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Legal System Monitoring Section

LEGAL REPRESENTATION IN CIVIL CASES

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Glossary

DoJ	Department of Justice
EAR	European Agency for Reconstruction
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
KCA	Kosovo Chamber of Advocates
LCP	Law on Contested Procedure
LNCP	Law on Non Contested Procedure
LSMS	Legal System Monitoring Section
OSCE	Organization for Security and Co-operation in Europe
PCCK	Provisional Criminal Code of Kosovo
SFRY	Socialist Federative Republic of Yugoslavia
UNMIK	United Nations Mission in Kosovo

EXECUTIVE SUMMARY

Lawyers, like judges and prosecutors, play an important role in promoting justice in any legal system. Through skilful advocacy, attention to detail, and professionalism, lawyers defend the interests of their clients and ensure that courts, prosecutors, and other attorneys respect the law.

This report focuses on problems related to legal representation in civil cases in Kosovo identified by the Organization for Security and Co-operation in Europe (OSCE). It follows the first comprehensive OSCE Review of the Civil Justice System in Kosovo, which was published in June 2006.

First, the report addresses the fact that Kosovo does not have a functioning legal aid system for civil cases, which may violate the rights to free and effective legal representation in civil cases, as established by case law under the European Court of Human Rights.

Second, the report focuses on problems related to powers of attorneys. The OSCE is concerned about the use of invalid powers of attorney, which are frequently created through the use of forged documents to consummate fraudulent real estate transactions. Injured parties in these fraudulent property transactions are typically members of minority communities who became displaced after the conflict and left their property.

Finally, the OSCE addresses the problem that some lawyers violate the Code of Lawyers' Professional Ethics. The OSCE observed ethical violations related to poor performance by lawyers, representation of clients despite overt conflicts of interest, and activities incompatible with their profession. Of special concern is the poor legal representation that occurs in cases where lawyers represented absent parties or parties unaware of the court proceedings.

In conclusion, the OSCE makes a number of recommendations to the relevant authorities, and encourages them to take all necessary steps to remedy the highlighted shortcomings.

I. Introduction

Lawyers, like judges and prosecutors, play an important role in promoting the rule of law. They should promote the interests of their clients through zealous advocacy, and can help ensure the courts, prosecutors, and other attorneys follow the law. This report focuses on problems identified by the OSCE,¹ related to legal representation in civil cases.

Although the right to an attorney and effective defence typically relate to criminal cases, under limited circumstances there is a right to free and effective legal representation in civil cases according to the European Court of Human Rights (ECtHR) case law.

Despite these legal requirements, Kosovo does not have a functioning legal aid system for civil cases, and most parties represent themselves even when unable to fully understand the proceedings or defend their interests. As the parties rarely understand or follow civil procedure, civil cases appear chaotic and sessions often must be postponed or rescheduled because parties do not appear or arrive unprepared.

Another problem observed by the OSCE is the use of invalid powers of attorney, which are often created through the use of forged documents, and which civil judges often do not detect.

Finally, the OSCE is concerned that some lawyers violate the Code of Lawyers' Professional Ethics (Ethics Code)² through poor performance, conflicts of interest, and activities incompatible with their profession.

2. The legal aid system in Kosovo and the impact of the absence of lawyers in civil cases

Although it is not expressly mentioned in the European Convention on Human Rights (ECHR),³ the ECtHR case law establishes that, under limited circumstances, the right of access to court requires free legal assistance in civil cases. According to the ECtHR, the right to free legal assistance in civil matters exists as part of the right to effective access to court in cases where legal representation is mandatory under domestic law or, when due to the complexity or the type of case, the parties cannot effectively protect their interests without the assistance of a legal professional.⁴ Under

¹ Pursuant to its mandate, the Legal System Monitoring Section (LSMS), part of the Department of Human Rights, Decentralization and Communities of the OSCE Mission in Kosovo, monitors the justice system in Kosovo for compliance with domestic and international human rights standards, and recommends sustainable solutions to ensure that these standards are respected. After monitoring the criminal justice system since 1999, the OSCE began to monitor the civil justice system in January 2005, recognizing the importance of a functioning civil/commercial legal system to the judiciary and economic development of Kosovo.

² Approved by the Assembly of the Kosovo Chamber of Advocates on 11 June 2005.

³ Article 6.1 of the ECHR only refers to the right to free legal assistance in criminal cases.

