, on 13 January 2014, the Anti-corruption Agency issued a general media announcement, reminding officials across Kosovo of the need to file. The media announcement and the fact that the Anti-corruption Agency did not subsequently receive declarations from municipal assembly members in Zubin Potok, Mitrovica/Mitrovicë North and Leposavić/Leposaviq formed the basis upon which the Anti-corruption Agency raised criminal reports against 38 municipal assembly members. The cases were then assigned between the prosecution offices in Mitrovicë/Mitrovica and Prishtinë/Priština.<sup>44</sup> Despite the marked similarities in these cases, the OSCE has observed divergent treatment by prosecutors and courts.

At the prosecution stage, a direct indictment was filed in three cases – two in Mitrovicë/Mitrovica and one in Prishtinë/Priština – but one case was immediately dismissed by the prosecution office in Prishtinë/Priština, indicating a difference of opinion on whether these cases gave rise to criminal liability at all. An investigation was initiated in the remaining 35 cases. Of the investigations that have been completed as at the end of October 2015, three were

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<sup>42</sup> See Section 3.1.2, *Supra*.

<sup>43</sup> See Section 3.2, *Supra*.

<sup>44</sup> It appears that these split assignments were a result of a change of policy in the assignment of cases to prosecution offices that occurred in 2014. This change favors the location of the defendant over the location of the relevant government agency involved, in this case the Anti-corruption Agency.

dismissed, all by the Prishtinë/Priština prosecution office, while eight resulted in indictments, three in Prishtinë/Priština, five in Mitrovicë/Mitrovica. Three of the indictments made reference to the role of the Contact Officer in notifying the Senior Public Officials and the 13 January 2014 public announcement, four made reference only to the 13 January 2014 public announcement, and one makes no mention of either.

At the courts, the OSCE has observed three decisions on motions to dismiss indictments and one judgment after a guilty plea in these cases. In just one instance, the court discussed the underlying facts from which knowledge could be inferred and that case relied solely on the 13 January 2014 public announcement. None of the defendants in these cases were represented by a lawyer.

These cases highlight the manner in which differences can be observed in cases concerning declaration of assets across Kosovo. Such differences were apparent even where the underlying facts relating to the failure to file were nearly identical for each individual defendant, as with the cases observed from the municipalities in northern Kosovo. In certain cases, the Anti-corruption Agency appears to place a great deal of reliance on the notification of Senior Public Officials by Contact Officers, and in others not. Moreover, individual prosecutors and judges react to cases differently resulting in different outcomes for those against whom a criminal report has been filed. Efforts to harmonize practice and ensure consistent application of the law in declaration of assets cases are needed to avoid violation of the principle of legal certainty and right to equality before the law as guaranteed in the Kosovo legal framework.

#### **4. CONCLUSION**

The above assessment indicates that inconsistencies exist in the enforcement, prosecution and adjudication of criminal cases related to the failure of Senior Public Officials to file declarations of assets. The OSCE has been unable to find uniform practice in line with the provisions of the Law on Declarations of Assets and the Criminal Code. The OSCE has observed inconsistent practices by the prosecution in processing these cases. The OSCE has also observed criminal reports, indictments and judicial decisions and judgments that failed to provide adequate reasoning and to give due regard to the underlying circumstances of the defendant's failure to file a declaration of assets, in particular whether they were provided with the notice required under the Law on Declarations of Assets.

These problems are compounded by the lack of legal representation of defendants in these cases and the failure of courts to give due consideration to the need to provide enhanced protection for unrepresented defendants, above all in cases where affected defendants are new Senior Public Officials, such as in the newly elected municipalities in the northern Kosovo. The result is a series of inconsistent outcomes across Kosovo undermining the principle of legal certainty and the right to equality before the law.

Some positive developments have been noted. Since February 2014, however, the Anti-corruption Agency has begun offering periodic training to Contact Officers and has published a manual for them. Similarly, in 2015, the Office of the Chief Prosecutor has begun efforts to harmonize practice among prosecutors, both with regard to these particular cases and, more broadly, with regard to the use of alternative procedures. It is hoped that these institutional efforts are followed-up with significant improvements in the enforcement and adjudication of declaration of assets cases.

However, officials of the Anti-corruption Agency, prosecutors and judges still require a better understanding of the law governing declaration of assets cases. Similarly, Anti-corruption Agency officials, prosecutors and judges need to place greater focus in their criminal reports, indictments and court decisions and judgments on the underlying facts surrounding the failure to file, in particular the role of Contact Officers in notifying Senior Public Officials of their obligation to file a declaration.

## **5. RECOMMENDATIONS**

### **To the Anti-corruption Agency**

- Unless there is clear evidence of intent to fail to file a declaration of assets, provide Senior Public Officials with an opportunity to remediate.
- File criminal reports only when satisfied that the Senior Public Official was notified by the Contact Officer of the obligation to file a declaration of assets.
- File criminal reports containing a comprehensive assessment of evidence and facts to the extent possible.
- Continue with efforts to train Contact Officers in their roles and responsibilities.
- Instruct Personnel Offices to require Senior Public Officials to sign a written notification of their obligation to file as part of their onboarding package from the Personnel Office.

### **To the public prosecutors**

- Attempt to harmonize practices between and among the prosecution offices in Kosovo through, for example, the issuance of guidance or through the Chief Prosecutor on how the law should be interpreted and prosecuted.
- Avoid filing direct indictments where the criminal reports do not provide comprehensive evidence and facts giving rise to a well-grounded suspicion of intent to fail to file declarations of assets.
- Review cases to identify suitable alternatives to proceedings, filing indictments only where there is evidence that a Senior Public Official was directly notified of the requirement to file a declaration of assets.

### **To the courts**

- Carefully review indictments for sufficiency of reasoning given the facts presented, paying close attention to whether the defendant was notified in accordance with the Law on Declaration of Assets.
- Advise unrepresented defendants of their right to request free legal assistance and otherwise keep in mind the defendants' lack of legal knowledge/training when, for example, reviewing motions to dismiss indictments and guilty pleas.
- Issue well-reasoned decisions and judgments and, at the appellate level, overturn decisions and judgments that fail to provide adequate reasoning.

### **To the Ministry of Justice**

- Review the implementation of Article 437 of the Criminal Code and the amendments to the Law on Declaration of Assets in line with the *Guidelines on Ex-Post Evaluation of*

*Legislation* made mandatory on all government agencies and ministries by government decision in July 2015.

**To the Kosovo Judicial Institute**

- In co-operation with prosecutors and courts, develop a training curriculum to encourage consistent interpretation and application of Article 437 of the Criminal Code and the Law on Declaration of Assets.

**To Defendants in Declaration of Assets Cases**

- Seek legal advice before taking decisive actions, such as pleading guilty.
- If you cannot afford a lawyer, request that one be provided to you. Such requests can be made to the prosecutor at the investigation stage or to the judge once the case reaches the courts.