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INTERNATIONAL LEGAL ASSISTANCE IN CIVIL MATTERS

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Abstract

International Legal Assistance in civil matters is an important pillar of the civil procedure by which the necessary actions are performed in another state, that are essential in resolving the issues put before the state court case. Because the area that deals with civil law is very broad, we believe that by focusing on the legal assistance we would be able to present an overview of legislation in Kosovo concerning this issue and what further necessary issues should be addressed in the future.

The challenges to Kosovo's justice system are immense. One such challenge has been the difficulty of drafting needed legislation to address civil justice issues within the system. Due to political circumstances, criminal issues have received the most attention. This has left civil issues to the side. Following the 2008 enforcement of the Constitution of Kosovo, the adoption of civil issue legislation has accelerated. This practice has proven ineffective; it has allowed large legal gaps in certain legislation while making their enforcement impossible. This paper analyzes the legal situation in the field of international justice assistance and how this corresponds to the situation on the ground through research of the positive instruments in force and formal conversations with officials. As a result, we have found that positive legislation in force is not sufficient to handle this institution. This further impacts the situation, whether in court or in any other authority that is responsible to address and manage the process. These issues have two main aspects: individual and institutional. In the former aspect the right of the individual to argue in favor of his or her claim and to be treated fairly is impossible. At the institutional level where as a result the whole functioning of the system is questionable in relation to fulfillment of the objective of justice which effectively results into legal uncertainty that defies the rule of law and justice.

Executive Summary

- International legal assistance in civil cases is a pillar of the international civil procedure. As such, it is a tool to ensure that facts and evidence are properly gathered to perform a specific procedural action by a state institution in a foreign country for a matter that is brought before the state of the case. In this context, it is an important tool for resolving civil legal cases raised as a claim by different parties. In order to resolve legal civil cases it is necessary to secure all facts, evidence, and testimonies to create an opportunity for the body to evaluate the claims of the related parties equally, fairly, and completely. This is very important, because this is a way to achieve the goals of justice, maintain social peace, and fulfill the function of justice in a country. It is very important that countries establish the right legislative infrastructure to fulfill the role of international legal assistance. It is also crucial to whether Kosovo's current legislation has addressed the institution of international legal assistance. Questions about the current situation in Kosovo and whether that corresponds with the legislative situation have been analyzed through the practices of Kosovo's institutions. For comparative purposes, we looked on how this functions in other countries from a legislative and practical point of view. Finally, what are the challenges that the Kosovo legislation faces in its road towards the *Aquis Coomunautaire?*
- The international civil procedure is a specific discipline of laws, provisions of which are included in both the national legislation of states as part of their civil procedure provisions either as separate laws, or are governed by international documents in which a specific state has been adhered to. The legal norms of the international civil procedure constitute a set of special norms and are public legal nature *ius cogens*, whose implementation cannot be avoided either by parties or by the court and as such are different from the norms of international private law with which regulate the private judicial relations with foreign element. The international legal assistance in civil matters, as a part of the international civil procedure, moves the mechanism of intrastate cooperation that is attributed to interstate relations, while respecting the sovereignty which stands on the pedestal of the international law regime. To balance the necessity for cooperation and respect for the sovereignty of the states, the institution of international legal assistance rests on some fundamental principles that should be manifested by States in order to achieve the fulfillment of the function of justice at a national and international level. The fundamental principles upon which the international cooperation is manifested include, but not limited to; the principle of reciprocity that ensures the same behavior by all states; the principle of sovereignty that ensures complete power of the bodies within the territory of the state; the principle of covenants that ensures the consent by the parties on specific issues; the principle of cooperation to ensure mutual assistance in the implementation of the justice requirements; the principle of access to justice and legal aid that ensures citizens to have access in services in any sovereignty; the principle of free movement

of judicial decision, which is a mechanism to facilitate justice;the principle of legal certainty that guarantees the rule of law; and, principle of settlement of disputes by the respective court, which enables legitimate decisions.