⁴ In the case of *Airey v. Ireland*, while assessing a violation of the applicant's right of access to the High Court for the purpose of requesting a decree of judicial separation, the ECtHR determined that,

ECtHR case law, relevant factors for the determination of a right to free legal assistance in civil cases are necessity to address complicated points of law and establish facts involving expert evidence and the examination of witnesses, and whether the type of dispute typically entails an emotional involvement incompatible with the degree of objectivity required by advocacy in court.⁵

In Kosovo, the applicable Law on Contested Procedure (LCP)⁶ does not explicitly provide for a right to legal representation by a lawyer, but in certain circumstances for the right to legal assistance by an “agent”, who can be any person with legal capacity to act.⁷ The LCP states that “[i]f a party [...] is not able to take a clear and well defined position in regard to the issue and does not have an agent, the president of the panel shall instruct the party of the necessity to designate an agent.”⁸ Of note, the LCP obliges the court, when it determines that a non-professional agent is not capable of performing his or her duties, to inform the parties of the harmful consequences possibly resulting from improper representation.⁹

While the LCP does not expressly establish the right to an attorney in civil cases, as discussed above, case law of the ECtHR interpreting the right to access to court and Article 6 of the ECHR establishes the right to an attorney in some civil cases. For example, this right exists when the parties or their agents cannot effectively protect the parties’ interests due to the complexity or the nature of the case.

Between July 2001 and August 2005, a legal aid system in Kosovo provided low income residents free legal assistance in civil and administrative cases. An agreement between the European Agency for Reconstruction (EAR) and the Kosovo Chamber of Advocates (KCA) in 2001 created the Legal Aid Project, which the EAR extended on a yearly basis until August 2005. Due to the completion of this project, the legal aid system for civil and administrative cases has ceased to function in Kosovo. Some non-governmental organisations (NGOs) still provide free legal assistance to low income

despite the absence of a provision on legal aid for civil disputes in Article 6.1, this provision “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court, either because legal representation is rendered compulsory as is done by domestic law of certain contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.” (See the ECtHR judgment in the case *Airey v Ireland*, ECtHR, 9 October 1979, Para. 26, *in fine*). In more recent jurisprudence, the Court has also recalled that “[t]he key principle governing the application of Article 6 is fairness” and that “[t]here is the importance of ensuring the appearance of a fair administration of justice and a party must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here [...], the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.” (*P., C. and S. v. the United Kingdom*, ECtHR, 16 July 2002, Para. 91); see also the case of *A. B. v. Slovakia*, where the Court determined that by failing to take a decision on the applicant’s request for the appointment of a lawyer, the domestic authorities deprived the applicant of the opportunity to present her case under conditions of equality *vis-à-vis* the defendant (*A. B. v. Slovakia*, ECtHR, 4 March 2003, Para. 61).

⁵ For example in some marital disputes (*Airey v. Ireland*, ECtHR, 9 October 1979, Para. 26, and *McVicar v. the United Kingdom*, ECtHR, 7 May 2002, Para. 49) and child custody cases (*P., C. and S. v. the United Kingdom*, ECtHR, 16 July 2002, Para. 95).

⁶ Official Gazette of the Socialist Federal Republic of Yugoslavia (SFRY), No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, and 35/91.

⁷ Article 90.1, LCP.

⁸ Article 296, LCP.

⁹ Article 90.4, LCP.

residents in limited categories of civil cases or for members of vulnerable groups.¹⁰ However, despite the availability of legal assistance for some civil cases in Kosovo, legal aid does not cover all residents, in all regions, for all types of civil cases.

UNMIK Regulation No. 2006/36 On Legal Aid, promulgated on 7 June 2006, fills the gap created by the completion of the Legal Aid Project. The Regulation creates a legal aid system for both criminal and civil cases. According to Section 9, primary and secondary legal aid concerning civil cases includes legal representation in matters of separation, divorce and family law, residential property claims, labour disputes over wrongful dismissals, and proceedings involving minors or incapacitated persons. According to Section 11, those eligible for primary legal aid include all “qualified” persons¹¹ who receive or are entitled to receive social assistance or are in an equivalent financial position. Secondary legal aid may be provided to all persons whose total household income is less than the average household income, and inadequate to meet the costs of legal services.¹² The District Legal Aid Bureau, established under Section 6, is responsible for ensuring the delivery of legal aid, and receives and decides on applications for legal aid. When approved, the Bureau refers the applicant to an appropriate legal aid provider, e.g. advocates from district service rosters, legal aid clinics or NGOs.¹³

Unfortunately, the Regulation has not been fully implemented and consequently there has not been a functioning comprehensive legal aid system for civil cases since August 2005. As of March 2007, the Office of the Prime Minister had not yet appointed all members of the Legal Aid Commission, which administers and monitors the legal aid system.¹⁴ Furthermore, the Legal Aid Coordination Office (the secretariat of the Commission) and District Legal Aid Bureau have not been established. This failure to create a functioning legal aid system for civil cases violates domestic law and possibly international human rights standards.

The OSCE has noticed additional problems in civil cases due to the completion of the Legal Aid Project prior to the establishment of the new legal aid system. In some cases, according to judges interviewed by the OSCE, lawyers who no longer received

¹⁰ The Spanish NGO *Movimiento por la Paz, el Desarme y la Libertad* (MPDL), located in Prishtinë/Priština, offers free legal advice to refugees, internally displaced persons (IDPs), and returnees; the NGO Civil Rights Program, Kosovo (CRP/K) in Prishtinë/Priština provides free legal assistance to IDPs, refugees, returnees and minorities at risk of displacement; the NGO *Programmes d'Aide et de Développement destinés aux Enfants du Monde* (PADEM), situated in the northern part of Mitrovicë/Mitrovica, provides free legal assistance to IDPs regarding property rights; the NGO Kodi, Association for Legal Assistance for Women in Pejë/Peć, provides free legal aid in civil cases for women and members of minority communities (mainly Kosovo Bosniaks); the NGO *Medica Mondial* provides free legal aid in civil cases for women in Gjakovë/Djakovica; the Lawyers Association Norma provides legal aid in civil matters for low income residents, including persons with disabilities and members of minority communities in Prishtinë/Priština.

