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Opinion⁵

Kosovo's Policy on Confiscation of Illicit Assets

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OPINION ON KOSOVO'S POLICY ON CONFISCATION OF ILLICIT ASSETS

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ABOUT GLPS

Group for Legal and Political Studies is an independent, non-partisan and non-profit public policy organization based in Prishtina, Kosovo. Our mission is to conduct credible policy research in the fields of politics, law and economics and to push forward policy solutions that address the failures and/or tackle the problems in the said policy fields.

1 The Parliament of Kosovo enacted Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offense and was published in the Official Gazette of the Republic of Kosova 8 March 2013. This law represents a step forward for Kosovo's fight against corruption, yet a European Union (EU) Report reveals that Kosovo's judiciary, and specifically prosecutors, need to use the law on confiscation of assets more proactively¹.

2. Kosovo should look to the EU Directives issued on the confiscation of illegal property and to EU member states in the region to make additional improvements to the legal framework and to strengthen its response to corruption². Recent EU priorities focus on improving home affairs, such as the fight against terrorism and organized crime. The EU's strategy for addressing these issues focuses on the funding of organized crime and terrorist activities. Several countries in the region have carried out the procedures for application as EU member states, and

therefore Kosovo's alignment with European standards on these issues is a key factor for approbation.

3. Improving legislation to ensure implementation of the law on confiscation of illicit assets is essential to tackling corruption in Kosovo. The fraudulent enrichment of politicians is a common form of corruption which undermines social and economic development, and exacerbates poverty. Furthermore, aiming to confiscate politician's illicit wealth is an essential tool for promoting transparency and credibility of Kosovo's government. This issue requires attention if Kosovo is to thrive as a democracy.

-Law on Confiscation of Assets: International Standards

4. Effectively addressing corrupt practices requires a framework that takes the complex reality of these crimes into account. Currently, the problem with Kosovo's law on extended powers for confiscation of assets pertains to its enforcement. According to the EU report on Kosovo, while Kosovo's current legal framework on corruption is established, there have been no prosecutions using these provisions³. Law enforcement

¹Parts of this Opinion derive from the "Confiscation of Illicit Wealth: Challenges and Perspectives of the Kosovar Approach.", Group for Legal and Political Studies, authored by Albana Rexha (to be published in November 2015)

²European Union. (5 March 2014). "Directive of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union." PE-CONS 121/13. Accessed at <http://register.consilium.europa.eu/doc/srv?l=E&N&f=PE%20121%202013%20INIT>.

³European Commission. (1 October 2014).

"Kosovo Progress Report." European Commission. Accessed at http://ec.europa.eu/enlargement/pdf/key_doc

agencies are reluctant to initiate financial investigations, resulting in a low number of confiscations ordered by the judiciary.

5. While the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offense in Kosovo is consistent with the standards set forth in the most recent EU Directive, the law can be improved by allowing the judiciary to be proactive in applying the law on confiscation. The most recent EU Directive provides minimal rules regarding the confiscation of proceeds and instrumentalities in criminal matters, and does not prevent member states from providing more extensive powers in their national law, including, for example, in relation to their rules of evidence. Kosovo legislation should go beyond the minimum standards promulgated in the Directive in order to surmount the barriers to confiscation of illegal assets.

-Barriers to Implementation of Legislation

6. Kosovo requires additional legal instruments to effectively combat organized crime and illicit activity. Confiscation of assets goes beyond the ordinary

restoration of legality given that the illicit activity negatively impacts the community at large. Though confiscation is an essential tool in the fight against organized crime and corruption, the law must continue to guarantee the protection of fundamental rights. As there has been a lack of implementation of the extended powers of confiscation, it is clear that the current laws in Kosovo are insufficient to successfully address the highly complex financial issues involved in cases where confiscation should occur.

7. The Kosovo legal framework should be improved in three main areas, with thorough consideration given to the protection of fundamental rights. This includes implementation of a non-conviction based mechanism, reversed burden of proof, and a time limit for sequestration of assets. By examining how other countries in the region, including Albania and Italy, have gone beyond the minimum standards set forth by the EU, Kosovo can adopt these practices to improve the number of successful confiscations ordered and carried out by the judiciary.