- The provisions concerning international legal assistance can be found in sources of national and international laws. National provisions that generally address issues of this nature can be found in the highest legal political act of the states, in general or specific acts, including the by-laws. On the other hand, the international provisions can be found in multilateral and bilateral conventions, in international customary law, in general principles of law and in judicial decisions and expert publications as subsidiary sources. At the international level, international legal assistance as a special pillar has been treated by the Hague Conference, whose aim was the unification of rules governing private laws. While the Hague Conference dates from the late nineteenth century and has attempted to do this at a global level, the European Union in the last decade of twentieth century, has raised the issue of international legal cooperation in the focus of the Member States aiming to promote policies concerning the mutual recognition of decisions, harmonization of the procedural laws, and legal assistance for the citizens of the Member States, including third country nationals who are lawfully staying within the union. The divergence between national and international regulations creates the necessity for harmonization of the procedural provisions not only inside the Union but also beyond it. The hierarchy of legal norms and the ratio between national and international provisions are determined in different ways in the legal orders of the States. The current development trends in international relations promote the priority of the international provisions on which states are party to the national ones. Because then there is possibility of achieving minimum standard of uniform approaches to the issues of similar nature.
- There is no clear and simple definition about the international legal assistance. However, the scope of international legal assistance consists of the totality of various procedural actions that relate to the service of court documents, external or other documents, obtaining and managing evidence, obtaining data about the content of foreign laws, whereas in a broad sense it has to do with the action to be undertaken in procedures related to the recognition and execution of foreign decisions, enabling access to justice and legal aid and other issue in order to facilitate the scope of the action. All these direct or indirect actions include the institution from at least two countries. Service of documents includes the service of judicial and extrajudicial documents or other documents, from the state providing the documents, according to the request by the state of the case. Whereas, obtaining the evidence requires a procedural action to be taken in the state providing the evidence for the needs of the process that takes place in the state of the case. There are three main methods of securing evidence according to the needs of the state: having traditionally obtained evidence through a letter of request, obtaining evidence using diplomatic channels determined by the legislation; obtaining evidence through the diplomatic agents, consular officers or commissioners, which is an alternative method that requires a prior mutual consent between the states involved,under some defined conditions. The

third contemporary method of directly obtaining evidence enables the organ of the state case to complete the action of obtaining evidence in the other state. The third method is an innovation of the EU Council Regulation, with the aim of promoting and establishing a functioning system with fast execution and transmission of claims, but limited in the form that is made available to the Member States to impose conditions that apply for the implementation of this method. On the other hand, obtaining data for the content of a foreign law is crucial for resolving a particular case in which a foreign element is involved. It is a procedural action by which the court decides for implementing and for the content of the foreign law, in a particular case. Regarding the implementation and recognition of the foreign law, there are two main systems, where one considers the foreign law as law and the recognition and proof of foreign law becomes *exofficio*, where the process of international legal assistance is activated, and this system isrepresented by the majority of the states with a continental system of law. While in the other system, the foreign law is considered as a fact, and the burden of providing foreign law falls on the respective parties, where the parties in an official manner argue for the foreign law (under English Law), or parties inform the court about the importance of foreign law (under American Law). We conclude that the second system is represented by the system of Common Law countries. In Kosovo, according to the Law on Compatibility of Laws and Practices of Competent Bodies, the first system of obtaining data and determining foreign law is implemented, which lead to the conclusion that this is done ex officio by the institute of international legal assistance.