¹¹ The following persons are “qualified” to receive legal aid: habitual residents of Kosovo, temporary residents of Kosovo from jurisdictions that provide reciprocal legal aid to habitual residents of Kosovo, and other persons determined by law or international agreement, see Section 10, UNMIK Regulation No. 2006/36 On Legal Aid.

¹² The exact standards for financial eligibility are to be defined in an administrative direction which to date has not been issued.

¹³ Section 6, UNMIK Regulation No. 2006/36 On Legal Aid.

¹⁴ Section 4, UNMIK Regulation No. 2006/36 On Legal Aid.

payment from the EAR stopped attending court hearings and terminated representation of their clients.

By abandoning clients, lawyers arguably violated their ethical duties according to the Ethics Code. Under Article 85, “[p]roviding legal assistance free of charge to people socially at risk or needy people is a prestigious duty of lawyers.” Moreover, Article 86 states that “[a] lawyer is required to represent persons socially at risk in civil and criminal cases.” Finally, a lawyer “[c]annot revoke the authorisation for representation, except for reasons provided by [the] Code, according to which he is [...] authorised to refuse legal assistance.”¹⁵ Even when terminating the lawyer/client relationship, the lawyer is obliged to represent the party during 30 days or until the client finds another lawyer, whichever comes first.¹⁶

While failure to receive payment could generally be considered as a reasonable ground for termination of legal services, it is not listed as a permissible reason under Article 24 of the Ethics Code, and conflicts with the duty to represent low income residents of Kosovo. Furthermore, even when the revocation is justified, the lawyer must respect the 30 days notice period as established in Article 29 of the Ethics Code to allow the client time to obtain other representation.

The current non-functioning legal aid system for civil cases may violate a party’s right to counsel under the ECHR because it denies low income residents access to justice, negatively impacts court proceedings, and causes undue case delays.

Without representation by an attorney, parties to civil disputes frequently do not understand substantive or procedural aspects of cases.¹⁷ Parties representing themselves often do not follow procedural rules and interrupt sessions to ask questions because they lack legal training. Judges have trouble maintaining order during preparatory and trial sessions, and non-lawyers sometimes do not treat the judges and other parties with due respect. Indeed, the OSCE has monitored cases where the parties shouted and insulted each other and the judge during the preparatory and trial sessions.

This disorder in preparatory and trial sessions also affects the flow of civil cases, leading to frequent postponements which could be avoided if the parties understood civil procedural rules. Consequently, the absence of legal representatives and legal aid in many civil cases negatively impacts parties’ access to justice and contributes to case delays.

¹⁵ Article 28, Ethics Code. Article 24 lists the following grounds for refusing to provide legal services: “[i]f he cannot act in the interest of the client taking into account other works and obligations, if he thinks that he is not competent to represent the case, if he considers that chances are small for winning the case, and if the client asking for legal assistance makes unreasonable requests.”

¹⁶ Article 29, Ethics Code.

¹⁷ For example, in a property case in the Viti/Vitina Municipal Court, the municipality requested in the claim, dated 1 December 2004, that the defendant vacate the contested property and return it to the municipality. The defendant was unable to represent himself. After failing to attend the first session on 28 December 2005, he was not able to express himself coherently, during the next session on 20 January 2006. There also seemed to be no merits in favour of the defendant in this case. The court in its judgment finally decided according to the plaintiff’s request.

III. Invalid powers of representation

Another area of concern regarding legal representation in civil cases relates to powers of attorney. The OSCE has monitored cases where a lawyer represented a party but the purported authorisation to act on behalf of the client (power of attorney) did not meet the legal requirements or had been forged.¹⁸ Of note, forging of powers of attorney frequently occurs in non-contested proceedings concerning the certification of property transactions. These cases usually involve a person who acts as the legal representative of the owner or the buyer.