-Non-conviction Based Mechanism

8. Kosovo's legislation on confiscation should incorporate a non-conviction based model to secure assets gained by illicit means in cases where a criminal conviction is not possible. Non-conviction models, also referred to as civil confiscation, allow for a more effective approach in dealing with crimes subject to confiscation. While the conviction-based model is aimed at seeking criminal punishment leading to imprisonment, non-conviction based models are oriented towards the recovery of assets gained by illicit means and securing criminal proceeds⁴.

9. Both Italy and Albania incorporate a non-conviction based system for confiscation of assets gained through illicit means. Under the Albanian model, the "Anti-Mafia Law" includes measures that allow asset forfeiture through civil proceedings, while the Albanian Criminal Code allows for seizure of property as part of a criminal conviction⁵. The Albanian framework includes civil forfeiture legislation which targets the recovery of assets gained through criminal means. This model is particularly important where the accused cannot be prosecuted or convicted, for instance, because of witness intimidation⁶. Similarly, Italy allows for confiscation without the necessity for prosecution to show a causal link with previous criminal activities, or to prove a link between the time an asset was acquired and the commission of the crime⁷. As a response to criminal organizations, such as the Mafia, Italy has developed a highly sophisticated system for depriving criminals of the financial assets that they have accumulated. The Italian framework provides for a mitigated burden of proof for confiscation of assets related to a criminal endeavor when the person in possession of the assets has already been convicted of the relevant criminal offense. Italy's system provides for this shifted burden of proof where convicted persons cannot justify the origin of their assets⁸. Once the relationship

⁴UNDOC. (2 September 2014). "The Italian experience in the management, use and disposal of frozen, seized and confiscated assets."

⁵ KIPRED. (April 2011). "Confiscation of Illegally Obtained Property."

⁶Project Against Corruption in Albania (PACA). "Comparative Analysis Between the Provisions on Forfeiture in the Albanian Criminal Code and the New Albanian Anti-Mafia Law Provisions on Civil Forfeiture, and Their Applicability with Regard to Offences of Money Laundering and the Financing of Terrorism." ECD/04/2010.

⁷Eurojust. (November 2012). "Eurojust's Opinion on the Proposal of the European Commission for a Directive on the Freezing and Confiscation of Proceeds of Crime in the European Union." Accessed at <http://www.statewatch.org/news/2012/nov/eu-eurojust-opinion-confiscation.pdf>.

⁸KIPRED. (April 2011). "Confiscation of Illegally Obtained Property." Accessed at

between the illegal assets and the person convicted of serious and organized crimes has been established, the prosecution may seek a confiscation order from the judicial authority.

10. Kosovo's Criminal Procedure Code and the law on extended powers of confiscation require the prosecution to establish that an asset is related to a criminal endeavor before that asset can be subject to a confiscation order. However, Kosovo's criminal-confiscation approach fails to consider the highly complex corruption behaviors of criminal organizations within its borders. The current legal framework acts as an often insurmountable barrier to the judiciary's enforcement of laws providing for the confiscation of criminal assets. Prosecutors fail to use the relevant law likely because they are unable to present the court with sufficient evidence to support a confiscation order in the context of highly complex criminal organizations.

11. A number of factors may hinder the gathering of evidence in a corruption case, including the possibility that evidence of

past corruption has been lost or destroyed, the influence of witness intimidation, and lack of resources and political will to support a comprehensive investigation. Non-conviction based confiscation is also useful in a variety of situations including where the violator is immune from criminal prosecution, where the violator is so powerful that criminal investigation or prosecution is unrealistic, where there is insufficient evidence to proceed with a criminal prosecution, and in cases where the violator is a fugitive or has died⁹.

12. Kosovo should incorporate a non-conviction based procedure in order to increase the likelihood of successful, permanent confiscations. This would not only allow for assets and proceeds from crime to be recovered, but such an approach would avoid the necessity of seeking a criminal conviction. Cases seeking criminal conviction are often lengthy and complex due to the necessity to guarantee fundamental rights in criminal proceedings.