- The institute of International Legal Assistance is initiated through a process of formal request by the requesting state (state of case), to the competent state bodies of the requested state (state where action is implemented). The formal process can vary from state to state and is regulated by legal provisions of the states involved which may submit requests of different nature, where the fulfillment of formal requirements is required. Formal transmission of requests typically operates in the form that the court case submits a formal request to the competent authority of home country that is established for this purpose, which further through diplomatic channel sends the request to the competent authority of the other state, established for the same purpose, while the latter conveys the request to the court of competent body to perform the certain action. After the completion of the action, the state body uses the same route to bring the answer back. The process of complete transmission of the request has a specific time limit that varies from 90 days for the service of documents to the 5 or 6 months for the cases of obtaining evidence and especially in the cases of witness hearing. Besides the timing, way of making a request, transmission channels, other issues that are considered include the language of the request which usually should be the official language or one of the official languages or certified translation of the language of requested state, the means of transmission (channels) and means of performing the action (for instance, video or teleconferences), then meeting the requirements for the form and content of request and elimination of the grounds for refusal of requests that can contain any of the above,what’s more, it includes the institution of public order. The institute of public order, legal order or compatibility

with the state's legal order becomes important particularly when there is a request for obtaining evidence through special methods that are required by the court of requesting state. The requested country, exceptionally obtains evidence through methods required by the requesting country if the method is not in collision with the public order of the requested country. In principle, the requested country performs the actions under the provisions of its own law. Whereas, the procedural expenditures are covered in the way that each of the countries involved pays for the expenses of their own required actions. Reimbursement of exceptional expenditures can be requested in cases where the expenses are immense, and related to special requests or for experts or translators. In some cases, these expenses should be reimbursed in advance. In principle, Kosovo also implements such a process of official transmission and implementation of requests in the field of international legal assistance.

- International judicial cooperation in civil matters would not be complete without the institution of recognition and enforcement of foreign judgments. This is part of the international civil procedures, whereby it is possible that a decision taken in a country and is recognized and enforced in another country. This is important because the goals of justice would not be achieved otherwise. This mechanism ensures that the decision taken in a country may have an effect in another country. The recognition and enforcement of foreign judgments are made according to the following: territorial criteria, the body which issued the decision according to the used law, the legal private nature of the case, its applicability in the state of the case, etc. The main assumption in this respect is the institution of Public Order, which is one of the essential conditions which have to do with the decision rendered in another state. This includes harmony with the legal order, the basis of the legal system, the purpose of justice, and the fundamental values of public morality in the state where it should be recognized and enforced. Therefore, the legislations of different states including the positive legislation in Kosovo, address the procedure in a manner such that the foreign judgment passes through the official procedures of examination. This is separated from the procedure of recognition, which can also be the same with the procedure of enforcement.
- Other institutions of civil procedures that activate international judicial cooperation are also: access to justice and legal aid, which provides access to effective protection of individual rights, enabling the receipt of legal assistance, assistance in obtaining the legal aid, access to provision of assistance for expenses related to the procedure in cases of failure and disproportionate amount of expenditures, especially among states with varying economic welfare; institute compensation of victims of crime; legalization of documents and some other cross-border procedures related to orders for payment and requests for small claims.
- The international legal assistance is part of the legal infrastructure in Kosovo. Provisions associated with this institute are scattered in several acts: the Law of Contested Procedures,Non-contested and Executive Procedures, the legal act of the Ministry of Justice, and Administrative Instruction on international legal assistance in criminal and civil matters. General provisions can be found in the Constitution of

Kosovo as well. Also, part of this infrastructure is the provisions of the past laws, such as the Law on Compatibility of laws and covenants that are accepted after the succession from former Yugoslavia. This set of provisions, among others, is invoked by conventions and reciprocity. Therefore, Kosovo is unable to accede in conventions, although it aims to do so during 2012, by engaging into agreement with several countries that have unilaterally recognized Kosovo. Reciprocity is usually assumed, since it cannot be referred to any official information about scope and its actual existence. Part of the infrastructure is also the Department for International Judicial Cooperation at the Ministry of Justice, which is the competent body responsible for international legal assistance in civil matters. It was established in 2009, after the transfer of authority from the UNMIK Department of Justice and has administered a large number of requests. Furthermore, courts are bodies that activate the institute for international legal assistance for request of the procedure which takes place before their court. Basic/municipal courts are competent for international legal assistance according to the territorial competences and subject matters. Regarding the request, there is a procedure that is followed for requests in Kosovo. The judge or the President of the Court, may submit a formal letter which includes a request for legal assistance regarding a specific object and the nature of the issues. This is directed towards the respective department of the Ministry of Justice, which further addresses the request through diplomatic channels to the bodies in the foreign states. The Ministry of Justice usually sends the request to the competent body to perform the necessary action. The same is valid for the requests that are directed towards Kosovo institutions. In theory, a diplomatic channel traverses a variety of bodies of the two states involved. In practice, the shorter routes can be used through the embassies and offices of foreign countries in Kosovo or Kosovo embassies in the other countries.