The Law on Transfer of Real Property states that “[a] contract pursuant to which the right of use of real estate, or the ownership of real estate, is being transferred must be compiled in written form, and the signatures of the contractors must be verified in the court.”¹⁹

While according to the Law on Non-Contested Procedure (LNCP),²⁰ a legal representative may represent one of the contracting parties to a real estate transaction,²¹ the judge shall inquire “whether the representative or the person provided with a proxy has capacity to act and whether he is authorised to execute the relevant legal relationship.”²² Finally, the Law on Contracts and Torts requires that “[t]he form prescribed [...] for a contract or some other legal transaction shall apply also to the authorisation for concluding such contract [...]”²³

Despite these legal requirements, the OSCE has observed the use of invalid powers of representation in fraudulent real estate transactions involving property owned by Kosovo Serbs who became displaced after the conflict and left their property and possessions in Kosovo. By mid 2006, plaintiffs filed complaints in the Kosovo courts alleging 37 cases of fraudulent transactions. Out of these lawsuits, 26 cases involved claims of false powers of attorney, and 11 cases involved claims of forged contracts. The largest number of cases comes from the region of Pejë/Peć, with 14 cases from Pejë/Peć, 11 from Klinë/Klina, and one from Istog/Istok Municipality. Typically, a person would forge the ID card of the absent owner, and use the forged document to obtain a legal power of representation issued outside of Kosovo and, as recent cases

¹⁸ See OSCE’s *First Review of the Civil Justice System*, June 2006, page 21, http://www.osce.org/documents/mik/2006/06/19407_en.pdf.

¹⁹ Article 10.1, Law on Transfer of Immovable Property (LTRP), Official Gazette of the Socialist Republic of Serbia, No. 15/74, 13 April 1974, and No.14/77, 9 April 1977.

²⁰ Official Gazette of the Socialist Autonomous Province of Kosovo (SAPK), No. 42/86, 24 October 1986.

²¹ See Chapter XII, LNCP.

²² Article 179.2, LNCP. The Law on the Validation of Signatures and Duplicates furthermore requires that the court official certify the signature of the parties or their legal representatives once their authenticity is demonstrated. This is done through the signature of the contract in person before the court official and through the admission of the signature in the document as corresponding to the party. In addition, the person producing the document for verification must testify before the court official that he or she is the author of the document (Articles 4.1 and 4.2). The signature can only be verified when the court official personally knows the individual requesting the certification, or when his or her identity is ascertained through the presentation of an identification card. When the person does not present an identification card, the verification may also be done through the testimony of two adult and reliable witnesses personally known to the court official or whose identity can be verified by an identification card (See Article 8).

²³ See Article 90, Law on Contracts and Torts, SFRY Official Gazette, No. 29/1978, 26 May 1978.

show, also at courts within Kosovo. The person would subsequently sell the property in Kosovo to another person. During this process, the court where the property is located certified the real estate transaction based on these invalid authorisations. The following cases serve as examples:

On 19 September 2005, a Kosovo Serb filed a complaint with the Public Prosecutor of Pejë/Peć against two Kosovo Albanians accusing them of having falsified her ID card to produce a legal authorisation to sell her property in Pejë/Peć. On 21 September 2005 the plaintiff filed a property claim before the Pejë/Peć Municipal Court requesting the annulment of the purchase contract with the Kosovo Albanian defendants that the court had certified on 5 July 2005 because the defendants used a forged legal authorisation. This authorisation was certified by the Municipal Court of Mitrovicë/Mitrovica on 9 June 2005 based on a falsified ID card. As evidence, the plaintiff presented the real ID card and the forged ID card used to certify the power of representation. Both cases are still pending at the court.

Similarly, in a second property case before the Municipal Court of Pejë/Peć, a Kosovo Serb plaintiff requested on 4 April 2005 the annulment of a property transaction contract certified in Pejë/Peć on 6 October 2004 because it was based on an invalid authorisation. The contract was concluded on behalf of the seller by a lawyer who presented an authorisation certified in the Municipal Court of Mitrovicë/Mitrovica on 5 October 2004. However, the plaintiff claims that this lawyer was never authorized to sell the property. The case is still pending.

In a third property case, dated 29 May 2006, before the Municipal Court of Istog/Istok, the Kosovo Serb plaintiff requested the annulment of a property contract which was certified at the same court on 19 May 2006. The plaintiff claimed that the defendants had forged the ID cards of the owners of the property (relatives of the plaintiff), and based on these forged documents they had obtained an invalid authorisation certified by the Mitrovicë/Mitrovica Municipal Court on the same date, 19 May 2006. As evidence, the plaintiff presented the death certificate of one of the owners, who had died long before allegedly signing the authorisation, as well as the forged and real ID cards of the two other persons who allegedly signed the authorisation. The case is still pending.

In a fourth example before the Vushtrri/Vučitrn Municipal Court, four Kosovo Serbs requested on 24 January 2006 the annulment of a property transaction between two Kosovo Albanian defendants (father and son). The court certified the contract on 30 October 2003. One defendant acted as seller of the property based on an authorisation from the owners allegedly certified in Belgrade, while the second defendant acted as buyer. The plaintiffs claimed that this authorisation was forged, as one of the persons who allegedly signed it, died in 2001. In addition, the First Municipal Court in Belgrade confirmed, on 26 April 2006, that it did not certify the authorisation. On 18 October 2006, the Municipal Court of Vushtrri/Vučitrn declared itself territorially incompetent to decide on the matter. The case is currently pending before the Municipal Court of Pejë/Peć.