-Reversed Burden of Proof

13. Kosovo law must be amended to reverse the burden of proof in both conviction and non-conviction based confiscation cases. In conviction based proceedings, the European Court of Human Rights (ECtHR) has treated confiscation as part of the sentencing process and therefore the presumption of innocence does not apply¹⁰. While the prosecutor must show the disproportion between the defendant's assets and

legitimate means of income, the accused must prove the legitimate acquisition of the assets in question. Essentially, the prosecutor conducts two parallel cases, one criminal and the other civil. Similarly, the ECtHR has upheld non-conviction based confiscation as such mechanisms "[seek] to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. It therefore considers that the aim of the resulting interference serves the general interest¹¹." The ECtHR has emphasized in its decisions that effective procedural safeguards must be in place to ensure due process and to afford defendants a reasonable opportunity to present their case to the judiciary.

14. Amending Kosovo law to allow for reversed burden of proof would increase the amount of successful confiscation cases, while continuing to protect fundamental rights. The right to a fair and impartial trial is protected by the EU Convention on Human Rights which states in Article 6 Paragraph 2 that "[e]veryone charged with a criminal offence is presumed innocent until proved guilty according by law." This right is also guaranteed under Article 31 of the Constitution of Kosovo. The most important procedural safeguard within the non-conviction based model is the assumption that the proceeds at issue have been derived from a criminal activity may be rebutted by the accused. The defendant has the opportunity to show that, on the balance of probabilities, the assets in question were acquired through legitimate means¹². Kosovo's law on extended powers of confiscation should be amended so that the burden of proof falls on the offender to establish that assets in his possession are legal income and not instruments of criminal activity. This approach would enable prosecutors to inquire into how the accused generated the assets or material

⁹Greenberg, Theodore, Linda Samuel, Wingate Grant; and Larissa Gray. "Stolen Asset Recovery." Accessed at http://www.coe.int/t/dghl/monitoring/moneyval/web_ressources/IBRDWB_Guidassetrecovery.pdf.

¹⁰FRA. (4 December 2012). "Opinion of the European Union Agency for Fundamental Rights on the Confiscation of Proceeds of Crime."

Accessed at https://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf.

¹¹Ibid.

¹²Ibid.

benefits in question by requiring the accused to prove the origins of the property. However, it is necessary to ensure that procedural rights are upheld in both confiscation and non-confiscation proceedings.

-Time Limit on Sequestration of Assets

15. Lastly, the Kosovo legal mechanisms which address confiscation of illicit assets should include a time limit on the sequestration of assets. This would not only significantly reduce costs to the state to manage such assets, but would also ensure that the right to property is protected. The right to property is ensured in Article 7 of the Kosovo Constitution, and under Article 17 of the Charter of Fundamental Rights of the EU which states, “[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law...[t]he use of property may be regulated by law in so far as is necessary for the general interest.” It is clear that international guidance allows for the right to property to be compromised in cases of public interest in accordance with a test of proportionality. Under

Albanian law, the cases for which confiscation of proceeds is applicable are detailed, and a sequestration period is set at a maximum of one year¹³. Kosovo should adopt a similar time limitation for sequestration of assets. This would help to ensure proportionality of the confiscation to the accused’s right to property. In addition, such a time period would encourage a higher rate of prosecution regarding confiscation of illicit proceeds, as there would be a clearly defined timeframe in which sequestration must be finalized.

-Conclusion

16. While a legal framework for confiscation of criminal assets is largely in place in Kosovo, implementation is limited. Three key barriers to implementation of the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offense are the lack of a non-conviction confiscation mechanism, failure to shift the burden of proof to the accused, and absence of a sequestration time limit. Kosovo should look to the comparative experience of developed countries in the region such as Italy and Albania, where these approaches have found success in addressing the issue of organized crime. Combatting organized crime and corruption is fundamental to countering criminal impact on Kosovo’s political, legal and economic systems. Amending Kosovo’s Criminal Procedure Code would enable proactive implementation of the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offense. Such an amendment would help to prevent criminal and terrorist organizations from enjoying the support of criminal assets acquired by members of those organizations.



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¹³Greenberg. “Stolen Asset Recovery.”

OPINION PUBLICATIONS

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