- The legal and factual situation in Kosovo with regard to the international legal assistance is balanced in a manner to the extent addressed in the legislation to what is done in practice. Legislation is not completed in this area and the existing provisions are scattered in many sub-legal acts (Kosovo) and throughout acts from the previous legal system (the former Yugoslavia). Although the current legislation addresses the conventions, these are not implemented in practice. There exists a format of the proceedings and the administration which is not standardized and hence, cases are handled on a case-by-case basis. In cases of difficult answers, there is a tendency to refer to the reciprocity. However, there is no more information on how such issues are evaluated and monitored. There is a need to review the completeness of the current legislation, revise the provisions on the implementation of international agreements, and finding ways of their implementation in absence of legislation even explicitly referring to them. Furthermore, the ways of transmitting requests should be standardized together with the approach of competent bodies as well as forms and procedures in a manner that unifies the practices of courts and the practice of competent authority responsible for international legal assistance. Moreover, there is a need to build human capacities and invest in technological tools in order to establish the minimum standards required. Also, the legal infrastructure in Kosovo will have to harmonize with the EU legislation. The lack of most of the legislation should be used

as an opportunity to accept acts that are in force within the EU and, as such, becoming part of the domestic legislation. At the same time and attempt should be made to establish the infrastructure related to administration, communication, transmission, and standardization according to the European Judicial Atlas. Also, information on international legal assistance should be published in the official website of the Ministry of Justice, so that interested parties will have the opportunity to receive information they need. Additionally, all procedures and standard forms and acts should be published in that page, and further it should be intended that this be put in place through the use of E-Administration. Such an action would enhance transparency and education.

- A more in-depth research within the particular partition of the object of international legal assistance and specification of particular procedure, especially regarding the requirements for standardization, would provide a more complete content of this institution.

1. Table of International and National Legal Acts Related for Matters with the International Legal Assistance

Legislation of Kosovo	**Documents of Hague's Conference**	**EC Council documents**
* Constitution of Kosovo as the highest legal act of Kosovo, mainly general provisions in this act are part of Implementation of International Right (Article 19); and the Continuance of International Agreements and Applied Legislation (Article 15), also Article 22 lists a number of international documents related mainly to human rights and freedoms which have the direct implementation in Kosovo. Contested Procedure Law contains provisions on international legal assistance, recognition and implementation of foreign judgments and disputes with international element in Article 28, Article 61, Article 62, Article 103, Article 284, Article 285 and Article 330. (Contested Procedure Law No.03 / L-006, entered into force in 2008) * Executive Procedure Law,	* Hague Convention on Civil Procedure was adopted in March 1954 and entered into force in 1957, as the need to further advance the 1905 Convention, in function of adaptation between the developing in world. With this convention are arranged: communication of judicial and extrajudicial documents; filing requirements; coverage of expenses; free legal assistance including free issue of civil status documents: and physical detention of persons. So far 47 countries have ratified this convention. * Hague Convention for notification and delivery abroad of judicial and extrajudicial documents in civil and commercial field was approved in 1965. This convention regulates the transmission channels which will be used for requirements concerning judicial and	* Council Directive 2002/8 / EC of 2003, for the improvement of access to justice in cross-border issues by building the minimum common rules relating to legal aid in that case. * Directive 2008/52 / EC of 2008, for certain aspects of mediation in cross-border issues by building the minimum common rules on legal aid that relate with in that case. * Regulation (EC) Nr.1896/2006 of 2006, for the creation of the European Order for Payment Procedure. * Regulation (EC) Nr.861/2007 of 2007, regarding the creation of the European Procedure for small claims. * Council Regulation (EC) No. 44/2001 of 2000, for the jurisdiction, recognition and enforcement of judgments in civil and commercial matters.