The OSCE is concerned that in the first two cases, lawyers were involved as legal representatives in the fraudulent transaction. If the lawyers acted in knowledge of the facts, this not only constitutes a criminal offence,²⁴ but also violates the lawyers' ethical duties, such as to work professionally, remain loyal to the client, and act honestly in front of judicial bodies.²⁵ In defence of the Kosovo judiciary, when certifying a property transaction or authorisation, it may be difficult to detect fraudulent documents because they may visually appear identical to the original documents.²⁶ However, in the fourth example mentioned above, the fraudulent transaction could have been prevented by the court. Before certifying the transaction, the court could have requested that the Department of Justice (DoJ) confirm that the court in Serbia had previously certified the authorisation.²⁷ In order to minimize delays, the DoJ should fast-track the process of checking whether authorisations issued outside Kosovo are valid.

Using forged documents to create the appearance of authorized representation is the primary method observed by the OSCE to achieve fraudulent transactions of property to the detriment of Kosovo Serbs. This practice is not only unlawful, but impedes and discourages the return of displaced persons and creates additional obstacles to resolving the already complex property situation in Kosovo.

IV. Conflicts of interest and lawyer incompatibilities

The OSCE is concerned that civil cases proceed when lawyers act as legal representatives despite conflict of interests or incompatibilities that prevent their independence and ability to effectively represent a client. Of further concern, the KCA fails to take any disciplinary measures.

²⁴ This might constitute the criminal offence of fraud according to Article 261, Provisional Criminal Code of Kosovo (PCKK), and/or legalisation of false content according to Article 334, PCKK.

²⁵ See especially Articles 3, 4 and 5 of the Ethics Code.

²⁶ In the following positive example, the Mitrovicë/Mitrovica Municipal Court managed to prevent a fraudulent property transaction: The Mitrovicë/Mitrovica Municipal Court refused to certify an authorisation for representation in a property transaction on 20 October 2006. Although the seller presented an apparently valid identification indicating the name of the owner of the property, the buyer's lawyer discovered during a conversation at the court's Office for Registration that the person who claimed to be the owner did not know about details of neighbourhood, and therefore could not be the owner. The case was referred immediately to the police because of the likely forgery of the identification. Consequently, three Serbs and one Kosovo Albanian lawyer involved in the case were indicted on 3 November 2006 for falsifying documents, (attempted) fraud, and/or legalisation of false content. On 19 February 2007, the Mitrovicë/Mitrovica Municipal Court convicted the three Serbs and imposed prison sentences of seven months for two defendants, one year and one month for the third defendant, and acquitted the Kosovo Albanian lawyer.

²⁷ In response to the increasing number of fraudulent transactions in Kosovo based on false authorisation letters that had been stamped by courts in Republic of Serbia and Montenegro based on falsified documents, the DoJ issued an Internal Memorandum on 12 February 2004, asking judges to request that all parties prove that the documents stamped by courts in Serbia and Montenegro are not false. The verification of the authenticity of these authorisations should be done by the DoJ through the communication with the Ministry of Justice in Serbia and Montenegro (Justice circulars DOJ/DIR/344/JH/04, and DOJ/LPD/0371/er/05). However, this Internal Memorandum only addresses the problem of forged authorisation letters which were stamped in courts outside Kosovo, but not within Kosovo.

Under the Ethics Code, a lawyer must follow ethical duties when practicing law.²⁸ For example, a lawyer must not represent a client if he has represented another party in the same case.²⁹ The lawyer also owes duties of loyalty and confidentiality to his client. Thus, after representing one party in a case, a lawyer cannot later switch to represent another within the same case, as this is a conflict of interest which affects the duties of loyalty and secrecy of the lawyer to the initial client.³⁰

In addition, the private practice of law is incompatible with working for public institutions,³¹ as the latter position compromises the independence of the lawyer. According to the Ethics Code, “[i]n the course of representation, the lawyer is required to be fully independent, freed from any pressure.”³²

Regarding the internal disciplinary procedure for lawyers who have committed ethical violations, both the Law on Advocacy and the Statute of the KCA³³ establish that the KCA must discipline lawyers who commit ethical violations.³⁴ However, while these laws define ethical duties and disciplinary procedures, they do not create a mechanism for notifying the KCA of such violations. Consequently, the KCA relies on complaints by external actors.³⁵ Although the LCP imposes some obligations on the court regarding legal representatives,³⁶ Kosovo law does not require the courts to report ethical violations of lawyers to the KCA. If the court, party, or attorney does

²⁸ Article 1, Ethics Code.

²⁹ Article 27.1, Ethics Code. See also Article 17.1, Law on Advocacy and other Legal Assistance (Law on Advocacy), SAPK Official Gazette No.43/73, 46/77 and 48/79, which states that an “[a]dvocate is obliged to refuse a client if for the same case he has provided assistance to the other party.”

³⁰ See Articles 16-21, Ethics Code.

³¹ Article 15.1, Ethics Code which states that “[t]he lawyer profession is incompatible with the profession of [...] employee of state institutions.” See also Article 36 of the Law on Advocacy, according to which only persons who do not work in public institutions have the right to register as a lawyer in the KCA.

³² Article 7, Ethics Code.

³³ Approved by the Assembly of the KCA on 27 October 2001.

³⁴ Article 14, Law on Advocacy states that “[a]dvocates shall be responsible to the Chamber of Advocates for any violation in the course of their duty.” Article 49.1 states that “[t]he decision for the termination of the right to practice advocacy [one of the punishments for violations of the Ethics Code] shall be made by the Chamber of Advocates.” Article 118.19, Statute of the KCA, defines a violation of the Ethics Code as a serious violation of the duties of advocates, and Articles 117-150 specify potential disciplinary punishments and disciplinary procedures.

³⁵ Article 126, Statute of the KCA states that the “[d]isciplinary Prosecutor initiates the disciplinary procedure based on the appropriate request lodged by the Executive Council, the President of the Bar, the President of one of Lawyers’ regional meetings and Co-heads of the Ministry of Justice.” Therefore, unless one of these enumerated individuals learns of an alleged ethical offence committed by a lawyer, the Disciplinary Prosecutor cannot initiate proceedings against a lawyer who has allegedly violated the Ethics Code.

³⁶ For instance, under Article 98.4 of the LCP “[t]he court shall be under the obligation to make sure that the person who appears as agent is really authorised to represent the party”, which means that the court must control the validity of the power of attorney throughout the proceedings. According to Article 90.2, LCP the court, if it realizes that a representative is a quack lawyer, “[s]hall deny the permission for his further representation of the party and notify the party immediately.” Article 90 (4) states: “[s]hould the court determine that an agent who is not a solicitor is not capable of performing that duty, the court shall warn the party of the harmful consequences that may appear as a result of improper representation”.

not report ethical violations, the KCA will not initiate disciplinary proceedings. At present, the KCA rarely disciplines lawyers for ethical violations.³⁷

Despite these ethical obligations, the OSCE has observed court proceedings where lawyers had a conflict of interest:

On 7 March 2006, the Municipal Court of Mitrovicë/Mitrovica appointed a lawyer as temporary representative of the absent defendant. On 13 June 2006, the lawyer transferred the temporary representative power of the defendant to a second lawyer, who had represented the plaintiff at the start of the case. Despite the conflict of interest, the court allowed this substitution of lawyers.

Besides conflicts of interest, the OSCE has also identified cases of lawyer incompatibility. For example, lawyers employed by public institutions have also continued to represent private parties in the courts.

In multiple cases before the Municipal Court of Pejë/Peć, the public lawyer of the municipality represented private parties. This is an ethical violation since it is incompatible to work as a lawyer representing private clients and for public institutions.³⁸ Nevertheless, (assuming the lawyer had a law license) the KCA failed to take any disciplinary action and the public lawyer continues to work in private practice.

In summary, lawyers have acted in clear violation of the Ethics Code and the courts have failed to report ethical violations to the KCA. Furthermore, the KCA has failed to take disciplinary actions against such lawyers.

V. Poor performance of legal representatives

Lawyers should zealously represent clients and pursue their interests to the best of the lawyers' abilities. The Ethics Code, which also regulates the relations between the lawyer and client,³⁹ states "[t]he lawyer advises and defends his client with diligence and zeal,"⁴⁰ and requires that "[t]he lawyer should take care to provide his party with necessary defence as soon as possible and with as few expenses as possible, as well as to fight any delay."⁴¹ At a minimum, the lawyer should diligently follow the established procedural rules under applicable law and advocate for his client.

Despite these requirements of effective, diligent and zealous legal representation,⁴² the OSCE has observed poor performance by some lawyers. The main concerns

³⁷ In 2006, 14 cases were referred to the disciplinary court of the KCA. The court dismissed 12 cases finding no basis for initiation of disciplinary proceedings and suspended attorneys in two other cases. The courts had reported both of these cases (misuse of official duty).

³⁸ In one case, the public attorney represented a private plaintiff against the Municipality defendant, also his employer, raising not only an incompatibility, but also a conflict of interest.

³⁹ See Chapter III, Ethics Code.

⁴⁰ Article 32, Ethics Code.

⁴¹ Article 50, Ethics Code.

⁴² ECtHR case law establishes that the formal appointment of a lawyer -- if it is not effective -- does not *per se* satisfy the requirement of free legal assistance when legal aid is required. In *Bertuzzi v France*, the applicant had been granted legal aid to bring a case against a lawyer, but each of the lawyers

include the failure of lawyers to attend court sessions proceedings without notifying the court in advance. In addition, many lawyers fail to abide by deadlines for court procedures. The following cases serve as examples:

In a case before the Municipal Court of Pejë/Peć, the lawyer failed to attend several trial sessions. The lawyer did not inform the court or other parties in advance or offer any justification for his absence. This unreliable behaviour caused many postponements of the proceedings and resulted in unnecessary delay. While the lawyer suffered no consequences for his actions, the court sanctioned the client and forced him to pay procedural costs resulting from the lawyer's absence.