Article 17. (Executive Procedure Law No.03 / L-008, entered into force in 2008) * Uncontested Procedure Law (Contentious Procedure Law No.03 / L-007, entered into force in 2008) * Law on Settlement of Conflict of Laws with provisions of other countries in certain relations. (Law on Settlement of Conflict of Laws with provisions of other countries in certain relations, No.43 / 82, improved with the law No.72 / 82, the former SFRY 1982) * Administrative Instruction Nr. 01-1265.2009 (Administrative instruction for the provision of international legal assistance in criminal and civilian matters was issued in 2009 by the Ministry of Justice)	extrajudicial documents in the demands being made on and from other countries; the purpose of this document is to facilitate the transmission of requests through counting channels to be used for such an issue. * Convention for obtaining evidence abroad in civil and commercial matters was adopted in 1970 and entered into force in 1972. This convention is designed with the aim to build methods for evidence exchange between Member States of the convention on civil and commercial matters and to "provide effective tools to overcome the differences between civil and common law systems in obtaining evidence." This convention has addressed two ways of getting evidence that are through letter-demand and through diplomatic officers, consular agents and commissioners. So far 54 countries have ratified this convention. * Convention on international access to justice was adopted in 1980 and entered into force in 1988. This convention is very important because it has addressed the issue of citizens who are not nationals of States Parties to the Convention. Convention on access to justice had intended to facilitate access to justice for every citizen of the State Parties or persons residing in one of the States Parties to the Convention. "Through this approach we tried to eliminate the basis for	* Commission Regulation (EC) Nr.1496/2002 of 2002, the annex of the regulation No. 44/2001 concerning jurisdiction, recognition and enforcement of judgments in civil and commercial matters. * Commission Regulation (EC) Nr.2245/2004 of 2004, the annex of the regulation No. 44/2001 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. * Commission Regulation (EC) Nr.1869/2005 of 2005, which replaces the annex of the regulation Nr.805/2004, for the creation of the European Implementing order for Uncontested Claims. * Regulation (EC) Nr.805/2004 of 2004, the creation of the European Implementing Order for Uncontested Claims. * Council Regulation (EC) Nr.2201/2003 of 2003, concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters relating to parental responsibility and the annex regulation nr.2116 / 2004, on the same issues, and also information on national courts to address the issues of this nature. * Council Regulation (EC) No. 4/2009 of 2008, regarding jurisdiction, applicable law, recognition and enforcement of decisions and cooperation regarding maintenance obligations. * Council Directives 2004/80/EC of 2004 concerning the compensation

	discrimination of different categories of citizens. By March of this year, 25 countries have acceded to this convention. * Convention on the abolition of legalization of official foreign documents, it was adopted in 1961. This convention applies to documents categorized in public and aims to enable the circulation of these documents in the States Parties without the need of their legalization in country of issuance of documents. Conventions have also been drafted to cover the area of jurisdiction and enforcement of agreements, such as: * Convention concerning the Jurisdiction of the body selected in cases of International sales of goods in 1958. * Convention for the Settlement of Court in 1965. * Convention on the Recognition and Enforcement of foreign judgments in matters of civil and commercial matters, and it was adopted in 1971 and entered into force in 1979, in which year the Additional Protocol to this Convention was also signed by four countries, while Convention until 2010 was signed by 5 contracting states. * Convention on choice of Court agreements adopted in 2005 and signed by a Contracting State.	of victims of crime and the Commission's decision regarding the establishment of standard forms for the transmission of applications and decisions relating to this directive and the previous one, for the compensation of crime victims. * And a series of directives, regulations, decisions, agreements, assessments, communications and proposals concerning and incorporated in the field of international cooperation, can be found on the official European legislation.