In a property case in Vushtrri/Vučitrn Municipal Court, after the plaintiff's lawyer did not appear at the second trial session scheduled for 13 June 2005, the court postponed the procedure for three months. The lawyer later claimed that he had been engaged in another session at the Mitrovicë/Mitrovica District Court, and that despite having sent this information, "the information came with delay to this court." After two scheduled trial sessions, the plaintiff's lawyer again failed to appear on 20 January 2006, and the court suspended the proceedings for a second time.

In a third example, a debt case before Prizren Municipal Court, dated 20 November 2003, the proceedings were delayed because the plaintiff's lawyer did not appear at a trial session on 19 May 2006 without excuse and the court, therefore, adjourned the trial to an indefinite date in the future. The court held the next trial session nearly six months after that session, on 15 November 2006.

In a fourth case before Mitrovicë/Mitrovica Municipal Court, the defendant's lawyer declared during the preliminary hearing on 13 January 2004 that he intended to submit a response to the claim, for which the court set a time-limit of 15 days. Because the defendant's lawyer still had not submitted a response to the claim at the next session, which was scheduled one month later, the court postponed the session.

withdrew on the grounds that they were acquainted with the lawyer. The ECtHR held that the court should have ensured that the applicant received effective assistance (*Bertuzzi v. France*, ECtHR, 13 February 2003, Para. 24ff). In the criminal case of *Daud v. Portugal*, the ECtHR stated that "assigning counsel does not itself ensure the effectiveness of the assistance he may afford an accused." (*Daud v. Portugal*, ECtHR, 21 April 1998, Para. 38). Although, as members of a profession, lawyers are independent in the exercise of their duties, the ECtHR has determined violations of article 6.3 c) of the ECHR in cases where the applicants had complained of the inadequacy of the legal assistance provided by *ex officio* defence counsel. In this context, the ECtHR stated that "(t)he competent national authorities are required under Article 6.3 c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way. (*Czekalla v. Portugal*, ECtHR, 10 October 2002, Para. 60). As for the circumstances considered as "manifest failures" to provide effective legal assistance, the ECtHR has considered the lodging of an appeal without complying with formal requirements of domestic law and the lack of contact between an officially appointed defence counsel and his client for more than eight months as manifest shortcomings on the part of lawyers officially assigned. (See, respectively, ECtHR judgments in the cases of *Czekalla v. Portugal*, Para. 62 ff and *Daud v. Portugal*, Para. 42).

Similarly, lawyers have not zealously represented their clients and arguably violated the procedural rules of the LCP by submitting claims without supporting evidence and failing to present new evidence to discredit the evidence of the other party.⁴³ The following cases serve as examples:

The first case involved a dispute over the division of wealth following a divorce before the Municipal Court of Prizren. Although the plaintiff's lawyer requested the return of items allegedly bought during the marriage in his claim dated 20 September 2005, the lawyer failed to provide any evidence as basis for the statement of claim. Since by the first session the lawyer had not presented any evidence, the judge postponed the session and ordered the plaintiff's lawyer to more precisely state the claim and submit supporting evidence. At the next trial session, the lawyer failed to amend the claim or to present any evidence, but asked for a postponement which was granted. When the lawyer also failed in the third session to respond to the court's order to more precisely state the claim, the court again postponed the session.

In a second case before the Municipal Court of Skenderaj/Srbica involving a compensation for damage claim dated 1 November 2004, the defendant's lawyer challenged an expert report about the amount of damage suffered by the plaintiff in the session dated 11 January 2005, but failed to provide evidence to rebut the expert report.⁴⁴ Consequently, the court followed the recommendations regarding the amount of the damage according to the expert report.

Another concern previously reported by the OSCE⁴⁵ is the poor performance of lawyers appointed as temporary representatives for absent clients.⁴⁶ In many monitored cases, the temporary representatives were passive during the proceedings and failed to properly defend the interests of the absent parties.

Although it is difficult for temporary representatives to present new evidence when the party is absent, in cases observed by the OSCE the temporary representative frequently did not adequately review and challenge the evidence proposed and provided by the opposing party. Rather, the temporary representatives typically stated that the court should decide the case according to the evidence and law. Even more troubling, at times the temporary representative suggested that the case should be decided against his client, thus violating the principle of zealous advocacy. The following cases serve as examples:

⁴³ Article 186.1 of the LCP requires that "[t]he complaint should contain [. . .] the principal issue and [...] facts on which the plaintiff grounds the claim, evidence proving those facts and all other information that every application must contain." Article 7.2, LCP states that "[t]he parties must present all facts upon which their claims are based and offer the evidence to support these facts." Article 219 of the LCP notes that "[e]ach party is under obligation to present the facts and propose evidence on which that party grounds its claim or refutes the statements and evidence of the opposing party."

⁴⁴ Under Article 261 of the LCP, the opinions of other experts shall be sought, "if contradictions or faults are found in the opinion of one or several expert witnesses, or a justifiable suspicion in the regularity of the given opinion, and the suspicion and faults cannot be removed by repeating the hearing of the expert witness..."

⁴⁵ See the OSCE's *Spot Report on the Appointment of Temporary Representatives* (April 2005), and the *First Review of the Civil Justice System* (June 2006), *supra* footnote 20, page 6.

⁴⁶ Article 84, LCP.

In a property case before the Gjilan/Gnjilane Municipal Court, the plaintiff requested on 10 January 2005 that the court confirm his ownership of an apartment based on a contract which had not been certified by a court. The plaintiff's only witness, who confirmed the terms and existence of the contract, gave contradictory testimony regarding the date when the contract was signed. The witness also stated that the contract was written by typewriter, although the presented contract was obviously printed from a computer. Despite these contradictions, the temporary representative of the absent defendant did not question the witness. Even more troubling, the temporary representative stated in his closing argument that the evidence confirmed the opposing party's claim.

In a second property case before the Gjilan/Gnjilane Municipal Court, the plaintiff requested on 30 June 2005 that the court confirm his ownership of the contested parcel, claiming that he purchased the property from the now absent Kosovo Serb defendant in 1997. As the only evidence in support of the claim, he presented one witness who confirmed the conclusion of the contract, whereas in the possession list the defendant was still registered as owner. Despite this weak evidence provided by the plaintiff in support of the claim, the defendant's temporary representative suggested that the court decide in the plaintiff's favour because the evidence proved that the parties had concluded a property transaction contract.

In another property case before the Municipal Court of Mitrovicë/Mitrovica, the Kosovo Albanian plaintiff requested on 3 March 2006 that the court confirm his ownership of contested property based on a judgment of the Mitrovicë/Mitrovica Municipal Court dated in 1987, which confirmed that the plaintiff bought the property from a Kosovo Albanian in 1987. However, the geodesy expert confirmed that the absent Kosovo Serb defendant currently appears in the possession list as the owner of the contested property. The defendant's temporary representative did not raise the important argument that the ownership rights might have changed after 1987, but passively stated that the court should decide according to submitted evidence. Only a third party, a neighbour of the defendant who joined the proceedings, pleaded in the defendant's favour, based on the fact that the latter was registered as the owner in the possession list.

These examples show that temporary representatives often do not effectively represent clients, in violation of the Ethics Code, domestic law, and arguably international human rights standards. An effective defence is especially important when the party is absent or unaware of the court proceedings. Therefore, especially in cases involving temporary representatives for absent parties, lawyers should act carefully, professionally and zealously.

VI. Conclusion

Lawyers can play an important role in promoting the rule of law. They should protect the interests of their clients, and can help ensure other members of the judiciary –

such as judges and prosecutors – follow the law. This report initially deals with structural and more general issues related to lawyers, such as the lack of a functioning legal aid system and the use of invalid powers of attorney. However, it also covers more specific problems related to individual legal representation such as violations of the Ethics Code through conflicts of interest, incompatibilities, and poor performance. As lawyers are an integral part of the Kosovo justice system, these violations of the Ethics Code, domestic law, and arguably international human rights standards are troubling and should be remedied.

VII. Recommendations

To the lawyers:

- Lawyers already engaged in legal aid cases should continue representing their clients *pro bono* or terminate representation according to domestic law and the Ethics Code.
- Lawyers should attend hearings or in advance justify their absence and communicate it to the court and the parties.
- Lawyers should follow the Ethics Code, avoid conflicts of interest and incompatibilities, and zealously represent their clients.

To the Kosovo Chamber of Advocates:

- Ensure that no licensed members of the KCA simultaneously work as public municipality attorneys.
- Take disciplinary action against lawyers who violate the Ethics Code such as through conflicts of interest, incompatibilities, or poor performance.
- Offer its members continuing legal education on the Ethics Code.

To the judges:

- Ensure adequate and effective representation of parties, especially when the party is absent or unable to defend him/herself adequately.
- Verify the validity of the powers of attorney presented before the court in both contested and non contested procedures.
- Whenever a court outside of Kosovo has certified a power of attorney, check its authenticity through the procedure specified by the DoJ, especially if the represented party is absent.

- Report violations of the Ethics Code by lawyers, such as conflicts of interest, poor performance, or incompatibilities, to the KCA.

To the Kosovo Judicial Institute:

- Organize training sessions for judges on ethical duties of lawyers, particularly on conflict of interests and incompatibilities.

To other Kosovo authorities:

- The Office of the Prime Minister of Kosovo should appoint the members of the Legal Aid Commission as soon as possible and ensure the establishment and staffing of all organs foreseen for the legal aid system by UNMIK Regulation No. 2006/36 On Legal Aid.
- The municipalities of Kosovo should provide office space for the regional legal aid offices.
- Once established, the Legal Aid Commission, the Legal Aid Coordination Office and the District Legal Aid Bureau should be supported by UNMIK or its successor, Kosovo authorities, and other donors through capacity building projects and expert consultants.